

Report for the Royal Commission into
Institutional Responses to Child Sexual Abuse

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THE ADMISSIBILITY AND USE OF TENDENCY, COINCIDENCE AND RELATIONSHIP EVIDENCE IN CHILD SEXUAL ASSAULT PROSECUTIONS IN A SELECTION OF FOREIGN JURISDICTIONS

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The Admissibility and Use of Tendency, Coincidence and Relationship Evidence in Child Sexual Assault Prosecutions in a Selection of Foreign Jurisdictions

A report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse

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Preface

On Friday 11 January 2013, the Governor-General appointed a six-member Royal Commission to inquire into how institutions with a responsibility for children have managed and responded to allegations and instances of child sexual abuse.

The Royal Commission is tasked with investigating where systems have failed to protect children, and making recommendations on how to improve laws, policies and practices to prevent and better respond to child sexual abuse in institutions.

The Royal Commission has developed a comprehensive research program to support its work and to inform its findings and recommendations. The program focuses on eight themes:

1. Why does child sexual abuse occur in institutions?
2. How can child sexual abuse in institutions be prevented?
3. How can child sexual abuse be better identified?
4. How should institutions respond where child sexual abuse has occurred?
5. How should government and statutory authorities respond?
6. What are the treatment and support needs of victims/survivors and their families?
7. What is the history of particular institutions of interest?
8. How do we ensure the Royal Commission has a positive impact?

This research report falls within theme 5.

The research program means the Royal Commission can:

- obtain relevant background information
- fill key evidence gaps
- explore what is known and what works
- develop recommendations that are informed by evidence, can be implemented and respond to contemporary issues.

For more on this program, please visit www.childabuseroyalcommission.gov.au/research

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Executive Summary

This report surveys the legal treatment of tendency, coincidence and relationship evidence applicable in sexual assault prosecutions in a selection of foreign jurisdictions, namely England/Wales, New Zealand, Canada and the United States.

This report is concerned with the situation where the prosecution seeks to rely upon evidence that the defendant committed other sexual misconduct not covered by the current charges in order to prove that the defendant committed the charged sexual offences against the complainant. There are a range of possible scenarios:

- the other allegations may involve misconduct against other alleged victims;
- the other allegations may be of other misconduct against the complainant (often termed 'relationship evidence');
- the other alleged misconduct may have been the subject of previous proceedings;
- such previous proceedings may have ended in conviction or acquittal;
- the other alleged misconduct may be the subject of other current charges – raising issues of joinder of counts as well as cross-admissibility.

Evidence of a defendant's other alleged sexual assaults can be particularly valuable in child sexual assault cases. These cases are often particularly difficult to prosecute due to a lack of evidence supporting the complainant's testimony. Medical, forensic or opportunity evidence may once have been available, but is often lost through the victim's understandable delay in reporting the offence. However, evidence of other alleged assaults may be subject to exclusion. Traditionally, common law jurisdictions exclude other-misconduct evidence. But it may gain admission if it can satisfy an admissibility test.

The common law has traditionally excluded evidence of a defendant's other misconduct due to concerns that the evidence would prejudice, confuse or distract the jury. Particular concern has been expressed about the jury employing propensity reasoning along the lines of: the defendant had done this before, he has a propensity to do this kind of thing, and, true to form, he did it again on the charged occasion. The jurisdictions covered in this report maintain some version of this exclusionary rule either at common law or under legislation.

Although subject to exclusion, such evidence may gain admission if it satisfies certain admissibility requirements. Where other-misconduct evidence is admissible, the trial judge should generally give the jury careful direction on its proper use. This report examines the exclusion, admission and use of other-misconduct evidence in England, Canada, New Zealand and the United States. Specific issues that are considered include:

- the scope of the exclusionary rule – whether it covers only evidence adduced for the purpose of propensity reasoning, or whether it covers all evidence revealing a defendant's other misconduct;
- the nature and stringency of the admissibility test, generally;

- whether the admissibility test operates more leniently in child sexual assault cases;
- whether relationship evidence avoids the exclusionary rule or readily satisfies admissibility tests;
- any special procedures relating to the proof of prior convictions;
- how the possibility of collusion between multiple alleged victims is treated, and whether it is a significant obstacle to admission;
- where the prosecution charges the defendant with the sexual assault of more than one complainant, the relationship between the principles governing cross-admissibility, and those governing joinder and severance of charges;
- whether the prosecution can rely upon evidence of other alleged misconduct of which the defendant has previously been acquitted;
- how the jury should be directed in relation to other-misconduct evidence that has gained admission.

One of the points made by courts and commentators in each of the jurisdictions is that admissibility decisions are highly discretionary and fact-specific, making it difficult to generalise. While true to a degree, some general points flow from this comparative survey.

The common law admissibility test in Canada and the statutory admissibility test in New Zealand require that the probative value of the evidence outweigh its prejudicial risks. Both jurisdictions recognise that other-misconduct evidence carries the risk of both reasoning prejudice (confusion, distraction, misinterpretation) and moral prejudice (failing to give the defendant the benefit of a reasonable doubt out of repugnance). The two jurisdictions also broadly agree on the features that give the other-misconduct evidence its probative value, the main ones being: frequency of alleged other misconduct, similarity with the charged misconduct, distinctiveness of the similarities, and proximity with the charged misconduct.

These factors go to the strength of the connection between the other misconduct and the charged offence. Both jurisdictions also recognise that the assessment is contextual, and that the other-misconduct evidence may be valued more highly having regard to the way in which it fits with the prosecution case. In effect, the other-misconduct evidence can derive support from other prosecution evidence. This is an important consideration in child sexual assault cases where the other-misconduct evidence may derive considerable support from the direct testimony of the complainant.

The law in England and Wales has diverged significantly from the common law. While bad character evidence is still subject to exclusion, recent legislation makes propensity evidence presumptively admissible. In practice the prosecution faces a slight hurdle in that the court must establish that the evidence is capable of demonstrating a propensity that is relevant to the question whether the defendant committed the charged offence. However, the English courts consider that, having regard to its nature, evidence of other child sexual assaults generally has the requisite capacity to gain admission.

The US exclusionary rule lies at the other end of the spectrum from England. On its face the US exclusion operates as an absolute prohibition on propensity reasoning. In practice, however, courts regularly allow evidence of other assaults on the (frequently artificial) basis that the evidence is relevant on a non-propensity basis. A number of jurisdictions, including the federal courts, have, with greater transparency, created express statutory or common law exceptions to the absolute exclusion so that evidence of other child sexual assaults is admissible and available for propensity reasoning. US law is rather messy and does not provide a good model for law reform, but it does provide a demonstration of the tension and distortions that can be generated when evidence law seeks to exclude such valuable evidence of an under-enforced criminal offence.

As well as the general exclusionary rule and admissibility tests, evidence of a defendant's other sexual assaults may be subject to a more specific restriction. Often in child sexual assault cases, the evidence is in the form of the testimony of other alleged victims. Whereas the prosecution will rely upon the improbability of the various witnesses telling similar lies, the defendant often counters that the similarities are the result of joint concoction or unwitting influence between the alleged victims. A key legal issue is how the defence argument is treated. Generally, witness credibility is left as an issue for the jury; however, in New Zealand and Canada the credibility of other alleged victims is treated as an admissibility issue for the trial judge. In England the risk of contamination may provide a basis for the trial judge to direct an acquittal or order a retrial.

Development of the law governing tendency and coincidence evidence should be informed by a proper understanding of structure and logic of the relevant inferences. As mentioned, US courts frequently mischaracterise other-misconduct evidence as deriving relevance from non-propensity (or non-character) theories. To a significant extent this may be seen as the result of the US's unviable absolute prohibition on propensity reasoning. However, other jurisdictions have displayed similar confusion. Courts have suggested that other-misconduct evidence may be admitted more readily or requires a less careful jury direction because it involves coincidence reasoning or merely provides background. But their claim that propensity reasoning is absent is often poorly reasoned and unpersuasive.

Another questionable line of English, Canadian and US authority requires that juries should be directed that they must be satisfied, to the criminal standard in some cases, that the defendant committed the other misconduct before using the other-misconduct evidence to infer the defendant's guilt of the charged offence. As other courts and commentators have recognised, this is contrary to the cumulative logic of circumstantial evidence, particularly where the prosecution relies upon coincidence reasoning to combine evidence that is 'individually inconclusive but collectively compelling'.

Whether Australia reforms its laws governing tendency and coincidence evidence and the direction those reforms may take will be informed by policy choices. Drawing on the law of other comparable jurisdictions, this report provides a range of possible directions for reform, together with assessments as to their workability and potential impact on child sexual assault prosecutions.

Introduction

This report surveys the legal treatment of tendency, coincidence and relationship evidence applicable in sexual assault prosecutions across a selection of foreign jurisdictions: England and Wales, New Zealand, Canada and the United States.¹ Different terms – such as ‘propensity evidence’ and ‘similar fact evidence’ – are also widely used throughout. This report will use the term ‘other-misconduct evidence’ to refer to evidence that reveals a defendant’s other misconduct, and ‘propensity evidence’ to refer to other-misconduct evidence that has been adduced for the purpose of demonstrating the defendant’s propensity for misconduct.

This report is concerned with the situation where the prosecution seeks to rely on evidence that the defendant committed other sexual misconduct not covered by the current charges, in order to prove that the defendant committed the charged sexual offences against the complainant. There is a range of possible scenarios, for example:

- the other allegations may involve misconduct against other alleged victims
- the other allegations may involve other misconduct against the complainant (often termed ‘relationship evidence’)
- the other alleged misconduct may have been the subject of previous proceedings
- such previous proceedings may have ended in conviction or acquittal
- the other alleged misconduct may be the subject of other current charges – raising issues of joinder of counts as well as cross-admissibility.

The common law has traditionally excluded evidence of a defendant’s other misconduct due to concerns that the evidence would prejudice, confuse or distract the jury. Particular concern has been expressed about the jury employing propensity reasoning along the lines of: ‘The defendant had done this before, he has a propensity to do this kind of thing and, true to form, he did it again on the charged occasion’. The jurisdictions covered in this report maintain some version of this exclusionary rule either at common law or under legislation.

Although subject to exclusion, such evidence may gain admission if it satisfies certain admissibility requirements. Where other-misconduct evidence is admissible, the trial judge should generally give the jury careful direction on its proper use. This report examines the exclusion, admission and use of other-misconduct evidence in England and Wales, Canada, New Zealand and the United States. Specific issues considered include:

- the scope of the exclusionary rule – whether it covers only evidence adduced for the purpose of propensity reasoning, or whether it covers all evidence revealing a defendant’s other misconduct
- the nature and stringency of the admissibility test, generally
- whether the admissibility test operates more leniently in child sexual assault cases

¹ This survey is based primarily on a review of leading evidence texts from each of the jurisdictions. These texts and the basis of their selection are detailed in the final Sources section of this report.

- whether relationship evidence avoids the exclusionary rule or readily satisfies admissibility tests
- any special procedures relating to the proof of prior convictions
- how the possibility of collusion between multiple alleged victims is treated, and whether it is a significant obstacle to admission
- where the prosecution charges the defendant with the sexual assault of more than one complainant, the relationship between the principles governing cross-admissibility, and those governing joinder and severance of charges
- whether the prosecution can rely on evidence of other alleged misconduct, of which the defendant has previously been acquitted
- how the jury should be directed in relation to other-misconduct evidence that has gained admission.

This report focuses on evidence of a defendant's other misconduct adduced on the initiative of the prosecution. It will not examine related areas of evidence law, namely:

- evidence of a defendant's good character opening the door to prosecution evidence of bad character;
- cross-examination of the defendant on credibility
- evidence of a defendant's reputation
- evidence that the defendant fits a particular profile that matches the circumstances of the offence
- defence evidence of alleged misconduct of a co-defendant or non-defendant, to prove that it was that person who committed the offence and not the defendant.

1. England and Wales²

The admissibility and use of tendency and coincidence evidence in England and Wales is currently governed by Part 1 of Chapter 11 of the *Criminal Justice Act 2003* (CJA), 'Evidence of bad character', commencing 15 December 2004. These provisions were introduced in response to reported 'growing public concern that evidence relevant to the search for truth is being wrongly excluded'.³ They brought fundamental change to the law. As outlined below, while 'bad character' evidence is excluded, there is specific provision for relevant evidence of a defendant's propensity to fit within a gateway of admissibility.⁴ It is up to the defendant to persuade the trial judge to exclude it by exercising a statutory discretion. Courts have acknowledged that the legislative intention behind the provisions is 'that evidence of bad character would be put before juries more frequently than in the past'⁵, and they have given effect to this intention.

The Court of Appeal has discouraged courts from citing pre-Act authorities on the basis that they would be unhelpful⁶, but Mirfield notes that some continue to do so.⁷ This may reflect Roberts and Zuckerman's observation that the old cases 'have as much – and frequently much more – to teach about the logic of factual inference and proof, as they do about doctrinal rules of admissibility'.⁸

Prior to the commencement of the CJA, it appeared that the English common law was already moving in the direction of readier admissibility.⁹ A late common law decision of the House of Lords, *DPP v P*¹⁰, made it clear that similar fact evidence is admissible if it possesses sufficient probative value to outweigh the risk of prejudice, and that it may be admitted for the purpose of propensity reasoning.¹¹ This decision is perceived as significantly relaxing the admissibility requirements.¹² The prior leading decision, *DPP v Boardman*¹³, suggested that the other misconduct would have to share a 'striking similarity'¹⁴ with the charged offence to gain admission. But *DPP v P* held that the shared features' sufficient probative value for admissibility may be no more than the 'stock in trade' of the paedophile.¹⁵ (The Court added that if striking similarity was required, it was present because the 'father has allegedly shown himself to be prepared to abuse sexually girls who are no more than children, in this case under the age of 13, girls who moreover

² The relevant common law and legislation applies across England and Wales. Scottish law differs considerably and is not discussed here.

³ *CJS Justice for All* Cm 5563 (TSO, 2002); Roberts and Zuckerman, 585.

⁴ CJA ss 101(d), 103(1)(a); *Chopra* [2007] 1 Cr App R 225 [12].

⁵ *R v Edwards* [2005] EWCA Crim 3244 [1].

⁶ *Campbell* [2007] EWCA Crim 1472 [24].

⁷ *Phipson on Evidence* [19–02], citing *Wallace* [2008] 1 WLR 572.

⁸ Roberts and Zuckerman, 623.

⁹ Although, as Redmayne notes, the lower courts did not universally follow the lead provided by the House of Lords: 148–9.

¹⁰ [1991] 2 AC 447.

¹¹ *Ibid* 460.

¹² Colin Tapper, 'The Probative Force of Similar Fact Evidence' (1992) 108 *Law Quarterly Review* 26, 29.

¹³ [1975] AC 421.

¹⁴ *Ibid* 439–41 (Lord Morris); 443–4 (Lord Wilberforce); 452, 454 (Lord Hailsham); 457–8, 60 (Lord Cross); 462–3 (Lord Salmon).

¹⁵ *DPP v P* [1991] 2 AC 447, 461.

are his own children, and to use his position of power over them in their own home to achieve those ends’.)¹⁶ A few years later in *R v H*¹⁷, Lord Griffiths suggested a ‘less restrictive form’ of the exclusionary rule suits today’s ‘better educated and more literate juries’.¹⁸

1.1 Scope of the exclusionary rule

Section 101(1) of the CJA provides that ‘[i]n criminal proceedings evidence of the defendant’s bad character is admissible if, but only if’ it fits within one of seven gateways of admissibility. Relevant gateways are discussed below. There are notice requirements¹⁹, but they are rarely strictly enforced.²⁰ There is no leave requirement for prosecution evidence fitting within the gateways, although the Court is often required to make admissibility rulings.²¹

Evidence of bad character is defined in s 98 as ‘evidence of, or of a disposition towards, misconduct on his part’, with the exception of evidence (a) that ‘has to do with the alleged facts’ of the charged offence, and (b) ‘of misconduct in connection with the investigation or prosecution of that offence’. ‘Misconduct’ is defined in s 112(1) as ‘the commission of an offence or other reprehensible behaviour’.

The effect of the CJA then is to exclude evidence of the defendant’s bad character, as defined, unless the prosecution can fit the evidence within one of the gateways of admissibility. The exclusion clearly extends to prior convictions for sexual offences, and allegations of the commission of other sexual offences. However, issues may arise with regard to evidence of the defendant’s other, non-criminal sexual conduct. Understandably, consensual homosexual acts are not nowadays viewed as reprehensible behaviour²²; however, different views have been expressed as to whether consensual practices of sadomasochism and sexual dominance, for example, are reprehensible.²³

Of course, even if such evidence avoids the exclusionary rule, it may be considered irrelevant or of limited probative value. In *Laws-Chapman*, the Court of Appeal held that evidence of consensual buggery had no ‘real relevance’²⁴ to charges of sexual assault of a boy; rather, ‘mutually agreed sexual relations between individuals over the age of consent do not, certainly without more, tend to prove that the older participant is a paedophile, who has a propensity to commit violent crimes against children’.²⁵ Arguably, the

¹⁶ Ibid 453.

¹⁷ [1995] 2 AC 596.

¹⁸ Ibid 613.

¹⁹ CJA s 111(1) creates a power to make rules “as necessary or expedient”. The rules must require the prosecution to give the defendant notice of the intention to adduce bad character evidence (s 111(2)). Part 35 of the consolidated Criminal Procedure Rules introduces notice requirements and forms, and gives the court a broad power of dispensation.

²⁰ Mirfield notes that the courts have shown little inclination to disallow evidence for failure to provide adequate notice: *Phipson on Evidence* [19–16]. Nor has the Court of Appeal encouraged a firmer line: *ibid*, citing a list of cases from *Malone* [2006] EWCA Crim 1860 to *Kisikidi* [2012] EWCA Crim 2943.

²¹ Spencer, 64; *Phipson on Evidence* [19–16].

²² *IJ* [2011] EWCA Crim 2734; *Phipson on Evidence* [19–66]; see also Spencer, 35.

²³ Assumed to be so in *Chapman* [2006] EWCA Crim 2545; suggested not to be, though without a final decision, in *Seymour* [2011] EWCA Crim 2201.

²⁴ [2013] EWCA Crim 1851 [17].

²⁵ *Ibid* [36].

defendant's consensual homosexual sex with an adult, while irrelevant in establishing a propensity to commit non-consensual child sexual abuse, may be relevant in showing that if the defendant did commit child sexual abuse, he would be more likely to choose male victims.²⁶ But this inference, if open, may have limited probative value.²⁷

Manister provides another example of the limits of the 'bad character' definition.²⁸ The defendant was charged with sexual assault against a 13-year-old girl. The prosecution adduced evidence that the defendant had made a sexually suggestive comment to the complainant's 15-year-old sister shortly before the alleged offence, and five years earlier, when aged 34, had a sexual relationship with a girl aged 16. Neither conduct was criminal; however, the trial judge considered that the evidence was covered by the exclusionary rule (but also fell within a gateway of admissibility). The Court of Appeal held that the other alleged conduct could not be considered 'reprehensible' and so was not subject to exclusion under the CJA.²⁹

Note that the definition of 'bad character' extends beyond evidence of the defendant's commission of misconduct to include evidence of the defendant's 'disposition towards misconduct'. Therefore 'bad character' would cover situations where the defendant admits a sexual attraction to children (even though the defendant denies having previously acted on it), and could also extend to evidence of the defendant grooming children in preparation for sexual abuse (even though the conduct, without this construal, is neutral or even open to a positive interpretation).³⁰

1.2 Propensity evidence

Section 101(1)(d) creates a gateway for evidence of a defendant's bad character where it is 'relevant to an important matter in issue between the defendant and the prosecution'. Section 112(1) defines 'important matter' as 'a matter of substantial importance in the context of the case as a whole'.

Section 101(1)(d) admits two types of evidence. It 'codif[ies] the principle that evidence which incidentally reveals the defendant's bad character is admissible if it is directly relevant to a particular disputed issue in the case'.³¹ In *Watson*³², the defendant presented an alibi at his trial for rape. The prosecution was allowed to present evidence of his conviction for an offence committed at the same time and place as the charged offence. This proved that his

²⁶ See Redmayne, 161.

²⁷ Among other things, sexual preferences with adults may not transfer to sexual preferences with children. On versatility and specialisation among sex offenders see, for example, Patrick Lussier and Jesse Cale, 'Beyond sexual recidivism: A review of the sexual criminal career parameters of adult sex offenders' (2013) 18 *Aggression and Violent Behavior* 445.

²⁸ *Weir* [2006] 1 WLR 1885.

²⁹ See Spencer, 37; Redmayne, 147–8. The Court considered it admissible under the applicable remnants of the common law, and not excluded under the general exclusionary discretion in the *Police and Criminal Evidence Act 1984* (PACE) s 78 – see §1.7.

³⁰ Spencer, 36, citing *S* [2007] EWCA Crim 1387; *A* [2009] EWCA Crim 513; cf *Fox* [2009] EWCA Crim 653. See also *Weir* [2006] 1 WLR 1885, where the evidence could be described as the defendant's grooming of vulnerable women, conduct that 'might, but for the accused's alleged purpose, bear a positive tone': *Phillips on Evidence* [19–64].

³¹ Spencer, 67.

³² [2006] EWCA Crim 2308; Spencer, 68.

alibi was false and that he did have opportunity for the charged rape. In *Isichei*³³, the complainants identified the defendant as the person who assaulted and robbed them in the street. They said that as he approached them he demanded cocaine. The prosecution was permitted to produce evidence of the defendant's prior conviction for importing cocaine, not to show his general tendency to break the law, but to corroborate the identification. As Spencer comments, 'it would have been an odd coincidence if the stranger they identified as responsible for the robbery had, like the person who actually committed it, a keen interest in cocaine'.³⁴ At common law, the evidence presented in *Watson* and *Isichei* would not be covered by the exclusion rule in the first place, as it was adduced for a purpose other than 'forbidden'³⁵ propensity reasoning.

More significantly, this gateway opens up the admissibility of propensity evidence. Section 103(1)(a) provides that that 'the matters in issue between the defendant and the prosecution include ... whether the defendant has a propensity to commit offences of the kind with which he is charged'.³⁶ This amounts to a 'radical change' to the law,³⁷ undoing the idea that propensity reasoning is forbidden.³⁸ The Court of Appeal has stated that, for propensity evidence to gain admission, there is no 'enhanced' probative value requirement; '[t]he test is the simple test of relevance'.³⁹

This is not to say that evidence of other misconduct will automatically gain admission.⁴⁰ In *Hanson*⁴¹, the Court of Appeal indicated the need to expressly consider (1) whether the bad character evidence 'establish[es] a propensity to commit offences of the kind charged [and (2) whether] that propensity make[s] it more likely that the defendant committed the offence charged'.⁴²

A third question posed by the Court in *Hanson* concerned discretionary exclusion on the basis of unfairness (discussed separately below – see §1.7). Discretionary exclusion poses a question that is legally and conceptually distinct from whether the evidence fits within an admissibility gateway, although the two are not always clearly distinguished.⁴³ It can be unclear whether the evidence is excluded under the discretion as being more prejudicial than probative, or excluded for not establishing propensity in the first place. As Mirfield

³³ [2006] EWCA Crim 1815.

³⁴ Spencer, 67–68. Note that the charged offence was assault and robbery, and did not involve cocaine. While the coincidence reasoning outlined by Spencer does assume the defendant's continuing propensity to be involved with cocaine, this does not amount to a propensity to commit assault and robbery.

³⁵ For example, *Boardman* [1975] AC 421, 453 (Lord Hailsham); see also 438 (Lord Morris) and 461 (Lord Salmon).

³⁶ The paragraph continues: 'except where his having such a propensity it no more likely that he is guilty of the offence'. Citing the explanatory notes accompanying the bill, Spencer notes that this was meant to exclude cases where the defendant's conduct was not in question and the issue concerned (for example in a homicide case) whether that conduct was the cause of death: Spencer, 73.

³⁷ *Phipson on Evidence* [19–30]; see also Redmayne, 149.

³⁸ For example, *Boardman* [1975] AC 421, 453 (Lord Hailsham); see also 438 (Lord Morris) and 461 (Lord Salmon).

³⁹ *Chopra* [2007] Cr App R 225 [17]; see also *Weir* [2006] 1 WLR 2866 [36]; *Phipson on Evidence* [19–40]; Roberts and Zuckerman, 627.

⁴⁰ Redmayne, 168.

⁴¹ [2005] EWCA Crim 824.

⁴² *Ibid* [7].

⁴³ *Phipson on Evidence* [19–40], citing *Beverley* [2006] EWCA Crim 1287 [8].

points out, 'in some cases, relevance, not fairness, has clearly been the basis for the ruling'⁴⁴, and Redmayne suggests that the Court's focus is on probative value rather than fairness.⁴⁵ Despite the Court's statements to the contrary⁴⁶, it does appear that for propensity evidence to fit within this gateway, there is a requirement of positive probative value beyond mere relevance, albeit a less demanding one than at common law.⁴⁷

In determining whether a probative propensity is demonstrated, the Court has referred to factors familiar from the common law: the number of other instances of misconduct, when they occurred and how similar they are to the charged offence.⁴⁸ These factors need not feature strongly, and a weakness in one factor can be compensated by a strength in another. The Court of Appeal appears particularly ready to admit evidence that has been adduced to show a propensity for sexual offences against children.

In *Hanson*⁴⁹, the Court said:

There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged.⁵⁰

The Court cited *DPP v P*⁵¹ on the last point, adding that 'child sexual abuse [is a] comparatively clear example of such unusual behaviour', and that 'striking similarity' is not required to 'demonstrat[e] probative force'.⁵²

In *Chopra*, the defendant dentist was charged with having indecently touched three young female patients. The Court was dismissive of defence counsel's argument that the defendant had treated thousands of patients over the 10-year period and, if the defendant did have the claimed propensity, the prosecution should have been able to come up with more than just three alleged victims. As Roberts and Zuckerman put it, '[t]he argument was that [the defendant] had a propensity occasionally to grope his pubescent female patients, not that he was doing so whenever the opportunity presented itself'.⁵³ The Court said:

[I]f three girls, or for that matter two girls, said this it did make it more likely that it was true than if only one of them said it. That ... remains so notwithstanding that there were countless opportunities to commit such offences which there was no evidence whatever that the defendant had taken.⁵⁴

⁴⁴ *Phipson on Evidence* [19–40], citing *Sievwright* [2007] EWCA Crim 592.

⁴⁵ Redmayne, 163–4.

⁴⁶ For example, *Chopra* [2007] Cr App R 225 [17]; *Weir* [2006] 1 WLR 2866 [36]; *Phipson on Evidence* [19–40]; Roberts and Zuckerman, 627.

⁴⁷ *Phipson on Evidence* [19–40].

⁴⁸ *Ibid* [19–32].

⁴⁹ [2005] 2 Cr App R 21.

⁵⁰ *Ibid* [9].

⁵¹ [1991] 2 AC 447, 460–461.

⁵² [2005] EWCA Crim 824 [9].

⁵³ Roberts and Zuckerman, 626–7.

⁵⁴ [2007] 1 Cr App R 16 [22].

In *Murphy*⁵⁵, the Court said that:

[T]he factual circumstances of just one conviction, even as long ago as 20 years earlier, might be relevant to showing propensity, but we would expect such cases to be rare and to be ones where the earlier conviction showed some very special and distinctive feature, such as predilection on the part of the Defendant for a highly unusual form of sexual activity ...

In *Pickstone*⁵⁶, the defendant was charged with various sexual offences against children. The trial judge admitted a prior conviction more than a decade old for indecent assault on a child, commenting that 'a defendant's sexual mores and motivations are not necessary [*sic*] affected by the passage of time'.⁵⁷ The Court of Appeal upheld the admissibility decision without any reference to any similarities with the charged offences. Mirfield says *Pickstone* 'would have been, at best, a marginal case before the 2003 Act'.⁵⁸

In *Cox*⁵⁹, convictions dating from 1981 for child sexual assaults similar to the charged offence were admitted. The Court held that there is 'some force in the proposition ... that a defendant's sexual mores and motivations are not necessarily affected by the passage of time', indicating that in this respect, child sex offences may be different from weapons offences.⁶⁰ The Court accepted 'unhesitatingly' that 'the fact that this defendant had, many years ago, demonstrated a sexual interest in a pubescent girl of 12 made it more likely that he had committed the offence which was now charged'.⁶¹

Recent cases confirm 'the judicial view being taken that paedophilic activities and attitudes are both persistent and exceptionally unusual'.⁶² Redmayne suggests that this view is borne out by empirical research that supports a conclusion that 'those convicted of sexual crimes against children ... pose "a significant risk of offending throughout their li[ves]".⁶³ 'While convictions for sexual offences appear to get special treatment – often being admitted when very stale – there is some empirical justification for this practice.'⁶⁴

A propensity for child sex offences may be viewed as inherently more probative (on the basis of being unusual or persistent) than a propensity for the sexual assault of adults. In *Robertshaw*⁶⁵, the shared distinctive feature permitting the admission of a single old

⁵⁵ [2006] EWCA Crim 3408 [16].

⁵⁶ [2005] 1 WLR 3169.

⁵⁷ *Ibid* [51].

⁵⁸ *Phipson on Evidence* [19–31].

⁵⁹ [2007] EWCA Crim 3365.

⁶⁰ *Ibid* [28].

⁶¹ *Ibid* [29].

⁶² *Phipson on Evidence* (2015 supplement) [19–31] citing *Malik* [2014] EWCA Crim 142 and *Wells* [2015] EWCA Crim 2. An extreme case is *Miller* [2010] EWCA Crim 1578. On charges of child sexual assault, the Court of Appeal upheld the trial judge's decision to admit evidence of a single eight-year-old conviction for a sexual offence committed when the defendant was 16 years old. This is a little surprising because the victim on that occasion was his own age, whereas the charged offence involved an 11-year-old victim, 12 years younger than the defendant. Redmayne criticises it as being 'too dismissive of the argument that isolated convictions gained at a young age show little': 153. Cases where old or dissimilar prior convictions have been excluded include *R v B* [2008] EWCA Crim 1850 and *McGarvie* [2011] EWCA Crim 141.

⁶³ Redmayne, 155, quoting from Hanson, Steff and Gauthier, 'Long-Term Recidivism of Child Molesters' (1993)

⁶¹ *Journal of Consulting and Clinical Psychology* 646, 650.

⁶⁴ Redmayne, 168.

⁶⁵ [2013] EWCA Crim 2003.

conviction was that both offences involved the rape of elderly women with considerable violence. In *McGarvie*⁶⁶, the Court held that convictions for similar offences – sexual assault against women with consent in issue – going back 33 and 18 years should not have been admitted at least without some similarities in the details, which had not been shown. In *Burdess*⁶⁷, a single prior rape conviction was held admissible on the basis that it and the charged offence had the distinctive characteristic of being conducted with a high risk of being discovered.

Under the CJA, the Court has found that conduct quite dissimilar from the charged offence may still be relevant and admissible. Several decisions have upheld the admissibility of evidence of pornography in prosecutions for sexual abuse. For example in *Weir*⁶⁸, the defendant was charged with indecently touching a 10 year-old girl. Evidence was admitted that the defendant had previously been cautioned for taking an indecent photograph of a child. In *R v A*⁶⁹, the Court approved the admission of evidence that the defendant had access to incestuous pornography between 2005 and 2008, in relation to charges pertaining to the sexual abuse of his daughter in the 1980s and early 1990s, commenting that ‘incestuous rape in particular is no ordinary offence’.⁷⁰ *R v D, P and U*⁷¹ is authority that ‘[e]vidence of viewing and/or collection of child pornography is capable of being admissible through gateway (d) though not automatically so’.⁷² It does not ‘necessarily follow that a person who enjoys viewing such pictures will act out activity there depicted by abusing children’.⁷³ However, evidence of a defendant’s interest in child pornography can be relevant since ‘[a] sexual interest in small children or pre-pubescents is relatively unusual and certainly not the norm.’⁷⁴ There may be ‘a temporal progression from the viewing of pornography to the acting out in physical abuse of its depicted content ... a translation of cast of mind into activity, in a readily understood escalation’.⁷⁵

1.3 Prior convictions

Prior convictions form a particular type of propensity evidence. Section 103(2) provides that:

- [A] defendant’s propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—
 - (a) an offence of the same description as the one with which he is charged, or
 - (b) an offence of the same category as the one with which he is charged.

Section 103(4) provides that:

⁶⁶ [2011] EWCA Crim 1414; *Shipson on Evidence* [19–32].

⁶⁷ [2014] EWCA Crim 270.

⁶⁸ [2006] 1 WLR 1885.

⁶⁹ [2009] EWCA Crim 513.

⁷⁰ *Ibid* [20].

⁷¹ [2011] EWCA Crim 1714; discussed in *R v W* [2011] EWCA Crim 2463. The reasoning as explained in *W* may be stronger than that actually outlined in *D, P and U*: see criticism in Redmayne, 161–2.

⁷² *R v W* [2011] EWCA Crim 2463 [26].

⁷³ *Ibid*.

⁷⁴ *Ibid*.

⁷⁵ *Ibid* [27].

- (a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms; [and]
- (b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.

There have only been two orders under s 103(4)(b), one of which groups together 36 child sex offences.⁷⁶

Redmayne suggests that these provisions do not make much difference; admissibility decisions would be the same without them.⁷⁷ The parenthetical words in 103(2) preceded by the word 'may' make it clear that these subsections do not prevent the prosecution from seeking to prove propensity in other ways⁷⁸, including convictions not of the same description or category.⁷⁹ And just because convictions are of the same category or description does not mean that they will be deemed admissible.

The Court of Appeal has held that even where convictions are of the same description or category, '[i]t will often be necessary, before determining admissibility ... to examine each individual conviction rather than merely to look at the name of the offence'.⁸⁰ Sometimes, however, 'the circumstances of the conviction are sufficiently apparent from its description to justify a finding that it can establish propensity ... [f]or example, a succession of convictions for dwelling-house burglary, where the same is now charged'.⁸¹ In *Pickstone*⁸², the defendant was charged with various sexual offences against children. A prior conviction was admitted for indecent assault on a child, on the basis that it was of the same category and description. The Court of Appeal upheld the admissibility decision without reference to any similarities with the charged offences.

However, the Court has recognised that it will 'often be the case' that more is required than the prior and present offences sharing the same name.⁸³ Where more is required, the Court has indicated that it:

... would expect the relevant circumstances of previous convictions generally to be capable of agreement, and that, subject to the trial judge's ruling as to admissibility, they will be put before the jury by way of admission. Even where the circumstances are genuinely in dispute, we would expect the minimum indisputable facts to be thus admitted. It will be very rare indeed for it to be necessary for the judge to hear evidence before ruling on admissibility under this Act.⁸⁴

Section 74 of the *Police and Criminal Evidence Act 1984* (PACE) provides that the fact of a person's conviction is evidence that the person committed the offence, and s 75 makes provision for the facts of the conviction to be established by the 'contents of the

⁷⁶ The Criminal Justice Act 2003 (Categories of Offences) Order 2004, www.legislation.gov.uk/ukSI/2004/3346/.

⁷⁷ Redmayne, 146.

⁷⁸ Spencer, 80–81; a view supported in *Hanson* [2005] 2 Cr App R 21 [8] and *Weir* [2006] 1 WLR 1885.

⁷⁹ Redmayne, 146.

⁸⁰ *Hanson* [2005] 2 Cr App R 21 [12].

⁸¹ *Ibid* [17].

⁸² Decided with *Hanson* [2005] 2 Cr App R 21.

⁸³ *Ibid* [17].

⁸⁴ *Ibid* [17].

information, complaint, indictment or charge sheet on which the person in question was convicted'. In *Steen*, the prosecution was permitted to have a prepared summary of the prior offences admitted as admissible hearsay.⁸⁵ Beyond that, witnesses from the previous trial(s) could be called.⁸⁶

In *Bovell*⁸⁷, the Court of Appeal highlighted the importance of complying with the notice requirements⁸⁸ and case management procedures, and of the proper exchange of information between the parties, in order for admissibility decisions to be made efficiently and fairly. (However, Mirfield notes that the Court has shown little inclination to disallow evidence for failure to provide adequate notice.⁸⁹)

1.4 Complainant or witness credibility and collusion

In child sexual assault cases the prosecution often adduces evidence of similar accusations from other alleged victims, relying on the improbability that they would all be telling similar lies. The defendant will often respond that the multiple similar allegations are the product of collusion or innocent infection. A key legal issue is whether the trial judge should consider this credibility issue at the admissibility stage, or whether it should be left as a matter of weight for the jury.

In s 109 of the 'bad character' Chapter, the CJA provides for an 'assumption of truth in assessment of relevance or probative value'. Section 109(1) provides that 'a reference ... to the relevance or probative value of evidence is a reference to its relevance or probative value on the assumption that it is true'. This is subject to s 109(2), which provides that 'a court need not assume that the evidence is true if it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true'. The effect is that except in the most extreme cases, credibility is a question for the jury and should not affect the trial judge's determination of admissibility.

This adopts the English common law position. In *R v H*⁹⁰, the House of Lords held that like other credibility issues, the question of collusion was a question for the jury. The trial judge could exclude the evidence only if 'no reasonable jury' could consider it reliable.⁹¹ This reflected a policy concern expressed some years earlier in *Johannsen*⁹²:

[In] the most common [classes of child sexual assault by school teachers] the depositions will almost certainly reveal that the alleged victims knew each other. Is the judge to infer in

⁸⁵ *Steen* [2007] EWCA Crim 335, applying CJA s 114(1)(d); Spencer, 134.

⁸⁶ Spencer, 84.

⁸⁷ [2005] EWCA Crim 1091.

⁸⁸ CJA s 111(1) creates a power to make rules 'as necessary or expedient'. The rules must require the prosecution to give the defendant notice of the intention to adduce bad character evidence (s 111(2)). Part 35 of the consolidated Criminal Procedure Rules introduces notice requirements and forms, and gives the court a broad power of dispensation.

⁸⁹ *Phipson on Evidence* [19–16]. Nor has the Court of Appeal encouraged a firmer line: *ibid*, citing a list of cases from *Malone* [2006] EWCA Crim 1860 to *Kisikidi* [2012] EWCA Crim 2943.

⁹⁰ [1995] 2 AC 596.

⁹¹ *Ibid* 612.

⁹² (1977) 65 Cr App R 101.

every such case that acquaintance with one another may have resulted in a conspiracy to give false evidence? If he is, many sexual molesters of the young will go free.⁹³

However, the Law Commission thought that the common law did not provide adequate safeguards against the possibility of collusion or innocent infection among purported multiple victims of sexual assault.⁹⁴ And so, while s 109 adopts the common law, an additional safeguard was introduced at the recommendation of the Law Commission. Under s 107(1):

If ... the court is satisfied at any time after the close of the case for the prosecution that—

- (i) the evidence is contaminated, and
- (ii) the contamination is such that, considering the importance of the evidence to the case against the defendant, his conviction of the offence would be unsafe,

the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.

Under s 107(5), a person's evidence will be considered contaminated where:

- (a) as a result of an agreement or understanding between the person and one or more others, or
 - (b) as a result of the person being aware of anything alleged by one or more others whose evidence may be, or has been, given in the proceedings,
- the evidence is false or misleading in any respect, or is different from what it would otherwise have been.

As Spencer notes, the definition of 'contamination', while not entirely clear, does extend to "contamination" by accident, as well as by design'.⁹⁵ In *Card*⁹⁶, the Court of Appeal indicated that contamination 'may result from deliberate collusion, or the exercise of improper pressure, but it may equally arise innocently, or through inadvertence'.⁹⁷ In that case, the Court held that the evidence of two sexual assault complainants, aged five and 10, had been influenced by a conversation that took place with their mother prior to a report being made to the police. Both complainants gave evidence that their mother had told them what to say. The Court did not need to consider whether the child complainants had deliberately manufactured their evidence.

In the later cases of *Woolf*⁹⁸ and *DZ*⁹⁹, the Court of Appeal distinguished *Card* and suggested the trial judge should exercise the s 107 power sparingly.¹⁰⁰ For the judge to intervene, the judge must be satisfied that the evidence is contaminated, and also that the evidence is sufficiently important that a conviction would be unsafe. If so satisfied, the trial judge must terminate proceedings. The trial judge has no discretion in the matter.

⁹³ Ibid, 105, quoted in Roberts and Zuckerman, 617.

⁹⁴ Spencer, 142.

⁹⁵ Spencer, 142, referring to Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com no 273, Cm 5257, October 2001), 223. See also *Lamb* [2007] EWCA Crim 1766.

⁹⁶ [2006] 2 Cr App R 28.

⁹⁷ Ibid [19].

⁹⁸ [2011] EWCA Crim 2764.

⁹⁹ [2012] EWCA Crim 1845.

¹⁰⁰ *Phipson on Evidence* [19–52].

Under s 107, the trial judge only considers the issue of contamination at the close of the prosecution case, when the evidence of the other alleged victims¹⁰¹ is before the court together with other prosecution evidence. As the Court of Appeal notes in *Card*, the advantage of dealing with the matter at this stage rather than as an admissibility issue is that the trial judge ‘would have well in mind the precise details of the evidence actually given, with such weaknesses and problems as may have emerged’.¹⁰² It would be a decision ‘not ... about anticipated evidence, but ... based on the evidence itself’. However, the Court also notes that the provision is ‘[s]trikingly ... unusual’ in that ‘a duty is imposed on the judge to make what is in truth a finding of fact. ... [T]he judge should form his own assessment, or judgment, of matters traditionally regarded as questions of fact for the exclusive decision of the jury’.¹⁰³

1.5 Relationship evidence

‘Relationship evidence’ is a useful descriptive term covering evidence of other (mis)conduct by the defendant towards the victim. Unlike evidence of ‘propensity’, for example, there is no specific provision for the admission of relationship evidence.¹⁰⁴ However, there are several possible routes to admission for relationship evidence in the CJA.

First, if the evidence is not of prior convictions or other alleged offences, it may not be considered evidence of ‘reprehensible’ behaviour, and would avoid being caught by the exclusion in the first place. However, as mentioned above, evidence that allegedly shows that the defendant was grooming an intended victim would be caught by the exclusion as evidence of a ‘disposition towards misconduct’¹⁰⁵, even though without this interpretation the conduct might be viewed neutrally or even positively.

Second, if the evidence is of conduct close in proximity to the charged offence it could be considered to ‘ha[ve] to do with the alleged facts’ and so be specifically excepted from the definition of ‘bad character’ evidence (s 98(a)). This expression is loose enough to be given ‘an extremely wide meaning’¹⁰⁶, but ‘the narrower view of s 98(a) is to be preferred’.¹⁰⁷ According to the narrower view, this exception corresponds with the narrow but problematic *res gestae* doctrine at common law.¹⁰⁸ *Res gestae* is an inclusionary principle by which evidence relating to events in close proximity with the charged offence avoid exclusionary rules such as the hearsay rule¹⁰⁹, but also the rule excluding propensity evidence. The *res gestae* doctrine has long been criticised for being ‘vague, overbroad, and prone to abuse’.¹¹⁰

¹⁰¹ Under CJA s 112(2), where counts relating to different complainants have been joined, the Bad Character provisions apply as though the offences were being tried separately. And so s 107 has application to cross-admissible evidence from different complainants. See §1.9.

¹⁰² *Card* [2006] 2 Cr App R 28, [23].

¹⁰³ *Ibid* [20].

¹⁰⁴ This is also true for Canada and New Zealand: §§2.8 and 3.8.

¹⁰⁵ CJA s 98.

¹⁰⁶ *Phipson on Evidence* [19–26].

¹⁰⁷ *Ibid*, quoting *Mullings* [2011] Cr App R 2 [32].

¹⁰⁸ *Phipson on Evidence* [19–26], though noting continued judicial support for the broader view.

¹⁰⁹ See, for example, Roberts and Zuckerman, 420.

¹¹⁰ *US v Green* 617 F3d 233 (3d Cir 2010); see also Julius Stone, ‘Res Gesta Reagitata’ (1939) 50 *Law Quarterly Review* 66, 67.

Like *res gestae*, s 98(a) can raise very difficult questions as to where the line is drawn between evidence of conduct intrinsic to the charged offence, and evidence of extrinsic conduct. The Law Commission suggested that this basis of admissibility should be limited to 'evidence of misconduct in the course of [the charged] offence or close to that offence in time, place or circumstances'.¹¹¹ However, authorities continue to be 'equivocal' as to the breadth of its application.¹¹²

Third, where relationship evidence does fall within the scope of the exclusion, it may fit within the admission gateway for 'important explanatory evidence' (s 101(1)(c)). This method of admission overlaps with that of s 98(a) in that evidence that 'has to do with the alleged facts of the [charged] offence' will also often be 'important explanatory evidence'.¹¹³ The Law Commission viewed this gateway as the most suitable for relationship evidence.¹¹⁴ It is discussed further below.

Finally, there is also scope for relationship evidence to be admitted as propensity evidence under gateway (d). In *M (Donald Gordon)*¹¹⁵, the defendant was charged with the rape and digital penetration of his daughter. He admitted having been in bed with her that night but denied the charges. To rebut his claim of 'innocent association', evidence was admitted under s 101(1)(d) of other incidents that indicated his sexual interest in her.

Most commonly, relationship evidence will be considered for admission as 'important explanatory evidence' under s 101(c). This gateway for admissibility resembles the pre-existing common law approach to background evidence, as stated in *Pettman*:

[W]here it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not a ground for excluding the evidence.¹¹⁶

At common law, relationship evidence often fitted the more general category of background evidence, enabling evidence of the defendant's previous offences against the complainant and other members of the family to be admitted in order to provide context for the charged sexual offence and to explain why the complainant did not report it sooner.¹¹⁷

Under the CJA, s 102 provides that evidence will be 'important explanatory evidence' if '(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and (b) its value for understanding the case as a whole is

¹¹¹ *Law Commission Report No 273* (2001) [8.23]; *Phipson on Evidence* [19–24].

¹¹² *Phipson on Evidence* (2015 supplement), with 'the most recent cases ... tend[ing] to the wider view': [19–26] citing, for example, *Okono* [2014] EWCA Crim 2521. There is authority suggesting that temporal proximity is not always required: *Sule* [2012] EWCA Crim 1130; *Lunkulu* [2015] EWCA Crim 1350. See also Spencer, 39; Roberts and Zuckerman, 631–2.

¹¹³ *Tirnaveanu* [2007] 1 WLR 3049 [24].

¹¹⁴ *Law Commission Report No 273* (2001) [10.8]–[10.12]; *Phipson on Evidence* 19.24.

¹¹⁵ [2006] EWCA Crim 3388.

¹¹⁶ *Pettman* CA, 5 May 1985, CA no 5048/C/82; see also *Haigh* [EWCA] Crim 90 [23]–[25]; Spencer, 64; *Phipson on Evidence* [19–29].

¹¹⁷ *TM* [2000] 2 Cr App R 266; Spencer, 64.

substantial'.¹¹⁸ Both requirements must be satisfied. The second requirement suggests that this route to admissibility is tougher than the one for propensity evidence. Unlike propensity evidence being admitted via s 101(1)(d), explanatory evidence clearly must satisfy a probative value threshold beyond mere relevance. This may represent a reversal of the common law, where the 'background evidence' label offered the promise of bypassing the exclusionary rule.

Section 102(a) establishes requirements that may be satisfied in the alternative. Of these, the second will be easier to satisfy than the first. It will be easier to show that the prosecution case would be 'difficult ... to understand' without the disputed evidence than to show that the prosecution case would be 'impossible ... to understand' without it.¹¹⁹ In *Pronick*, an attempted rape case, the Court of Appeal upheld the trial judge's decision to admit evidence of the defendant's previous rapes and violence against the complainant, to enable the jury 'to make a proper assessment of the respective evidence of the two protagonists'.¹²⁰

If evidence gains admission through one gateway, it may be available for uses associated with other gateways. The Court of Appeal in *Highton* drew a distinction between admissibility and use.¹²¹ Relationship evidence that gains admission as 'important explanatory evidence' under s 101(1)(c) may also be available for propensity reasoning, provided, of course, that it is relevant for that purpose. Authority suggests that if the further use creates a prejudicial risk exceeding its probative value, a limiting direction should be given.¹²² However, there is a desire to avoid such directions, in the interest of keeping directions simple and comprehensible.¹²³

*R v N*¹²⁴ provides an illustration of non-relationship evidence being admitted as 'important explanatory evidence'. The prosecution was allowed to adduce evidence of the complainant's discovery of the defendant's recent conviction for child sexual assault, to explain why she had only recently come forward with her complaint that the defendant had sexually abused her as a child 30 years earlier.

In *Smith*¹²⁵ the Court held that s 101(1)(c) was not an appropriate gateway for evidence of other misconduct against other alleged victims. The defendant faced charges for indecent offences against young girls. The Court of Appeal upheld the trial judge ruling that gateway (c) should not be used to admit evidence that the defendant committed other similar offences against other girls in that area at around the same time. The prosecution case relating to the charged offence could be understood without evidence of the defendant's other similar offences. (However, evidence of the other offences was admissible propensity evidence under s 101(1)(d).)

¹¹⁸ Emphasis added.

¹¹⁹ Roberts and Zuckerman, 632.

¹²⁰ [2006] EWCA Crim 2517 [9]; *Phipson on Evidence* [19–29].

¹²¹ [2005] 1 WLR 3472 [10].

¹²² *Phipson on Evidence* [19–18] citing *Williams* [2011] EWCA Crim 2198; *R* [2011] EWCA Crim 2667. See also Roberts and Zuckerman, 611–612, citing *Edwards* [2006] 1 Cr App R 3 [3].

¹²³ See Roberts and Zuckerman, 625–6.

¹²⁴ [2014] EWCA Crim 419.

¹²⁵ *Edwards* [2008] EWCA Crim 3244.

1.6 Acquittals

Prior to the CJA, the House of Lords held in *R v Z*¹²⁶ that the prosecution could adduce evidence of prior offences as similar fact evidence, notwithstanding that the defendant had been acquitted of those offences. In *Z* the defendant was charged with rape. At trial, the similar fact evidence included rapes for which he had been acquitted.

This position remains unchanged under the Act.¹²⁷ Indeed, the principle that evidence of bad character is assumed to be true¹²⁸ applies to an alleged victim's evidence, notwithstanding that defendant had been previously acquitted of an offence in relation to the alleged victim apparently because the jury had not believed the alleged victim.¹²⁹

1.7 Discretionary exclusion

Under the CJA, evidence can gain admission without passing the common law probative value versus prejudicial risk balancing test. However, the trial judge may exclude the evidence by applying a version of this balancing test.

If the evidence is otherwise admissible under CJA s 101(1)(d) as propensity evidence 'relevant to an important matter in issue between the defendant and the prosecution', then under s 101(3):

The court must not admit [the] evidence ... if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

This is a 'broad discretion'¹³⁰ that the courts need to consider even without a defence application (despite the words of the section).¹³¹

Where the propensity evidence consists of previous convictions of the same description or category of offence under s 103(2), s 103(3) provides that the conviction evidence is not to be admitted 'if the court is satisfied, by reason of the length of time since the conviction or for any reason, that it would be unjust'.

The basis for exclusion under s 101(3) resembles the common law admissibility balancing test of *DPP v P*¹³², though with the burden shifted to the defendant. However, as commented above (in §1.11), the courts have not used the discretion to continue 'business as usual'. They have recognised and given effect to the legislative intent 'that evidence of bad character would be put before juries more frequently than in the past'.¹³³ Also, as Roberts and Zuckerman note, there has been a 'pronounced shift in focus from admissibility

¹²⁶ [2000] 2 AC 483.

¹²⁷ *O'Dowd* [2009] 2 Cr App R 16 [37]; *Wiltshire* [2009] EWCA Crim 1874; *Phipson on Evidence* [19–52].

¹²⁸ CJA s 109; see §1.4.

¹²⁹ *MP* [2012] EWCA Crim 401 [23].

¹³⁰ *Edwards* [2006] 1 WLR 1524 [82]. The term 'must' suggests mandatory exclusion; however, the considerations underlying exclusion clearly require 'the judge to exercise a discretion based on the particular circumstances of the case': *Ibid*.

¹³¹ *Manister* [2006] 1 Cr App R 19 [38]; Redmayne, 162.

¹³² [1991] 2 AC 447.

¹³³ *R v Edwards* [2005] EWCA Crim 3244 [1].

to judicial directions as the principal institutional mechanism for neutralizing potential prejudice'.¹³⁴

Frequently, courts do not spell out the reasoning behind their admissibility decisions. The discretion to exclude may be exercised against propensity evidence that, although relevant (and so admissible under ss 101(1)(d) and 103(1)(a)), is viewed as only weakly probative. However, as commented above (in §1.3), it is unclear whether such decisions involve discretionary exclusion or a determination that other misconduct does not demonstrate a relevant propensity in the first place. Mirfield submits that 'trial judges would be assisted in making sound decisions about this difficult balancing exercise were they to receive clearer guidance from the higher courts with regard to prejudice'.¹³⁵

Mirfield suggests that 'post-Act authorities place less emphasis' upon the danger of reasoning prejudice – juries overestimating the probative value of bad character evidence, but adds that 'the concern has not gone away'.¹³⁶

Spencer suggests that the risk of moral prejudice – the defendant's other misconduct inflaming the jury – should not be considered a valid ground for exclusion. To exclude such evidence 'would make it impossible for the criminal justice system to deal with the most serious cases or offenders'.¹³⁷ However, there is no real support for this view.¹³⁸ Courts still refer to this risk. In *Benabbou*, for example, the Court indicated that a defendant's prior conviction for a gang rape of a vulnerable stranger 'must have had a highly prejudicial effect on the fairness of the trial ... potentially to distract the jury from considering and indeed to blind them to the issues in the case'.¹³⁹ A factor contributing to the risk of moral prejudice in this case was that the prior conviction involved conduct that may have been viewed as worse than the charged offence – the rape by the defendant alone of an acquaintance. As Redmayne notes, one option in such a case is to inform the jury of the conviction but not the facts, as occurred in *Baker*.¹⁴⁰

Spencer suggests that propensity evidence should be excluded where it is 'being adduced to support a case that is otherwise extremely weak'.¹⁴¹ In *Hanson*¹⁴², the Court of Appeal indicated that '[i]f there is no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are'.¹⁴³ 'Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant'.¹⁴⁴ However, Redmayne has argued that while '[i]t is not surprising to

¹³⁴ Roberts and Zuckerman, 660.

¹³⁵ *Phipson on Evidence* [19–60].

¹³⁶ *Ibid* [19–59].

¹³⁷ Spencer, 95.

¹³⁸ Spencer cites just one decision, *De Vos* [2006] EWCA Crim 1688 (at 95 fn134), but this case provides no support for the general principle advanced.

¹³⁹ [2012] EWCA Crim 1256 [23].

¹⁴⁰ [2012] EWCA Crim 1801; Redmayne, 163.

¹⁴¹ Spencer, 86.

¹⁴² [2005] 2 Cr App R 21.

¹⁴³ *Ibid* [10].

¹⁴⁴ *Ibid* [18]. This observation was made with reference to jury directions rather than admissibility. Note that in *Shrimpton* [2007] EWCA Crim 3346, the Court suggested that the weakness of the other prosecution evidence

find the case law littered with defence claims that the prosecution is propping up a flimsy case by dragging up the defendant's past ... in the appeal courts, such arguments appear to have little chance of success'.¹⁴⁵ He questions whether, in practice, there is even a need for the rest of the prosecution case to amount to a case to answer.¹⁴⁶ 'This must be right, because propensity evidence can sometimes be powerful.'¹⁴⁷

It may be that one of the more prominent grounds of discretionary exclusion under the CJA is the 'danger about letting in peripheral and collateral matters', with the consequence that jurors become 'distracted [and] lose sight of the central issue'.¹⁴⁸ This will be a greater risk where the bad character evidence concerns other misconduct that is not the subject of a conviction and is disputed by the defendant.¹⁴⁹ An extreme case is that of *O'Dowd*¹⁵⁰, a case described by the Court of Appeal as 'involving just one defendant and ... relatively simple issues'¹⁵¹, ended up taking six and a half months, 40 per cent of which was occupied with 'bad character' evidence.¹⁵² The Court said that the 'bad character' evidence made the trial 'unnecessarily and unduly complex' and made it 'very difficult for the jury to keep its eye on the ball'.¹⁵³ 'If ever there is a case to illustrate the dangers of satellite litigation through the introduction of bad character evidence this is it.'¹⁵⁴ The Court suggested that the 'bad character' issues could have been simplified by the prosecution focusing on the most compelling of the other alleged incidents, and using PACE s 74 to overcome the defendant's challenge to the admission of a prior conviction.¹⁵⁵

While the CJA provides specific grounds for excluding propensity evidence, there is no such provision for 'important explanatory evidence' (including relationship evidence) admitted under s 101(1)(c) CJA. The Court of Appeal has held that PACE s 78 applies to 'bad character' evidence under the CJA.¹⁵⁶ Section 78 provides that:

[T]he court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

was relevant to jury directions rather than admissibility, but Spencer doubts the correctness of this decision: Spencer, 25 fn94.

¹⁴⁵ Redmayne, 163, citing *Miller* [2010] EWCA Crim 1578 and *Burton* [2008] EWCA Crim 376.

¹⁴⁶ Redmayne, 163, citing *Burton* [2008] EWCA Crim 376 and *Shrimpton* [2007] EWCA Crim 3346 [21].

¹⁴⁷ Redmayne, 164.

¹⁴⁸ *Sylvester* [2005] EWCA Crim 1794 [27], [44].

¹⁴⁹ *Phipson on Evidence* [19–33].

¹⁵⁰ [2009] 2 Cr App R 16.

¹⁵¹ *Ibid* [1].

¹⁵² Redmayne, 165.

¹⁵³ [2009] 2 Cr App R 16 [83–84].

¹⁵⁴ *Ibid* [1].

¹⁵⁵ *Ibid* [71]. Section 74 of the *Police and Criminal Evidence Act 1984* (PACE) provides that the fact of a person's conviction is evidence that the person committed the offence, and s 75 makes provision for the facts of the conviction to be established by the 'contents of the information, complaint, indictment or charge sheet on which the person in question was convicted'; see §1.3.

¹⁵⁶ *Highton* [2005] 1 WLR 3472 [13], [14]; *Weir* [2006] 1 WLR 1885 [44]. This involves consideration of the CJA provisions abolishing the common law (s 99) and governing the interpretation of the bad character provisions (s 112): see, for example, Spencer, 21–23.

It has been held that ‘there is no difference’ between the operation of the PACE and the CJA discretions to exclude.¹⁵⁷ However, Spencer suggests that there would be little scope for ‘important explanatory evidence’ to be excluded under this provision, since, to be found admissible, the court must first have determined under s 102 that ‘(a) without it, the court or jury would find it impossible or difficult to understand other evidence in the case, and (b) its value for understanding the case as a whole is substantial’.

There is authority that the s 78 discretion may be used to exclude evidence falling within the inclusionary s 98 (*res gestae*) provision.¹⁵⁸

1.8 Appeals and precedents

Admissibility decisions under the CJA are highly fact-specific. ‘[T]he admission of evidence of bad character in any one case involves questions of fact and degree.’¹⁵⁹ This has the consequence that the ‘outcome of another case decided by reference to its own particular facts’ will provide little assistance in determining the present case.¹⁶⁰ Furthermore, ‘responsibility for [admissibility under the CJA] is not for [the Court of Appeal] but for trial judges’.¹⁶¹ The Court of Appeal has indicated that it will not overturn the trial judge’s decisions ‘unless the judge’s judgment as to the capacity of prior events to establish propensity is plainly wrong, or discretion has been exercised unreasonably in the *Wednesbury* sense’.¹⁶² As Mirfield points out, despite this the ‘Court of Appeal decisions continue to flow out at a startling rate’, adding that ‘extraordinarily’ none have gone to the House of Lords or Supreme Court.¹⁶³

1.9 Cross-admissibility and joinder of counts

In some child sexual assault cases the prosecution will seek to have charges relating to multiple alleged victims joined and heard together with cross-admissibility. Section 112(2) provides that:

Where a defendant is charged with two or more offences in the same criminal proceedings, this Chapter (except section 101(3)) has effect as if each offence were charged in separate proceedings; and references to the offence with which the defendant is charged are to be read accordingly.

Where counts are heard together, for the evidence of one complainant to be admissible on a count relating to a different complainant, it will have to fit within one of the admissibility gateways. If it is not cross-admissible it cannot be excluded altogether by s 101(3), but the jury will be directed to consider the evidence only in relation to the count on which it is admissible.

¹⁵⁷ *R v Tirnaveanu* [2007] 1 WLR 3049 [29].

¹⁵⁸ *Phipson on Evidence* [19–28], citing *Saleem* [2007] EWCA Crim 1923 [30]; Roberts and Zuckerman, 607, citing *Tirvaveanu* [2007] 1 WLR 3049 [27]–[29].

¹⁵⁹ *Benabbou* [2012] EWCA Crim 1256 [23].

¹⁶⁰ *Ibid.*

¹⁶¹ *Renda* [2006] 1 WLR 2948 [3].

¹⁶² *Hanson* [2005] 2 Cr App R 21 [15], citing *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

¹⁶³ *Phipson on Evidence* [19–02], fn11.

In England, joinder is governed by Rule 9 of the *Indictment Rules 1971*.¹⁶⁴ Counts may be joined only if they are ‘founded on the same facts, or form *or are a part of a series of offences of the same or a similar character*’.¹⁶⁵ The italicised words impose a requirement that is weaker than the test for admissibility of similar fact or ‘bad character’ evidence.¹⁶⁶ Cross-admissibility provides a sufficient basis for joinder¹⁶⁷, but counts can be joined without cross-admissibility.¹⁶⁸ The picture becomes a little more complex, however, because the trial judge also has a discretion to separate counts under s 5(3) of the *Indictments Act 1915*, on the basis that ‘a person may be prejudiced or embarrassed in his defence by reason of’ the joinder. Counts should be severed to remove ‘any risk of injustice’ to the defendant.¹⁶⁹

Different views have been expressed as to how readily counts should be severed by exercise of the discretion where the evidence of each complainant is not cross-admissible. In *Boardman*¹⁷⁰, it was suggested that counts should be severed where evidence was not held cross-admissible and there was a risk that even with appropriate direction, evidence on one count might be used on another count.¹⁷¹ However, the House of Lords in *Christou*¹⁷² later held that consideration should be given, not only to the position of the defendant, but also to the prosecution and other parties. Special circumstances would be required for the discretion to be exercised, such as the evidence on the other count(s) being extremely complex or inflammatory.¹⁷³ In determining whether the counts should be separated, it is assumed that the trial judge’s directions protecting against prejudice are ‘applied faithfully’.¹⁷⁴

In *Powell*¹⁷⁵, the Court rejected the defendant’s argument that since the scope of admissibility has been broadened by the CJA and evidence is consequently excluded less frequently, cross-admissibility should be made a requirement for joinder, and exclusion should be accompanied by severance.

Mirfield highlights the CJA decision of *R v W*¹⁷⁶ as one that ‘may indicate that trial judges should take a more active view of their severance power than *R v Christou* seems to indicate’.¹⁷⁷ In *R v W*, the Court of Appeal suggested the various charges should not have been tried together.

There existed clear water between the most serious allegations, rape by a forty-year old of a girl aged between 9 and 14, and indecencies beginning with the touching of a 12–13 year old by a 15–16 year old. Additionally, there are striking temporal gaps, of 32 and of 20 years.

¹⁶⁴ See *Phipson on Evidence* [19–70].

¹⁶⁵ Italics added.

¹⁶⁶ *Ludlow v MPC* [1971] AC 29 (HL).

¹⁶⁷ *McGlinchey* (1983) 78 Cr App R 282.

¹⁶⁸ *Ludlow v MPC* [1971] AC 29.

¹⁶⁹ *Kray* [1970] 1 QB 125, 131.

¹⁷⁰ [1975] AC 421.

¹⁷¹ *Ibid* 442, 459.

¹⁷² [1997] AC 117, 129.

¹⁷³ *Ludlow v MPC* [1971] AC 29, 41.

¹⁷⁴ *Ibid*.

¹⁷⁵ [2014] EWCA Crim 642, discussed in *Phipson on Evidence* (2015 supplement) [1970].

¹⁷⁶ [2011] EWCA Crim 2463.

¹⁷⁷ *Phipson on Evidence* [19–70].

What we might term the gulf, in terms of harm, of culpability and of date between the rape and the remaining allegations is wide.¹⁷⁸

1.10 Jury directions

In *Campbell*¹⁷⁹, the Court of Appeal held that:

The change in the law relating to character evidence introduced by the 2003 Act should be the occasion for simplifying the directions to juries in relation to such evidence ... Where evidence of bad character is introduced the jury should be given assistance as to its relevance that is tailored to the facts of the individual case. Relevance can normally be deduced by the application of common sense. The summing up that assists the jury with the relevance of bad character evidence will accord with common sense and assist them to avoid prejudice that is at odds with this.

The jury direction should not be concerned with the technical details of which gateway the evidence passed to gain admission, but should address the evidential purpose for which the evidence was admitted.¹⁸⁰ Cases contain the usual exhortations against boilerplate directions.¹⁸¹

Different directions will be required, depending, for example, upon whether the evidence was adduced for a propensity purpose, a coincidence purpose, or as relationship or background evidence. Specimen directions can be found in the Judicial Studies Board (JSB) *Crown Court Benchbook*.¹⁸²

Whatever the basis of the admission of the evidence, the Court should clearly identify:

- what the ‘bad character’ allegations are (such as prior convictions, other alleged sexual assaults, grooming conduct or possession of child pornography)
- what issue the ‘bad character’ evidence goes to – in child sexual assault cases this will generally be commission or the credibility of the complainant’s account, or less commonly, the defence of innocent association or non-sexual touching
- how the evidence is relevant, and the reasoning involved (that is, background evidence, coincidence reasoning or propensity reasoning)
- what aspects of the ‘bad character’ evidence the defendant challenges (for example outright denial of the other misconduct; collusion among complainants or witnesses; or admission of the other misconduct but denial that it demonstrates a propensity)
- that it is for the jury to resolve the conflict between the prosecution and defence claims, and to decide what weight to attach to the evidence

¹⁷⁸ [2011] EWCA Crim 2463 [28].

¹⁷⁹ [2007] 2 Cr App R 28 [24].

¹⁸⁰ Ibid [37].

¹⁸¹ *Campbell* [2007] 1 WLR 2798 [34]–[43]; *Phillips on Evidence* [19–67]; Redmayne, 166. The latest JSB *Benchbook* (below) contains fewer specimen directions and more general guidance.

¹⁸² Judicial Studies Board (JSB), *Crown Court Benchbook*, March 2010, https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf. The relationship evidence direction is at 173; a direction for the propensity inference from a prior conviction is at 178; a coincidence direction relating to the allegations of several purported victims is at 179. See also the directions for cross-admissibility cases at 202–209.

- a warning to avoid relevant types of prejudicial reasoning – for example, not giving too much weight to the prior convictions or other misconduct; remembering that the ‘bad character’ evidence cannot prove guilt by itself; considering the ‘bad character’ evidence in the context of the overall case; not being distracted by the other allegations; and maintaining focus on whether the charged offences have been proven.

Where counts have been joined without cross-admissibility, ‘it is essential that the jury is directed in clear terms that the evidence on each set of allegations is to be treated separately and that the evidence in relation to an allegation in respect of one [alleged] victim cannot be treated as proof of an allegation against the other [alleged] victim’.¹⁸³ As Mirfield notes, later cases indicate that while the separate treatment direction is mandatory¹⁸⁴, the direction that evidence on one count cannot be used in respect of others is discretionary.¹⁸⁵

In *Hanson*, the Court of Appeal suggested that where propensity evidence is admitted:

[T]he judge in summing-up should warn the jury clearly against placing undue reliance on previous convictions. Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant. In particular, the jury should be directed that they should not conclude that the defendant is guilty ... merely because he has these convictions. That, although the convictions may show a propensity, this does not mean that he has committed this offence ... in this case; that whether they in fact show a propensity is for them to decide; that they must take into account what the defendant has said about his previous convictions; and that, although they are entitled, if they find propensity as shown, to take this into account when determining guilt, propensity is only one relevant factor and they must assess its significance in the light of all the other evidence in the case.¹⁸⁶

In one line of authority, the Court of Appeal has held that, where propensity reasoning is employed, the jury should be directed that, in order to draw a propensity inference, it should be ‘sure’¹⁸⁷ that the defendant committed the other misconduct, and sure that this conduct demonstrates such propensity.¹⁸⁸ This has been termed the ‘sequential approach’.¹⁸⁹ Perhaps this restrictive direction is prompted by concerns about the prejudicial potential of propensity evidence. If so, this should be spelt out, because the direction, imposing the criminal standard of proof upon a particular piece of evidence, runs contrary to the logic of inference. The Court of Appeal recognised this in another CJA case on a different issue, *Robinson*:¹⁹⁰

¹⁸³ *Dye* [2011] EWCA Crim 2463 [28].

¹⁸⁴ See *R v C(D)* [2012] EWCA Crim 1852 at [14].

¹⁸⁵ *R v C(D)* [2012] EWCA Crim 1852 at [14]; *R v H* [2011] EWCA Crim 2344; *Phipson on Evidence* [19–71].

¹⁸⁶ *Hanson* [2005] 2 Cr App R 21 [18].

¹⁸⁷ This is the English term used for the criminal standard of proof: see, for example, Roberts and Zuckerman, 254–5.

¹⁸⁸ For example *Lowe* [2007] EWCA Crim 3047; *JSB Benchbook* (above) 178, 204.

¹⁸⁹ For example *Phipson on Evidence* [19–35]; Redmayne, 179. The useful conceptual distinction between ‘sequential’ and ‘pooling’ reasoning originated with Rosemary Pattenden, ‘Similar Fact Evidence and Proof of Identity’ (1996) 112 *LQR* 446.

¹⁹⁰ [2006] 1 Cr App R 32. In this respect, the English Court of Appeal resembles the High Court of Australia.

It is trite law that a jury only have to be sure that the ingredients of the offence have been proved. The jury do that after considering all the relevant evidence. There is no requirement for the jury to be sure about any particular piece of evidence (unless, without that piece, the ingredients of the offence would not have been proved).¹⁹¹

As Redmayne observes, it is a pity that the Court has ‘not brought this elementary insight to bear’ on the propensity cases.¹⁹²

Other decisions have recognised that it is ‘too restrictive’ to require the jury to be sure that the defendant committed the other misconduct before using the other-misconduct evidence as proof of the charged offence.¹⁹³ While, in a multi-count indictment ‘the jury must be reminded that it has to reach a verdict on each count separately, it is entitled, in determining guilt in respect of any count, to have regard to the evidence in regard to any other count, or any other bad character evidence if that evidence is admissible and relevant’.¹⁹⁴ This has been described as the ‘pooling approach’.¹⁹⁵

The sequential and pooling approaches correspond closely with propensity/tendency and coincidence reasoning respectively. Propensity reasoning moves sequentially from the other-misconduct evidence, to the defendant’s commission of the other misconduct, to the defendant’s propensity for misconduct, to the defendant’s commission of the charged offence. Coincidence reasoning pools the evidence implicating the defendant in the other harms and the charged offence, and then, excluding the possibility that these multiple connections arose from coincidence, accepts that the defendant was responsible for all of them. Both sequential propensity inference and the pooling coincidence inference are potentially sound. Other-misconduct evidence may lend itself to either inferential approach. However, where the propensity inference is employed, it is contrary to inferential logic to demand that any of the steps be proven to the criminal standard of proof, except in very rare cases where the propensity evidence is the only evidence against a defendant.¹⁹⁶

A related error that appears in decisions on judicial directions is the suggestion that coincidence reasoning does not involve ‘evidence of a propensity’.¹⁹⁷ While some

¹⁹¹ Ibid [85].

¹⁹² Redmayne, 194. The Australian High Court’s jurisprudence is also mixed, with some decisions understanding the limited application of the criminal standard of proof (for example *Shepherd* (1990) 170 CLR 573), and others illogically applying it too broadly (for example *Chamberlain* (1984) 153 CLR 521; *HML* (2008) 235 CLR 334): David Hamer, ‘The Continuing Saga of the Chamberlain Direction: Untangling the Cables and Chains of Criminal Proof’ (1997) 23 *Monash University Law Review* 43; David Hamer, ‘Admissibility and use of relationship evidence in *HML v The Queen*: One step forward, two steps back’ (2008) 32 *Criminal Law Journal* 351.

¹⁹³ *Freeman* [2009] 1 Cr App R 137 [20].

¹⁹⁴ Ibid; *Phipson on Evidence* [19–35].

¹⁹⁵ For example *Phipson on Evidence* [19–35]; Redmayne, 179; Pattenden, ‘Similar Fact Evidence and Proof of Identity’ (1996) 112 *LQR* 446.

¹⁹⁶ David Hamer, ‘Admissibility and use of relationship evidence in *HML v The Queen*: One step forward, two steps back’ (2008) 32 *Criminal Law Journal* 351. An example of such a rare case would be one where the prosecution case that the defendant committed offence Z consists purely of evidence that the defendant committed offences X and Y, and that offences X, Y and Z all bear the same signature.

¹⁹⁷ *McAllister* [2009] 1 Cr App R 129 [14]; see also *Wallace* [2008] 1 WLR 572 [44].

commentators endorse this reasoning¹⁹⁸, the better view is that coincidence reasoning does, in fact, involve reliance on the defendant's propensity.¹⁹⁹ Redmayne and Mirfield express approval of *Chopra*²⁰⁰, where the Court recognised this. In a coincidence case, 'propensity is advanced by way of multiple complaints, none of which has yet been proved, and whether they are proved or not is the question which the jury must answer'.²⁰¹ The Court in *Chopra* recognised that such a case is 'different' from one where the prosecution presents 'conclusive or undisputable evidence' of the defendant's other misconduct, but suggested that both involve versions of propensity reasoning.²⁰²

To say that the two types of reasoning are closely related and exist on the same spectrum is not to deny that there are differences between the two, in terms of both probative value and prejudicial risk. The trial judge should consider these differences at the admissibility stage and they should be addressed in judicial directions at the proof stage.²⁰³ There may be a greater risk of prejudice with (propensity) evidence of a prior conviction as compared with (coincidence) evidence of a mere allegation. At the same time, (propensity) evidence of an undisputed conviction or admission may be more probative than a disputed allegation. Currently, English law handles the differences between the related coincidence and propensity inferences poorly, particularly with regard to judicial directions.²⁰⁴

1.11 Reception of radical change

The exclusionary rule has been described as 'fundamental' and 'one of the most deeply rooted and jealously guarded principles of our criminal law'.²⁰⁵ And yet the CJA made the subject matter of this fundamental, deep-rooted exclusion presumptively admissible. What kind of response has this radical change evoked?

When the 'bad character' provisions of the CJA first came into force, some questioned whether they would make much difference.²⁰⁶ Under the common law, propensity evidence had to be more probative than prejudicial to gain admission. Under the legislation, propensity evidence would be excluded if it was more prejudicial than probative. This shift in the burden of proof would not necessarily bring a great difference in practice. As recently as 2010 Roberts and Zuckerman expressed some support for this view:

[T]he CJA 2003 did not simply kill off the common law of bad character evidence. English law's suspicion of bad character and extraneous misconduct evidence has been cultivated over many centuries. It is deeply embedded in English judicial culture and institutions, and has frequently been actively propounded and celebrated ... [A]s a sociological observation about legal culture it is safe to assume that deep-seated attitudes are not going to be

¹⁹⁸ For example Fortson and Ormerod, 'Bad Character Evidence and Cross-Admissibility' [2009] *Crim LR* 313, 326.

¹⁹⁹ *Phipson on Evidence* [19–33]; Redmayne, 175–6; Roberts and Zuckerman, 608–9 are equivocal.

²⁰⁰ *Chopra* [2007] 1 Cr App R 225. See also *Spencer* [2008] EWCA Crim 544.

²⁰¹ [2007] 1 Cr App R 225 [15].

²⁰² *Ibid.*

²⁰³ Redmayne, 180–184.

²⁰⁴ *Ibid.* Consider, for example, the effort of *Spencer*, 90, to incorporate the required sequential direction in a case where both coincidence and propensity reasoning appear open. The resulting direction is highly complex and potentially circular.

²⁰⁵ *Maxwell v DPP* [1935] AC 309, 320, 317; see also *Pfennig v The Queen* (1995) 182 CLR 461, 512 (McHugh J).

²⁰⁶ *Spencer*, 16; Redmayne, 148.

changed simply by reversing the polarity of judicial supervision, replacing presumptive exclusion at common law with a statutory rule of presumptive admissibility.

But courts did not minimise the significance of the legislation. They recognised that it brought a ‘sea change’; the old law has been ‘consigned to history’.²⁰⁷ It ‘completely reverses the pre-existing general rule’.²⁰⁸ The legislative intention is ‘that evidence of bad character would be put before juries more frequently than in the past’.²⁰⁹ As Redmayne notes, ‘[t]he CJA was intended to enlarge the admissibility of propensity evidence against defendants, and it has done just that’.²¹⁰

Spencer indicates he is ‘in favour’ of the changes. He considers admission of other-misconduct evidence as ‘neither dangerous nor unjust, provided there is other solid evidence’.²¹¹ He suggests that his views are unusual for an academic²¹², but he is not alone. Redmayne also supports the opening up of admissibility.

Redmayne’s position is based on a survey of empirical research into the consistency of human behaviour. Like other commentators, Redmayne notes changes in theories regarding the role character plays in determining human behaviour.²¹³ Early in the 20th century, trait theory dominated. On this view, character traits were robust and stable, and furthermore, a person’s character was assumed to display coherence so that the possession of one positive character trait, such as honesty, increased the likelihood of other positive traits, such as humility or loyalty.²¹⁴ This theory was challenged in the 1960s by empirical work showing that human behaviour lacked the predicted cross-situational consistency.²¹⁵ Behaviour was deemed to be heavily influenced by context; trait theory was replaced by situationism. But then in the 1970s and 1980s, a further theoretical shift took place. Empirical work suggested that situationism had gone too far in denying the role of character in behaviour. As Redmayne puts it, ‘[t]he rather predictable consensus is that both persons and situations are important factors in explaining behaviour’.²¹⁶ The current theory, blending the insights of its predecessors – ‘interactionism’ – continues to be the subject of more detailed work.²¹⁷ However, current knowledge ‘suggests that information about past behaviour can be powerful evidence in a comparative exercise’.²¹⁸

²⁰⁷ *Saleem* [2007] EWCA Crim 1923 [23]; see also *Chopra* [2007] 1 Cr App R 225 [12].

²⁰⁸ *Manister* [2006] 1 Cr App R 19 [35].

²⁰⁹ *Edwards* [2005] EWCA Crim 3244, [1].

²¹⁰ Redmayne, 145.

²¹¹ Spencer, ix.

²¹² *Ibid.* Colin Tapper is a prominent opponent of moves to relax the exclusion of propensity evidence. He said of the earlier common law development in *DPP v P*: ‘it is not satisfactory that so important a principle of English criminal evidence should be diluted in this way’: Colin Tapper ‘The Probative Force of Similar Fact Evidence’ (1992) 108 *LQR* 26, 29.

²¹³ For example Redmayne, 10–16; Jonathan D Kurland, ‘Character as a Process in Judgment and Decision-making and its Implications for the Character Prohibition in Anglo-American Law’ (2014) 38 *Law and Psychology Review* 135; Miguel A Méndez, ‘The Law of Evidence and the Search for a Stable Personality’ (1996) 45 *Emory Law Journal* 221.

²¹⁴ Kurland (above), 144–5.

²¹⁵ Kurland (above), 145–147; Redmayne 12–14.

²¹⁶ Redmayne, 12.

²¹⁷ Kurland (above), 149–151.

²¹⁸ Redmayne, 15.

Redmayne's conclusion is supported by his analysis of recidivism data. The relationship between the recidivism rate and the strength of the propensity inference is sometimes misunderstood.²¹⁹ A relatively low recidivism rate, while providing a weak basis for predicting behaviour, may still have strong probative value. Probative value is not determined solely by the recidivism percentage – the likelihood that the defendant will reoffend (or has reoffended). Probative value is instead determined by comparing the probability that the defendant – a person with a prior conviction – will reoffend, with the probability that someone without a prior conviction will offend. The ratio between the two probabilities is the 'comparative propensity'.²²⁰ Redmayne's work, for example, shows that a recidivism rate of less than 25 per cent for violent offences can produce a comparative propensity of 98.²²¹ The same reasoning is employed, for example, with motive evidence. A person with a motive to kill the victim may still be unlikely to kill the victim. But the point is that a person with a motive is much more likely to kill the victim than someone without a motive.

The concept of comparative propensity as a measure of probative value signals a further important point regarding recidivism data. Commentators have questioned the special admissibility provisions for sexual assault offences (for example, in the United States Federal Rules of Evidence: FRE 413–415)²²² on the grounds that the recidivism rates for sexual assault are lower than the average recidivism rate.²²³ However, comparative propensity, a ratio or fraction, increases not only as the recidivism rate (the numerator) increases, but also as the frequency of the offence among non-offenders (the denominator) decreases. 'Because some crimes are rarer than others, they will have higher levels of comparative propensity'²²⁴, notwithstanding low recidivism rates. The probative value of a prior conviction for theft can be relatively low, notwithstanding that recidivism among thieves is very high, because a relatively high percentage of the population is prepared to commit such a minor crime. By comparison, the probative value of a prior conviction for sexual assault is considerably higher, notwithstanding the lower recidivism rate, because far fewer people are prepared to commit this more serious offence. In Redmayne's work the comparative propensity for sexual offences ranges from twice as high as the comparative propensity for theft, to seven times as high.²²⁵

²¹⁹ George Franklin, 'Navigating between extremes: the Florida Supreme Court's rulings on the admission of similar fact evidence in child sexual abuse cases' (2001) 55 *U. Miami L. Rev.* 619, 623. See also references in Redmayne, 20 fn50.

²²⁰ See also Roger Park, 'Character at the Crossroads' (1998) 49 *Hastings Law Journal* 717; Redmayne, 16–17. An early example of this reasoning is Colin Tapper, 'Proof and Prejudice' in E Campbell and L Waller (eds), *Well and Truly Tried* (1982), 177, 199: 'less than 1 in 138 of the population is likely to commit a serious crime in a given year, while 1 in 2 of those found guilty in the year of committing such crimes will have a record of having committed such a crime.' Note, however, that Tapper's view was that 'the law must set its own standard of what it is proper to take into account' and Tapper did not support a more lenient approach to admissibility.

²²¹ Redmayne, 23–4, Tables 2.6 and 2.7.

²²² See §4.5.

²²³ Franklin (above), 623; E Imwinkelreid, 'A small contribution to the debate over the proposed legislation abolishing the character evidence prohibition in sex offense prosecutions' (1993), 44 *Syracuse Law Review* 1125, 1150; Michael S Ellis, 'The Politics Behind Federal Rules of Evidence 413, 414 and 415' (1998) 38 *Santa Clara Law Review* 961, 982.

²²⁴ Redmayne, 131.

²²⁵ Redmayne, 24, Tables 2.7 and 2.8.

Having regard to the genuine probative value that other-misconduct evidence can provide, the CJA's opening up of admissibility appears warranted. However, it is important to emphasise the difference between probative value and proof. The strong probative value of other-misconduct evidence may justify its more frequent admission under the CJA, but conviction must, of course, take into account all the evidence. Other-misconduct evidence, no matter how strong, is most unlikely to be sufficient in itself to constitute proof to the requisite standard. As Redmayne observes, 'one must always be careful in interpreting a criminal record: offending behaviour can, and does, change rapidly ... While previous offending is one of the best predictors of future offending, most offenders are convicted only once.'²²⁶

While the policy behind the CJA elicited mixed views, its drafting prompted widespread criticism, at least initially. Roderick Munday predicted that the Act 'will prove a nightmare of interpretation'.²²⁷ An early Court of Appeal decision bemoaned 'conspicuously unclear ... obfuscatory language'.²²⁸ More recently, however, commentators have suggested the criticisms are 'exaggerated'.²²⁹ Redmayne argues that while there are 'instances where there is a degree of inconsistency between decisions', admissibility under the CJA is relatively predictable and, perhaps, 'no less determinate than' under the previous law.²³⁰ Rudi Fortson and David Ormerod suggest that admissibility under the CJA is subject to the same underlying principles as admissibility at common law:

On more than one occasion the Court of Appeal has referred to the 'sea change' that the 'bad character' provisions have brought about. But that is not to say that we are in calm waters in dealing with the cross-admissibility issues. Even if the CJA 2003 requires criminal law practitioners to navigate using new 'charts', it does not follow that some of the fundamental principles of navigation have thereby been rendered out-of-date, or redundant. Indeed, it is submitted that the changes made by the 2003 Act require practitioners and judges to reflect on principles, relating to the admissibility and use of evidence, which they often applied intuitively prior to the Act.²³¹

Roberts and Zuckerman suggest that the text of the CJA may have brought some improvement:

[T]he pre-existing common law was barely a paragon of jurisprudential virtue. Despite its evident shortcomings, the CJA 2003 deserves some credit ... [It] purged the law of excessive technicalities and brought trial procedure into closer conformity with common sense reasoning and expectations.²³²

However, some criticisms do remain. As noted above (see §1.7) in the context of discretionary exclusion, Mirfield argues that the 'trial judges would be assisted in making

²²⁶ Redmayne, 32.

²²⁷ Roderick Munday, 'What Constitutes "Other Reprehensible Behaviour" under the Bad Character Provisions of the Criminal Justice Act 2003?' [2005] *Criminal Law Review* 24, 43.

²²⁸ *Bradley* [2005] 1 Cr App R 24 [38].

²²⁹ Redmayne, 169.

²³⁰ *Ibid*, 169–170.

²³¹ Rudi Fortson and David Ormerod, 'Bad Character Evidence and Cross Admissibility' [2009] *Crim Law Review* 313, 341.

²³² Roberts and Zuckerman, 659.

sound decisions about this difficult balancing exercise were they to receive clearer guidance from the higher courts with regard to prejudice'.²³³

While there is room for improvement in some areas, a degree of uncertainty around admissibility and a high rate of appeals may be the inevitable result of the discretionary nature of the admissibility determination. Redmayne suggests it is 'an acceptable cost of more individualised and contextualised decision-making'.²³⁴ Roberts and Zuckerman describe it as '[o]ne of the great lessons of the accretion of this bulky jurisprudence over the course of more than a century ... that assessments of relevance and probative value are intensely contextual and fact-specific'.²³⁵

Redmayne notes that most appeals against admission are dismissed, although this may reflect the Court of Appeal's heavy workload, and the necessity of it taking a 'light touch'²³⁶ as much as it does approval of trial decisions. Roberts and Zuckerman also note that for reasons of workload, it is 'simply unrealistic to imagine the Court of Appeal is going to intervene in more than a fraction of cases'.²³⁷

Solid empirical data on the impact of the new provisions is limited.²³⁸ A relatively small study suggests that applications to adduce 'bad character' evidence are fairly common in the Crown Court, and are successful in full or in part more than half the time, with a third being wholly rejected.²³⁹ Judges interviewed in the small study did not consider the evidence to have had an undue impact on the fact-finder, nor to have had an adverse impact on the balance between prosecution and defence.²⁴⁰ It is unclear whether increased admissibility has led to an increase in convictions – there are too many confounding factors to trace cause and effect. However, Spencer says he has 'anecdotal evidence ... from various sources ... that the changes have brought a slight increase in convictions and in guilty pleas – particularly in sex cases'²⁴¹ which would otherwise be 'word against word'.

It is still less clear whether opening up admissibility has led to an increase or decrease in accuracy, or an impact on the rates of correct convictions or wrongful convictions. Wrongful convictions generally are difficult to detect. Although England, with its Criminal Cases Review Commission, makes more of an effort than most jurisdictions, the data is still too limited to detect a trend.

²³³ *Phipson on Evidence* [19–60].

²³⁴ Redmayne, 171.

²³⁵ Roberts and Zuckerman, 623.

²³⁶ Redmayne, 170, 172 fn148.

²³⁷ Roberts and Zuckerman, 661.

²³⁸ Spencer, 29–30. See also Roberts and Zuckerman, 661, suggesting that there is almost no empirical evidence of the impact of the changes in the trial courts.

²³⁹ Spencer, 29–30, discussing A Mackie, M Hopkins, P Duffy, *Research into the Impact of the Bad Character Provisions on the Courts* (Report to the Office of Criminal Justice Reform, 2007).

²⁴⁰ Spencer, 29–30.

²⁴¹ *Ibid* 30.

2. Canada

In Canada, tendency and coincidence evidence is known as similar fact evidence and is governed by the common law. Canadian discussions of the law do employ the terms ‘propensity’ and ‘coincidence’ but Canadian law does not appear to draw a clear distinction between the two types of evidence.

2.1 Scope of the exclusion²⁴²

There are two main alternatives regarding the scope of the exclusionary rule. The broader alternative extends the exclusion to any evidence that *reveals* the defendant’s misconduct. The narrower alternative will only exclude such evidence where it has been adduced for the *purpose* of propensity reasoning. It is not clear whether the Canadian exclusionary rule is broad or narrow.

Canadian common law traces its development back to the oft-quoted maxim from *Makin v Attorney-General for New South Wales*²⁴³, which appears to adopt the narrower alternative:

It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment *for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.*²⁴⁴

Consistent with this position, the Supreme Court of Canada (SCC) in *R v Arp*²⁴⁵ quoted from Lord Hailsham in *Boardman* that ‘what is *not* to be admitted is a chain of reasoning and not necessarily a state of facts’²⁴⁶, adding:

That is, disposition evidence which is adduced *solely* to invite the jury to find the accused guilty because of his or her past immoral conduct is inadmissible. However, evidence of similar past misconduct may exceptionally be admitted where the prohibited line of reasoning may be avoided.²⁴⁷

In *R v B(CR)*²⁴⁸, the SCC referred to ‘the general exclusionary rule against evidence going merely to disposition’, adding that ‘evidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible’.²⁴⁹ Lederman *et al* suggest that ‘[t]he Crown ... may properly adduce evidence that discloses discreditable conduct of the accused ... that is incidental to the crime charged’.²⁵⁰ By ‘incidental’ they mean ‘its relevance does not rest upon propensity reasoning’.²⁵¹

²⁴² Other issues arise as to the scope which are of less concern to the present report, such as whether the exclusion is limited to evidence of ‘discreditable conduct’, and how that limit is defined and applied: for example Lederman *et al*, 677–8; Paciocco and Stuesser, 57. Compare §1.1.

²⁴³ (*Makin*) [1894] AC 57 (PC).

²⁴⁴ *Ibid* 65 (emphasis added); quoted in Lederman *et al*, 681; cited in Paciocco and Stuesser, 61.

²⁴⁵ [1998] 3 SCR 339.

²⁴⁶ *Ibid* [41] quoting from *Boardman* [1975] AC 421, 453 (emphasis added in *Arp*).

²⁴⁷ [1998] 3 SCR 339 [41].

²⁴⁸ [1990] 1 SCR 717.

²⁴⁹ *Ibid* [63].

²⁵⁰ Lederman *et al*, 701.

²⁵¹ *Ibid*.

However, other authorities suggest that the exclusion operates more broadly. The ‘threshold question [is] whether “the proposed evidence [is] discreditable to the accused”’.²⁵² It covers all prosecution evidence that ‘either directly or indirectly reveals the discreditable or stigmatizing character of the accused’.²⁵³

Discussions of exclusion and admissibility in the authorities are often open to either interpretation. Evidence covered by the exclusionary rule can still gain admission if it satisfies the admissibility requirement (discussed in the next section) that probative value exceeds prejudicial risk. Evidence that incidentally reveals a defendant’s propensity for misconduct will be covered by the *broader* version of the exclusionary rule, but will be more likely to satisfy this admissibility test. Canadian courts tend to assume that evidence relying on propensity reasoning is less probative and more prejudicial than evidence that does not rely on propensity reasoning.²⁵⁴ Moreover, evidence that incidentally reveals a defendant’s propensity for misconduct will not be covered by the *narrower* version of the exclusionary rule, but may still be excluded by exercise of the general discretion. As discussed elsewhere in this report²⁵⁵, the general discretion weighs probative value against prejudicial risk²⁵⁶ in almost identical terms to the common law (and some statutory) admissibility tests. Discussions of admissibility in the case law often distinguish between propensity and non-propensity uses, and mention the weighing of probative value and prejudicial risk, but without making clear the underlying legal structure.

*R v G (SG)*²⁵⁷ provides an illustration. In this case the defendant was charged with the murder of an adolescent boy. He was killed in the defendant’s house by three boys, one of whom was the defendant’s son. The prosecution theory was that the defendant incited the boys to commit the murder to conceal her illegal activities. The prosecution was allowed to adduce evidence that stolen property was found in the defendant’s home, to show the existence of this motive. The prosecution was also allowed to adduce evidence of the defendant’s sexual relationship with one of the boys. Cory J said:

[This evidence] was not adduced simply to show that she was more likely to have committed the crime because of her bad character. This evidence was relevant to an important issue in the case, namely, the ability of the accused to exercise such exceptional control over the boys that she could persuade them to assault and kill another boy. It was therefore properly admissible, subject to a determination that its probative value outweighed its prejudicial effect.²⁵⁸

It is not clear, in this case, whether the evidence was considered to be covered by the exclusionary rule and satisfy the admissibility test, or whether it was considered to avoid the exclusionary rule altogether and not be susceptible to discretionary exclusion.

What is clearer is that ‘coincidence evidence’ is covered by the exclusionary rule, even if the exclusion operates narrowly. The distinction between coincidence reasoning and propensity

²⁵² Paciocco and Stuesser, 57, quoting *R v B(L)* 9 CR (5th) 38, 49 (Ont CA).

²⁵³ Paciocco and Stuesser, 60.

²⁵⁴ For example Lederman *et al*, 675–6; Paciocco and Stuesser, 56, 57, 61, 80.

²⁵⁵ See §§1.7 and 3.7.

²⁵⁶ For example *R v Devine* [2008] 2 SCR 283 [30].

²⁵⁷ [1997] 2 SCR 716; Lederman *et al*, 706–707.

²⁵⁸ [1997] 2 SCR 716 [74].

reasoning does not carry immediate legal significance in Canadian law. Courts²⁵⁹ and commentators²⁶⁰ occasionally make reference to coincidence reasoning, or the ‘doctrine of chances’, but without suggesting that this automatically calls for any distinctive treatment under the similar fact rule.

2.2 A principled admissibility test: probative value versus prejudicial risk

In the last few decades of the 20th century, Canadian common law developed along similar lines to the common law of Australia²⁶¹ and England.²⁶² In a series of cases²⁶³ culminating in *R v Handy*²⁶⁴, the SCC rejected the formalist notion, flowing from *Makin*, that other-misconduct evidence could gain admission by the application of categories or ‘catchwords’.²⁶⁵ Instead, the Court established a ‘principled and functional framework to determine the admissibility of similar fact evidence’.²⁶⁶

Similar fact evidence ... is presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.²⁶⁷

The adoption of the balancing admissibility test marks a paradigm change in two respects. The formal categories of admissibility have been replaced with the more principled reference to probative value and prejudicial risk. And the new admissibility test clearly allows the admission of evidence that has been adduced for the very purpose of showing the defendant’s propensity for misconduct.

The admissible categories under *Makin* were represented as situations where the evidence was being used for a ‘different purpose’²⁶⁸, that is, for a non-propensity purpose not prohibited by the exclusionary rule. However, as was increasingly appreciated, courts often admitted evidence under one of the admissible categories even though the evidence did rely upon propensity reasoning for its relevance. As the Court said in *Handy*, this approach failed to appreciate that ‘propensity evidence by any other name is still propensity evidence’.²⁶⁹ Evidence admitted under the categories may often have been sufficiently probative for this not to be a problem, but there was potential for evidence to be admitted ‘even though its probative value was weak and its potential prejudicial impact on the

²⁵⁹ For example *Perrier* [2004] 3 SCR 228 [40].

²⁶⁰ For example G Arthur Martin, ‘Similar Fact Evidence’, [1984] *LSUC Special Lectures* 1, 7, quoted in Lederman *et al*, 716.

²⁶¹ For example *Sutton* (1984) 152 CLR 528, 534 (Gibbs CJ); *Harriman* (1989) 167 CLR 590, 593–4 (Brennan J), 597–99 (Dawson J) and 610 (Toohey J); *Thompson* (1989) 169 CLR 1; *B* (1992) 175 CLR 599, 618–9 (Dawson and Gaudron JJ); *Pfennig* (1995) 182 CLR 461, 478 (Mason CJ, Deane and Dawson JJ) and 515, 528 (McHugh J).

²⁶² See §1.

²⁶³ For example *R v Sweitzer* [1982] 1 SCR 949, 953; *R v B(CR)* [1990] 1 SCR 717; *Arp* [1998] 3 SCR 339 [42].

²⁶⁴ (*‘Handy’*) [2002] 2 SCR 908.

²⁶⁵ Lederman *et al*, 682, citing R B Sklar, ‘Catchwords and Cartwheels’ (1977) 23 *McGill LJ* 60. See also Paciocco and Stuesser, 61.

²⁶⁶ Lederman *et al*, 673.

²⁶⁷ *Handy* [2002] 2 SCR 908 [55].

²⁶⁸ Lederman *et al*, 682.

²⁶⁹ [2002] 2 SCR 908 [59]–[61].

fairness of the trial was significant'.²⁷⁰ This was recognised as a failure of the formalistic approach and led to the development of the principled approach advanced in *Handy*.

However, *Makin's* influence is lingering. Court decisions and commentator analyses still contain suggestions that propensity reasoning is prohibited or forbidden:

[I]f the proffered character evidence does *no more* than show that the accused is the type of person likely to have committed the offence or its own relevance is that he or she has a *mere* propensity to commit offences of this nature, the evidence is inadmissible since it lacks probative value and its potential unfair prejudicial effect is too great.²⁷¹

Proof of *general* disposition is a prohibited purpose ... Discreditable disposition or character evidence, at large, creates nothing but 'moral prejudice' and the Crown is not entitled to ease its burden by stigmatizing the accused as a bad person.²⁷²

It is trite law that 'character evidence [called by the Crown] which shows *only* that the accused is the type of person likely to have committed the offence in question is inadmissible'.²⁷³

It may be possible to reconcile such statements with the new principled paradigm, by interpreting them as statements that, to gain sufficient probative value for admission, any relevant contested evidence must show a specific or distinctive propensity rather than a generalised one.

[T]he jury is not asked to infer from the accused's habits or disposition that *he is the type of person* who would commit the crime. Instead, the jury is asked to infer from the degree of distinctiveness or uniqueness that exists between the commission of the crime and the similar act that *the accused is the very person* who committed the crime.²⁷⁴

Even if this reconciliation is feasible, the formalism of these statements is problematic. As well as being facially inconsistent with principle, it also leads to contradictory judicial directions, as noted below in §2.11.

2.3 Prejudicial risks

In *Handy*, the SCC explained the reason for excluding evidence of a defendant's other misconduct:

The danger is that the jury might be confused by the multiplicity of incidents and put more weight than is logically justified on the ex-wife's testimony ("reasoning prejudice") or by convicting based on bad personhood ("moral prejudice").²⁷⁵

As well as the risk of juror confusion from introducing evidence of a defendant's other misconduct, 'reasoning prejudice' also refers to the risk that the fact-finder will give the evidence more weight than it deserves. The notion is that jurors are liable to jump to the conclusion that the defendant committed the charged offence, not giving sufficient weight

²⁷⁰ Lederman *et al*, 682–3.

²⁷¹ Lederman *et al*, 675–6 (emphasis in original, footnotes omitted); see also Paciocco and Stuesser, 56, 57, 61, 80.

²⁷² *Handy* [2002] 3 SCR 908 [72] (emphasis in original).

²⁷³ *R v G(SG)* (1997) 8 CR (5th) 198, 226 (SCC) (emphasis in original), quoted in Paciocco and Stuesser, 57.

²⁷⁴ *Arp* [1998] 3 SCR 339 [43]. Perhaps, though, this is a reference to the supposedly non-character *modus operandi* theory: see §4.4.

²⁷⁵ [2002] 3 SCR 908 [31]; see also Paciocco and Stuesser, 59, 80–81.

to the possibility that the other misconduct was out of character, or that the defendant mended his ways.

There is an area of overlap between moral and reasoning prejudice. In *Handy*, under the heading ‘reasoning prejudice’, the Court noted that ‘the similar facts may induce in the minds of the jury sentiments of revulsion and condemnation which might well deflect them from the rational dispassionate analysis upon which the criminal process should rest’.²⁷⁶

There is authority that the risk of moral prejudice is higher where ‘the similar fact incidents are more reprehensible than the charge before the court’.²⁷⁷ Conversely, ‘where the offence charged is significantly more troubling than the similar fact evidence, the risk of moral prejudice is diminished’.²⁷⁸ In *R v Talbot*²⁷⁹, the prosecution alleged that the defendant got boys intoxicated and then sexually assaulted them. The other alleged misconduct consisted only of the defendant providing young boys with alcohol. It presented a low risk of prejudice and was held admissible. In *Handy*, the Court noted that the defendant’s other alleged misconduct towards his ex-wife was ‘more reprehensible’ than the charged conduct towards the complainant: ‘The jury would likely be more appalled by the pattern of domestic sexual abuse than by the alleged misconduct of an inebriated lout in a motel room on an isolated occasion’.²⁸⁰ The evidence was held to be inadmissible.

The Canadian experience is that similar fact evidence is less likely to be excluded in judge-alone trials, as the risk for prejudice is somewhat reduced.²⁸¹ It is plausible that judges could better handle the risk of confusion and distraction resulting from the multiplication of issues.²⁸² It has been suggested that judges are also immune from overvaluing propensity evidence and moral prejudice²⁸³, but commentators have questioned this. ‘Even judges can struggle to overcome the tainting effect that discreditable information which is given undue focus during a trial can have.’²⁸⁴ ‘No doubt judges, like juries, can be affected by moral prejudice when they hear evidence of the accused’s bad character.’²⁸⁵ Different views have been expressed as to whether judge-only trials will mitigate the impact of disputed other-misconduct evidence on the length of a trial.²⁸⁶

2.4 The probative value assessment

Probative value is a measure of the impact that the evidence has upon the probability of a fact in issue.²⁸⁷ A preliminary step in measuring probative value is to identify the fact in

²⁷⁶ [2002] 3 SCR 908 [145], quoting from *R v D (LE)*, (1987) 20 BCLR (2d) 384 (BC CA) 399.

²⁷⁷ Paciocco and Stuesser, 80, citing *Handy* [2002] 3 SCR 908 [140]. This point has also been recognised in England: for example *Benabbou* [2012] EWCA Crim 1256 [23]; *Baker* [2012] EWCA Crim 1801; Redmayne, 163; see §1.7.

²⁷⁸ Paciocco and Stuesser, 80.

²⁷⁹ (2002) 161 CCC(3d) 256 (Ont CA); Paciocco and Stuesser, 80.

²⁸⁰ [2002] 3 SCR 908 [140].

²⁸¹ *R v W(J)* 2013 ONCA 89 [57]; *R v Villeda* [2011] AJ No 316 [18].

²⁸² Lederman *et al*, 739, citing *R v B(T)* (2009) 95 OR (3d) 21 (Ont CA).

²⁸³ *R v B(T)* (2009) 95 OR (3d) 21 [27].

²⁸⁴ Paciocco and Stuesser, 82; see also Delisle *et al*, 280.

²⁸⁵ Annotation on *R v B(T)* (2009) 63 CR (6th) 197; quoted in Delisle *et al*, 280.

²⁸⁶ Paciocco and Stuesser, 82; cf Lederman *et al*, 739.

²⁸⁷ Lederman *et al*, 689, citing *R v Watson* (1996) 50 CR (4th) 245 (Ont CA).

issue to which the similar fact evidence is said to be relevant.²⁸⁸ *Handy* is authority that the evidence must be relevant to a genuine 'live issue'²⁸⁹, and furthermore that the issue must be framed with some specificity. *Handy* is an acquaintance sexual assault case, in which the prosecution argued that the similar fact evidence was relevant to the complainant's credibility. However, the SCC held that this characterisation was too broad. 'Identification of credibility as the "issue in question" may, unless circumscribed, risk the admission of evidence of nothing more than general disposition ("bad personhood").'²⁹⁰ The live issue should have been more carefully identified as commission of the *actus reus*.²⁹¹

Having identified a live issue to which the similar fact evidence is relevant, the degree of probative value needs to be assessed. There are various ways to break down the inference for the purposes of determining its strength.²⁹² In *Shearing v The Queen*²⁹³, the SCC noted that a 'double inference'²⁹⁴ is involved. The first step is from the other misconduct to the conclusion that the defendant has a propensity for that kind of misconduct. The second step is that the defendant acted consistently with that propensity on the charged occasion.

Alternatively, the inference can be divided into firstly, the defendant's connection to the other misconduct, and secondly, the likelihood that the person who committed the other misconduct also committed the charged offence. With respect to the connection element, *R v Sweitzer*²⁹⁵ is authority that, for admissibility:

... there must be some evidence upon which the trier of fact can make a proper finding that the similar facts to be relied upon were in fact the acts of the accused for it is clear that if they were not his own but those of another they have no relevance to the matters at issue under the indictment.²⁹⁶

While setting a low threshold, it is questionable whether this requirement is always justified. In *Sweitzer*, the defendant was charged with 15 sexual assaults. In the SCC it was held that evidence of 11 of them was inadmissible and these counts should not have been joined, because there was no evidence linking the defendant to them. However, as Lederman *et al* point out, '[t]he question which could have been raised was whether the 11 episodes and the [four] attacks where the accused was identified were sufficiently similar that it could be safely concluded that all [15] were committed by the same person'.²⁹⁷ They suggest that the result in *Sweitzer* was correct since the various episodes were 'not sufficiently similar to identify one person as the perpetrator of all of them'.²⁹⁸ The *Sweitzer* principle may be another instance of a court mishandling the conceptual relationship between propensity reasoning and coincidence reasoning, and inappropriately imposing strict sequential reasoning.²⁹⁹

²⁸⁸ For example Lederman *et al*, 689; Paciocco and Stuesser, 62.

²⁸⁹ [2002] 2 SCR 908 [26].

²⁹⁰ *Ibid* [116]; New Zealand authorities have taken a similar view: see §3.3.

²⁹¹ *Ibid* [81].

²⁹² See also Paciocco and Stuesser, 63.

²⁹³ [2002] 3 SCR 33.

²⁹⁴ *Ibid* [31].

²⁹⁵ [1982] 1 SCR 949.

²⁹⁶ *Ibid* 954.

²⁹⁷ Lederman *et al*, 710.

²⁹⁸ *Ibid*.

²⁹⁹ See also §§1.10, 2.11, 3.11 and 4.4.

Canadian courts have also suggested that the second element – connection between the other misconduct and the charged offence – may be subject to a threshold proof requirement. Where identity is in issue, the trial judge must be satisfied on the balance of probabilities that the same person committed the other misconduct and the charged offence.³⁰⁰

To achieve sufficient probative value for admissibility, the prosecution will need to establish a strong connection between the defendant's other alleged misconduct and the charged offence. In the past, *Boardman* was sometimes taken as authority for a requirement that they share a 'striking similarity'.³⁰¹ More recent authorities have held that this strict test does not apply in all cases³⁰², but authorities continue to view similarity between the charged offence and the other misconduct as a key factor in determining probative value. 'The more similarities there are between the similar acts and the offence charged, the more distinctive those similarities and the greater number of similar acts, the stronger the inference and the greater the probative value.'³⁰³

In *Handy*, the SCC provided an extensive list of factors to be considered in determining the connection between other misconduct – or 'similar acts' – and the charged offence:³⁰⁴

1. the proximity in time and place of the similar acts
2. the extent to which the other acts are similar in detail to the charged conduct
3. the number of occurrences
4. the circumstances surrounding or relating to the similar acts
5. any distinctive features unifying the incidents
6. any intervening events
7. any additional factors tending to support or rebut the underlying unity of similar acts.

In *Handy*, the prosecution sought to rely on evidence of the defendant's sexual abuse of his wife in support of sexual assault charges relating to the complainant. While the wife's evidence related a significant number of incidents, and these were proximate in time to the charged offences, the alleged abuse of the wife was held to have insufficient connection. There were no shared distinctive similarities; the acts against the complainant but not the wife began consensually; and there was too great a distinction between sexual abuse in the context of a long dysfunctional marriage and sexual abuse during a 'one-night stand'.³⁰⁵

The list provided in *Handy* is only a guide. Not all will be relevant in every case.³⁰⁶ Furthermore, there may be trade-off between different factors. For example, if frequency is very low, more will be required in terms of similarity or distinctiveness. 'There is no minimum number of other occurrences but the use of one incident as evidence of others is

³⁰⁰ *Arp* [1998] 3 SCR 339 [48].

³⁰¹ For example *B(CR)* [1990] 1 SCR 717 [13]; see §1.

³⁰² For example *Handy* [2002] 2 SCR 908 [77], [89]–[92].

³⁰³ *Lederman et al*, 711, citing *Handy* [2002] 2 SCR 908 [76]–[78].

³⁰⁴ *Handy* [2002] 2 SCR 908 [76]; *Lederman et al*, 717; *Paciocco and Stuesser*, 70.

³⁰⁵ See *Paciocco and Stuesser*, 70–71.

³⁰⁶ *Handy* [2002] 2 SCR 908 [82].

only applicable where the similarities are so distinctive as to preclude coincidence.³⁰⁷ Conversely, 'repeated acts' may be sufficiently 'cogent even though the acts are not distinctive or unique'.³⁰⁸ Where there is a strong demand for connection between the other misconduct and the charged offence, this may be provided by either a 'unique trademark or signature', or 'a number of significant similarities, taken together, such that by their cumulative effect, they warrant admission of the evidence'.³⁰⁹

The Canadian courts appear to recognise that the similar fact evidence may acquire support from the other evidence pertaining to the issue. In *R v Carpenter (No 2)*³¹⁰, the issue was whether it was the defendant who had set fire to his premises. The trial judge rejected evidence that there had been fires at two other of the defendant's premises in the previous six months, on the basis that there was a lack of 'striking similarity'. However, on appeal it was held that the evidence was admissible. There was other evidence pointing to the defendant as the arsonist. He had motive, he received an insurance payout for the fire and he was the only person known to have had the opportunity. No one else was known to have been in the vicinity in the hours preceding the fire. As the Court observed: '[t]he degree of similarity required will depend upon the issues in the particular case, the purpose for which the evidence is sought to be introduced *and the other evidence*'.³¹¹ Conversely, where there is little other evidence going to the issue, more will be required of the similar fact evidence. 'The more work [it] is required to do to prove the prosecution's case, the more cogent the evidence must be.'³¹²

This appears to be the better interpretation of the law, though it is not entirely without controversy. Without engaging with the contrary authorities, Paciocco and Stuesser suggest:

The relevant enquiry is into the probative value of the inference yielded by the similar fact evidence, not the probative value of the Crown's case. For this reason the probative value of the similar fact evidence is not enhanced because other evidence supports the same inference the similar fact evidence is offered to promote.³¹³

Paciocco and Stuesser also suggest that 'where the similar fact evidence is required to bear the whole burden of connecting the crime charged ... a very high degree of similarity is required'³¹⁴, but explain this on the basis that 'the consequences of the misuse of similar fact evidence, should it occur, are apt to be higher when it stands alone'.³¹⁵

³⁰⁷ Lederman *et al*, 711–712, citing *R v Chan* [2004] 3 SCR 245.

³⁰⁸ Lederman *et al*, 714, citing *R v B(W)* (2000) 34 CR (5th) 197 (Ont CA).

³⁰⁹ *Arp* [1998] 3 SCR 339 [21].

³¹⁰ (1982) 31 CR (3d) 261 (Ont CA), discussed by Lederman *et al*, 715.

³¹¹ (1982) 31 CR (3d) 261, 268.

³¹² Lederman *et al*, 715.

³¹³ Paciocco and Stuesser, 78, citing *Arp* [1998] 3 SCR 339 as an illustration of a case where 'the Supreme Court of Canada ... evaluated the probative value of the similar fact evidence independently of the other evidence that happened to point in the same direction': *ibid*, 79.

³¹⁴ Paciocco and Stuesser, 83, quoting *R v Dickens* (1984) 40 CR (3d) 384, 389 (Ont CA).

³¹⁵ Paciocco and Stuesser, 83.

2.5 Variable threshold for admissibility: discretionary assessment

‘There is no bright line to distinguish admissible from inadmissible similar fact evidence.’³¹⁶ Admissibility is a question of law, but there are numerous considerations and a strong element of judgement involved in assessing both probative value and prejudicial risk, as well as in weighing these against each other. Implicit in the balancing test is that the probative value threshold for admission will vary depending on the prejudicial risk of the evidence, which in turn depends on the nature of the evidence and how it fits in the prosecution case.

In *Handy*, the SCC expressly rejected the apparently stringent ‘conclusiveness’ test of the High Court of Australia in *Pfennig*.³¹⁷ The SCC in *Handy* also rejected the notion that a very high level of probative value reduces the room for prejudicial reasoning to operate. ‘As probative value advances, prejudice does not necessarily recede. On the contrary, the two weighing pans on the scales of justice may rise and fall together.’³¹⁸ However, elsewhere the SCC appears to accept the existence of an inverse relationship:

[E]vidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.³¹⁹

The high level of discretion involved in admissibility decisions makes it difficult to be prescriptive as to what features to look for. As Lederman *et al* point out, ‘characterising circumstantial evidence and the inferences to be drawn from them may differ depending on one’s logic, common sense and experience which is “not susceptible of exact codification when applied to the actual facts of life in its infinite variety”’.³²⁰ Paciocco and Stuesser suggest ‘the logical connection must be evaluated in the entire context of the case’.³²¹

One consequence of this is that appeal courts are reluctant to override a trial judge’s decision on admissibility.³²² The appeal court approaches the question with ‘substantial deference’.³²³ The appeal court will only interfere in cases where the judge makes an error of law or reaches a conclusion that is not reasonably open to the judge to make.³²⁴ A further corollary is that precedents have limited value because the exercise is so fact-sensitive.³²⁵ ‘There are no shortcuts or categories that save reasoning, and care must be taken not to overuse precedent in similar fact evidence cases.’³²⁶

However, various statements of the admissibility exception are expressed in fairly strict terms. For example, Lederman *et al* suggest that ‘[p]robative value exceeds prejudice where

³¹⁶ Lederman *et al*, 734.

³¹⁷ [2002] 2 SCR 908 [95]–[97] rejecting *Pfennig* (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ) and 506 (Toohey J).

³¹⁸ [2002] 2 SCR 908 [149].

³¹⁹ *B(CR)* [1990] 1 SCR 717 [56]; *Handy* [2002] 3 SCR 908 [52], [60], [96].

³²⁰ Lederman *et al* 695, quoting *Boardman* [1975] AC 421, 452 (Lord Hailsham).

³²¹ Paciocco and Stuesser, 72.

³²² *R v B(CR)* [1990] 1 SCR 717 [23]–[24].

³²³ *Handy* [2002] 2 SCR 908 [153].

³²⁴ Paciocco and Stuesser, 84.

³²⁵ For example Lederman *et al*, 744.

³²⁶ Paciocco and Stuesser, 72.

the force of the similar circumstances defies coincidence or other innocent explanation'.³²⁷ Paciocco and Stuesser note that, prior to *Handy*, the SCC described the rule as setting a 'strict test for admissibility', and they suggest '[t]his remains true after *Handy*'.³²⁸ *Handy* refers to a '[n]arrow [e]xception of [a]dmissibility'.³²⁹

2.6 Admissibility in child sexual assault cases

Some jurisdictions consider that child sexual assault *per se* is unusual and distinctive, or otherwise warrants more lenient treatment under the exclusionary rule.³³⁰ In *Handy*, the SCC held that 'there is no special rule for sexual abuse cases. In *any* case, the strength of the similar fact evidence must be such as to outweigh "reasoning prejudice" and "moral prejudice"'.³³¹ Nevertheless, many child sexual assault cases possess features that call for special mention.

The first feature has the potential to hinder rather than facilitate the admissibility of similar fact evidence. As noted above, *Handy* is authority for the proposition that the issue on which admission is sought should be characterised with greater precision than just the relative credibility of the defendant and the complainant. This may be more of a formal obstacle to admission than a substantive one – a matter of how the prosecution characterises the evidence. In *R v Blake*³³², the defendant faced charges of touching an eight-year-old's vagina in a bedroom. The trial judge's decision to admit convictions relating to two other incidents of genital touching, of a 10-year-old girl and an eight-year-old boy, was overturned, largely because the trial judge had 'framed the issue too widely'.³³³ While the trial judge initially identified the issue as one of commission, her Honour then said the evidence was probative on a range of other issues, including 'the credibility of the complainant, the credibility of the allegations, [the defendant's] credibility and character, a pattern of behaviour on the part of [the defendant], and rebuttal of the defence of innocent association'.³³⁴

In *R v Titmus*³³⁵, counts relating to sexual acts of the defendant against two complainants ('the shower incidents') were joined with cross-admissibility. The appeal court rejected the defendant's appeal. As in *Blake*, the Court noted that the evidence went both to the complainant's credibility, which was 'central to the Crown's case', and to commission.³³⁶ The appeal court referred to 'the warning [in *Handy*] against the admissibility of similar fact evidence on the issue of credibility because of the risk that the evidence might go only to the appellant's general disposition or propensity'.³³⁷ However, the appeal court added that *Handy* had recognised that 'where the similar fact evidence is relevant to an element of the

³²⁷ Lederman *et al*, 674, citing *R v MacCormack* (2009) 245 OAC 271 [47] (Ont CA).

³²⁸ Paciocco and Stuesser, 62, quoting from *Arp* (1998) 129 CCC (3d) 321, 353.

³²⁹ [2002] 2 SCR 908 [41].

³³⁰ See §§1.2, 3.4, 4.4 and 4.5.

³³¹ *Ibid* [42] (emphasis in original).

³³² *R v Blake* (2003) 68 OR (3d) 75 (CA); Deslisle *et al*, 274.

³³³ (2003) 68 OR (3d) 75 [59].

³³⁴ *Ibid* [64].

³³⁵ (2004) 27 CR(6th) 77 (BCCA); Deslisle *et al*, 275.

³³⁶ (2004) 27 CR(6th) 77 [37].

³³⁷ *Ibid* [39].

actus reus, the fact that it is also relevant to the complainant's credibility will not render the evidence inadmissible'.³³⁸

With regard to the required strength of connection between the other misconduct and the charged offence in child sexual assault cases, SCC authorities suggest that the admissibility test can be relatively demanding. In *Shearing*³³⁹, the defendant was charged with 20 sexual assaults against 11 young women and adolescent girls. The defendant claimed to be a spiritual leader and the complainants were adherents of the faith or family members of adherents. In one group of counts the issue was consent, while in another group it was whether the defendant had committed the sexual acts. The legal issue was whether the evidence relating to the different complainants was cross-admissible, particularly between the two groups of charges, which raised issues of consent issue and commission respectively.

The cogency of the similar fact evidence in this case is said to arise from the repetitive and predictable nature of the appellant's conduct in closely defined circumstances. There must therefore be shown a persuasive degree of connection between the similar fact evidence and the offence charged in order to be *capable* of raising the double inferences. The degree of required similarity is assessed in relation to the issue sought to be established and must be evaluated in relation to the other evidence in the case. If the cumulative result is simply to paint the appellant as a 'bad person', it is inadmissible.³⁴⁰

The Court held that the 'sexual acts themselves were not particularly distinctive'³⁴¹, but that the defendant 'utilised a distinctively bizarre *modus operandi*'.³⁴² The Court referred to:

[T]he alleged abuse of a cult leader's authority ... the fantastic sales pitch and rationale developed by the appellant ... [t]he combination of spiritualist imagery (achieving higher states of awareness) and horror stories (invasion of young girls by disembodied minds) and the supposed prophylactic power of the appellant's sexual touching to ward off these horrific threats.³⁴³

As mentioned above, the admissibility test is said to apply to child sexual assault cases in the same way it applies to other cases. Nevertheless, most child sexual assault cases have a distinct feature that may help the prosecution get the evidence admitted: there is authority that the admissibility threshold for identity may be higher than for other issues. In *Arp*³⁴⁴, for example, Justice Cory suggested that 'a high degree of similarity consisting of a unique trademark or signature, or a series of significant similarities' was required for similar fact evidence to be admissible in identity cases.³⁴⁵ In most child sexual assault cases, identity is not in issue because the defendant is known to the complainant (as a relative, friend of the family, teacher or similar). The issue tends to be commission, as consent is obviously no defence given the complainant's age.

³³⁸ Ibid.

³³⁹ [2002] 2 SCR 33.

³⁴⁰ Ibid [48] (emphasis in original).

³⁴¹ Ibid [50].

³⁴² Ibid [49].

³⁴³ Ibid, [50]–[55]. See Lederman *et al*, 692; Paciocco and Stuesser, 71–72; Delisle *et al*, 278.

³⁴⁴ [1998] 3 SCR 339.

³⁴⁵ Ibid [50]. See also *R v Perrier* [2004] 3 SCR 228 [20]; Lederman *et al*, 685, 718.

It is difficult to understand why, as a matter of principle, identity cases should be treated differently.³⁴⁶ On one view, not all identity cases demand the higher admissibility standard; it only applies when there is very little evidence going to identity other than the similar fact evidence.³⁴⁷ On this view, the stricter requirements in certain identity cases are just an instance of the more general principle mentioned in §2.4: that in gaining admission, similar fact evidence may derive support from other prosecution evidence. In the typical sexual assault case, the similar fact evidence is evidence of other alleged victims that can be added to the complainant's direct evidence of the defendant having committed the charged sexual act(s), to get the prosecution over the line. Given the potential strength of this support offered by the complainant's direct evidence, it may be, as Paciocco and Stuesser suggest, that '[i]ndependent allegations can yield probative value ... even where there is nothing strikingly similar or unique in the allegations provided a network of features is shared between the allegations that is significant to undermine the suggestion of chance'.³⁴⁸

*B(CR)*³⁴⁹ provides an illustration. In this case the defendant was charged with sexual offences against his daughter, beginning when she was 11, a few months after she came into his custody following the death of her mother. The prosecution adduced evidence of his sexual offences six years earlier against a 15-year-old girl, the daughter of his partner, with whom he was in a father–daughter relationship. A majority of the SCC upheld admissibility, but expressly mentioned the deference owed to the trial judge in the discretionary exercise, and described the case as 'borderline'.³⁵⁰

The main similarity is that in each case the accused, shortly after establishing a father–daughter relationship with the victim, is alleged to have engaged her in a sexual relationship. Additionally, the trial judge detailed similarities relating to the place and manner in which the relations occurred in the two situations. The age of the girls was different; one was sexually mature, the other only a child when the acts began. One girl was a blood relation, the other was not. While many of the acts were the same, there is no suggestion of urination with M.H.S. And there is a considerable lapse of time between the two alleged relationships.³⁵¹

Dissenting, Sopinka J noted there were 'only two instances ... separated by a considerable passage of time and as well there are material differences'.³⁵² The existence of a 'father–daughter relationship [is] not unusual ... and indeed [is] neutral. In any case, where it is alleged that a father has had an incestuous relationship with two of his children, this fact will be common to both'.³⁵³

³⁴⁶ See also §4.4.

³⁴⁷ *R v Dickinson* (1984) 40 CR (3d) 384, 389 (Ont CA) (Martin JA); Lederman *et al*, 720. English law has treated this issue the same way. In *DPP v P* it was suggested that in identity cases 'obviously something in the nature of ... a signature or other special feature will be necessary': [1991] 2 AC 447, 462. However, in *John W* the Court of Appeal suggested that the House of Lords comments were directed to cases where the similar fact evidence is the only evidence on identity and that there is no special rule for identification cases: [1998] 2 Cr App R 289, 301. This view has subsequently prevailed in England.

³⁴⁸ Paciocco and Stuesser, 76.

³⁴⁹ [1990] 1 SCR 717.

³⁵⁰ *Ibid* [75].

³⁵¹ *Ibid* [74].

³⁵² *Ibid* [30].

³⁵³ *Ibid*. The logic of this proposition is questionable. Black and white stripes are common to all zebras. This does not mean that black and white stripes are not useful in distinguishing zebras from other equines.

2.7 Risk of collusion among multiple alleged victims or complainants

A key legal issue in assessing the admissibility of the similar fact evidence is whether issues of credibility go to the trial judge's probative value assessment, or whether the trial judge assumes the evidence to be true and leaves such issues to the jury. This was addressed by the SCC in *Handy*:

In the usual course, frailties in the evidence would be left to the trier of fact, in this case the jury. However, where admissibility is bound up with, and dependent upon, probative value, the credibility of the similar fact evidence is a factor that the trial judge, exercising his or her gatekeeper function is, in my view, entitled to take into consideration. Where the ultimate assessment of credibility was for the jury and not the judge to make, this evidence was potentially too prejudicial to be admitted unless the judge was of the view that it met the threshold of being reasonably *capable* of belief.³⁵⁴

In child sexual abuse cases the credibility issue often concerns the risk of collusion between multiple alleged victims or complainants. The defendant denies that the sexual assault occurred (or advances some kind of innocent explanation for the touching, or, with adult complainants, claims consent). The prosecution seeks to corroborate the complainant's evidence by adducing evidence of other witnesses who claim that the defendant sexually abused them in a similar way. (In some cases these witnesses may also be complainants, in which case the issue is one of cross-admissibility and joinder of charges.) The evidence derives its force from the improbability that the various alleged victims are all telling similar lies about the defendant. However, the defendant may respond that the evidence is neither improbable nor inconsistent with innocence. It is no coincidence that the alleged victims are all telling similar lies; they colluded and fabricated their evidence together. While 'collusion' will often involve deliberate fabrication, there is also the risk of 'innocent infection'; 'communication among witnesses ... can have the effect, whether consciously or unconsciously, of colouring and tailoring their descriptions of the impugned events'.³⁵⁵

Canadian courts and commentators viewed the House of Lords decision in *Boardman* as authority for the proposition that 'similar fact evidence was inadmissible if there was a possibility of collusion'.³⁵⁶ (English common law subsequently developed in a different direction: see §1.4.) In Canada, at the admissibility stage, the defendant carries the initial burden of adducing some evidence of collusion, giving the allegation an 'air of reality'.³⁵⁷ This requires more than a mere opportunity for collaboration because '[t]he issue is one of concoction or collaboration, not contact'.³⁵⁸ In *Handy*, the complainant had not only met the victim of the defendant's other misconduct, but they had talked about the victim's receipt of compensation from the Criminal Injuries Compensation Board on the basis of a mere allegation of abuse by the defendant. This 'whiff of profit' was sufficient to raise the issue of collusion.³⁵⁹ However, in *Shearing*³⁶⁰ there was no 'air of reality', notwithstanding that two complainants, sisters, had brought an action for compensation.³⁶¹ The Court said 'there is

³⁵⁴ [2002] 2 SCR 908 [134] (emphasis in original); see also Lederman *et al*, 739.

³⁵⁵ *R v B(C)* (2003) 167 OAC 264 [40] (Ont CA).

³⁵⁶ Lederman *et al*, 683, citing *Boardman* [1975] AC 421, 439, 444, 451, 460, 461.

³⁵⁷ *Handy* [2002] 2 SCR 908 [111]–[113]; see also Paciocco and Stuesser, 66–67; Lederman *et al*, 725–6.

³⁵⁸ *Handy* [2002] 2 SCR 908 [111].

³⁵⁹ *Ibid* [111]–[112]; Lederman *et al*, 725.

³⁶⁰ [2002] 2 SCR 33.

³⁶¹ [2002] 2 SCR 33 [39]–[45]; Paciocco and Stuesser, 67.

some evidence of opportunity for collusion or collaboration and motive, but nothing sufficiently persuasive to trigger the trial judge's gatekeeper function.³⁶² In *R v B(C)*, it was revealed that there existed significant financial conflict between the complainants and the defendant (the complainants had mounted a joint lawsuit against the defendant) and the Court therefore held there was an 'air of reality' to the claim of collusion.³⁶³

Where the allegation of collusion does have an air of reality, the prosecution will bear the burden of negating collusion on the balance of probabilities.³⁶⁴ If the evidence of the other allegations is found admissible, the trial judge should instruct the jury to consider the possibility of collusion at the final proof stage.

2.8 Relationship evidence

The term 'relationship evidence' describes evidence of the defendant's other misconduct towards the complainant. It is not a legal term – relationship evidence is not the subject of special evidentiary rules³⁶⁵ – but relationship evidence is a common form of evidence in child sexual assault.

As discussed above, there is some uncertainty about the scope of the exclusionary rule in Canada and whether it applies to all evidence disclosing a defendant's discreditable conduct, or is limited to situations where such evidence is adduced for the purpose of propensity reasoning. If the exclusion operates narrowly, there is the potential for relationship evidence to avoid the exclusionary rule on the basis it is relevant to provide background or context without reliance on propensity reasoning. On the broad view of the exclusion, this strategy is unavailable. The prosecution cannot avoid exclusion by claiming that the evidence is being used for the non-propensity purpose of providing context or background. Nevertheless, if the defendant's bad character is only revealed incidentally, the evidence may be viewed as carrying a lower risk of prejudice and as satisfying the admissibility test.

Paciocco and Stuesser note that '[c]ourts often permit the Crown to prove the violent or abusive nature of the prior relationship between the accused and an alleged victim'.³⁶⁶ However, Canadian decisions often leave unclear the particular reasoning raised by relationship evidence, whether or not it involves propensity reasoning, and the precise path to admissibility. In *R v MacDonald*³⁶⁷, it was said that 'evidence of the nature of the relationship ... provided context that was essential to an accurate interpretation of the event'.³⁶⁸ That is, the evidence ostensibly did not involve propensity reasoning and so either avoided the narrow exclusion rule or, while covered by the broader exclusion, was less prejudicial and so satisfied the admissibility test.

³⁶² [2002] 2 SCR 33 [44].

³⁶³ Paciocco and Stuesser, 67, citing *R v B(C)* (2003) 171 CCC (3d) 159[40].

³⁶⁴ *Handy* [2002] 2 SCR 908 [104]–[106], [110]–[113], [153]; Lederman *et al*, 726; Paciocco and Stuesser, 67.

³⁶⁵ This is true also of England and New Zealand: see §§1.5 and 3.8.

³⁶⁶ Paciocco and Stuesser, 76.

³⁶⁷ (2002) 170 CCC (3d) 46 (Ont CA).

³⁶⁸ *Ibid* [35]. See also *R v G (SG)* [1997] 2 SCR 716 discussed above in §2.1.

In other cases, relationship evidence is admitted for a propensity purpose but nevertheless gains admission. Greater specificity, connection with the charged offence, and probative value is derived from the fact that the other misconduct was directed against the complainant. The courts may more readily conclude that the evidence demonstrates a 'strong disposition' to act violently or sexually against the complainant³⁶⁹, and not just that the defendant is a 'bad person'.³⁷⁰ This is 'permissible propensity reasoning'.³⁷¹ As Lederman *et al* note, in such a case 'the probative value of similar fact evidence [may] not lie in the similarity of the sexual acts to the offences charged'.³⁷²

However, admission of relationship evidence is not automatic. In *R v H(J)*³⁷³, for example, evidence of three prior sexual incidents between the defendant and his younger sister were held inadmissible since they had a different nature and had occurred some time earlier than the charged offence.³⁷⁴ And in *R v Johnson*³⁷⁵, a prior physical assault in response to the victim's 'misbehaviour' was inadmissible as it offered no 'real insight in the background and relationship between the accused and the victim'³⁷⁶ and did not help in determining whether the defendant had committed the sexual killing.³⁷⁷

2.9 Prior convictions and acquittals, and admitted and disputed other misconduct

The extent to which the other misconduct is in dispute will affect the assessment of probative value and prejudicial risk. Lederman *et al* note that there is 'greater ... potential for confusion of the jury'³⁷⁸ where the other misconduct is disputed. Conversely, 'if the prior extrinsic discreditable conduct has been the subject of an admission of guilt or the subject of a conviction, this factor will enhance its cogency and strength'.³⁷⁹ (Although perhaps propensity reasoning from a prior conviction or admission of other misconduct is more prejudicial than coincidence reasoning from a mere allegation.)³⁸⁰

There are relatively straightforward procedures for adducing evidence of other misconduct that has resulted in a conviction:³⁸¹

The conviction can be proved by a 'certificate of conviction'.³⁸² The underlying facts can be proved by formal admission³⁸³, by reading in facts admitted after a guilty plea ...³⁸⁴, by

³⁶⁹ *R v C(DAR)* (2002) 170 CCC (3d) 64 [45] (PEI CA); Paciocco and Stuesser, 77.

³⁷⁰ 170 CCC (3d) 64 [37].

³⁷¹ Paciocco and Stuesser, 77.

³⁷² Lederman *et al*, 738, with reference to *R v Batte* [2000] 49 OR (3d) 321 (Ont CA).

³⁷³ (2006) 44 CR (6th) 136 (Ont CA).

³⁷⁴ Paciocco and Stuesser, 77.

³⁷⁵ [2010] OJ No. 4153 (CA).

³⁷⁶ *Ibid* [101].

³⁷⁷ Paciocco and Stuesser, 78.

³⁷⁸ Lederman *et al*, 716

³⁷⁹ Lederman *et al*, 716, citing *R v Jesse* [2012] 1 SCR 716; see also Paciocco and Stuesser, 63.

³⁸⁰ In the latter case, 'the propensity of the accused will usually only be established by the verdict. The risk of prejudice is much less': *Pfennig v The Queen* (1995) 182 CLR 461, 530 (McHugh J). See also *Mahomed v The Queen* [2011] 3 NZLR 52 [89], see §3.11.

³⁸¹ Paciocco and Stuesser, 64 (footnotes in original, edited).

³⁸² Simply the court record of the conviction.

³⁸³ *Criminal Code* RSC 1985, s 655.

³⁸⁴ *R v Stubbs* [2013] OJ No 3657 (CA).

calling witnesses to the event³⁸⁵, or through transcripts of evidence given at the earlier trial where they constitute admissible hearsay.

There is authority that where the defendant has been acquitted of the alleged other misconduct, the prosecution will be subject to an ‘issue estoppel’ and may not adduce evidence calling into question the correctness of the acquittal.³⁸⁶ There is authority that issue estoppel may also apply to previously prosecuted allegations that were stayed due to lack of prosecution evidence, though perhaps not where the stay was purely due to delay.³⁸⁷

2.10 Severance

Where the prosecution is proceeding on the basis of complaints from a series of alleged victims, charges relating to different complainants may be joined in a single indictment. The counts may be severed by a trial judge under s 591(3) of the *Criminal Code*, in the ‘interests of justice’. In *R v Last*³⁸⁸, the SCC indicated that if evidence relating to one count is held inadmissible in connection with another count, this will provide strong support for the defence argument that the counts should be severed. ‘The obvious risk when counts are tried together is that the evidence admissible on one count will influence the verdict on an unrelated count.’³⁸⁹ However, severance will not be automatic. The ‘interests of justice’ encompass considerations of efficiency as well as the defendant’s interest in only being tried on the admissible evidence.³⁹⁰ Prejudice to the defendant, while a dominant consideration, is not the only consideration.

Despite the close connection between the issues of severance and cross-admissibility, they are handled quite differently procedurally. Whereas the prosecution bears the burden of persuading the Court to cross-admit the evidence, the defendant bears the burden of persuading the Court to sever the counts.³⁹¹ Furthermore, whereas the severance application and order will take place at the beginning of the trial at the latest, the cross-admissibility of evidence may not be determined until the trial is well underway. In *Last*, the defendant appealed against the denial of his severance application to the SCC. The Court observed that:³⁹²

In the case at bar, an issue facing the trial judge at the time of the severance hearing was the fact that the Crown indicated that it wanted to wait until the conclusion of its evidence before making a similar fact evidence application. There is no procedural rule requiring the Crown to bring the similar fact evidence application at the time of the severance application: see D. Watt, *Watt’s Manual of Criminal Evidence* (2009), at §34.02. Given that the

³⁸⁵ *R v W(J)* 2013 ONCA 89 [50].

³⁸⁶ Lederman *et al*, 716, fn citing, inter alia, *Arp* [1998] 3 SCR 339 [76]–[80]; *R v Mahalingan* (‘Mahalingan’) (2006) 80 OR (3d) 35 (Ont CA); affirmed *R v Mahalingan* [2008] 3 SCR 316. See also Paciocco and Stuesser, 64–65. However, as noted below, where counts are joined, evidence relating to a charge that results in an acquittal may nevertheless have been relied upon in connection with another charge that resulted in conviction: the ‘Arp anomaly’: *ibid* 65–66.

³⁸⁷ Paciocco and Stuesser, 65, citing *Mahalingan* (2006) 80 OR (3d) 35 [77]; *R v C(DN)* [2011] OJ No 47777 (CA). These questions were left open in *Mahalingan* [2008] 3 SCR 316 [67].

³⁸⁸ [2009] 3 SCR 146.

³⁸⁹ *Ibid* [16].

³⁹⁰ *Ibid*.

³⁹¹ *Arp* [1998] 3 SCR 339 [52]; quoted in *Last* [2009] 3 SCR 146 [33].

³⁹² *Last* [2009] 3 SCR 146 [34].

assessment of the similar fact evidence application can be a difficult task, in many cases such an assessment may be best done once all of the Crown's evidence has been tendered.

However, the Court added that it should have been fairly clear at the time of the severance hearing that the similar fact evidence 'did not come close to having the requisite "high degree of similarity"' required to gain admission.³⁹³ Furthermore, the Court was not persuaded that a joinder would bring efficiency gains:

[T]here was no overlap in evidence or key witnesses, such as complainants or expert witnesses. Indeed, only some of the investigating officers would likely have testified on both sets of counts and even then their evidence would not have overlapped. The benefits to the administration of justice in trying the counts together were thus minimal.³⁹⁴

On balance, the counts relating to the different complainants should have been severed in the interests of justice.³⁹⁵

Where counts are heard together without cross-admissibility being granted, the jury should be told not to consider the evidence on one count in connection with other counts.³⁹⁶

However, Paciocco and Stuesser refer to authority that where counts are to be heard together, the court is more likely to uphold cross-admissibility.³⁹⁷ Prejudice is less of an issue because making a finding against cross-admissibility will not prevent the jury from hearing the evidence of the defendant's other misconduct.

2.11 Judicial directions

Where similar fact evidence gains admission, the trial judge should carefully direct the jury as to its use.³⁹⁸ The required directions reflect the concerns underlying the exclusionary rule, and also the way in which the evidence satisfies the admissibility test. The trial judge should direct the jury regarding the live issue for which the evidence is relevant and has been admitted; the way in which the evidence is relevant; any factors potentially contributing to or diminishing its weight; and any perceived prejudicial risks the evidence carries.³⁹⁹ The jury should be informed that it remains a question for them to decide whether or not to draw the inference, and what weight they should give to such an inference.

The trial judge should instruct the jury to avoid reasoning prejudice – that is, jumping to the conclusion that the defendant must have committed the charged offence given the defendant's other misconduct.⁴⁰⁰ The jury should also be warned to avoid moral prejudice –

³⁹³ *Ibid*, quoting from *Arp* [1998] 3 SCR 339 [43].

³⁹⁴ *Last* [2009] 3 SCR 146 [42].

³⁹⁵ *Ibid* [49].

³⁹⁶ *Paciocco and Stuesser*, 89.

³⁹⁷ *Ibid*.

³⁹⁸ *Lederman et al*, 699, 746; *Paciocco and Stuesser*, 84. Model jury instructions have been provided by the National Judicial Institute: <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/>. See, in particular, [11.15]–[11.18].

³⁹⁹ *R v Anderson* (2003) 19 CR (6th) 152 [28]–[29] (Ont CA).

⁴⁰⁰ *Shearing* [2002] 3 SCR 33 [57], [65].

convicting the defendant without being persuaded of the defendant's guilt, as punishment for the defendant's other misconduct and bad character.⁴⁰¹

Some recommended directions going to reasoning prejudice appear to echo the notion of prohibited reasoning. Paciocco and Stuesser talk of 'direct[ing] the jury to avoid relying on the prohibited inference'.⁴⁰² In *Arp*⁴⁰³, the SCC suggested that '[t]he jury must be warned that they are not to use the [similar fact] evidence ... to infer that the accused is a person whose character or disposition is such that he or she is likely to have committed the offence'.⁴⁰⁴ Delisle *et al* note that the SCC 'persisted with the need for a warning' in *Handy* and *Shearing*.⁴⁰⁵ Where the evidence has been admitted for a propensity purpose this appears inappropriate, as Doherty JA recognised in *Batte*.⁴⁰⁶ And yet Paciocco and Stuesser describe it as the 'most critical element', and indicate that an appeal will generally be granted if the warning is not given.⁴⁰⁷

There is authority that the warnings against prejudice are not required – or that it is a less serious error to omit them – where the evidence is believed to pose a lower risk of prejudice. This includes relationship evidence⁴⁰⁸, and evidence of misconduct significantly less serious than the charged offence.⁴⁰⁹

In an appropriate case, the judge should also refer to any issues with the credibility or reliability of the similar fact evidence, such as the alleged victims having the opportunity or motive for collusion.⁴¹⁰ Where a number of children make simultaneous allegations against the defendant of sexual abuse, the trial judge must warn the jury of the possibility of innocent infection.⁴¹¹

Where the defendant is being tried on a multi-count indictment and the judge has held that the evidence is not cross-admissible, the jury should be directed that, in determining guilt on a particular count, it must only consider the evidence admissible in that count, and must not use the evidence admitted for other counts.⁴¹² The risk of prejudice in such a case will call for a careful direction. These cases may be rare because, as discussed in §2.10, a finding against cross-admissibility will often be accompanied by a severance order and cross-admissibility is more likely to be permitted where counts are joined.

Some authorities suggest that the jury should be directed that the similar fact evidence must satisfy a standard of proof for it to be used. Citing *R v B(C)*⁴¹³, Paciocco and Stuesser

⁴⁰¹ *B(C)* 167 OAC 264 [35].

⁴⁰² Paciocco and Stuesser, 84.

⁴⁰³ [1998] 3 SCR 339.

⁴⁰⁴ *Ibid* [80].

⁴⁰⁵ Delisle *et al*, 279.

⁴⁰⁶ *Ibid*; (2000) 34 CR(5th) 197 (Ont CA).

⁴⁰⁷ Paciocco and Stuesser, 85.

⁴⁰⁸ Lederman *et al*, 747, citing *R v Krugel* (2000) 143 CCC (3d) 367 [85]–[90].

⁴⁰⁹ *R v C(NP)* (2007) 86 OR (3d) 571 [23] (CA).

⁴¹⁰ Lederman *et al*, 746, citing *Shearing* [2002] 2 SCR 33 [40]–[44].

⁴¹¹ Delisle *et al*, citing *R v B(M)* 2011 CarswellOnt 535 (Ont CA).

⁴¹² Lederman *et al*, 745, citing *R v Brown* (2007) 216 CCC (3d) 299; Delisle *et al*, 281, citing *R v Farler* (2006) 131 CCC (3d) 134 (NSCA).

⁴¹³ 167 OAC 264 [29].

suggest that the jury should be advised not to use the evidence unless satisfied that the other alleged incident occurred.⁴¹⁴ Another appellate court has more recently suggested that the criminal standard should be applied to the other misconduct.⁴¹⁵ Such directions appear quite inconsistent with the holistic operation of coincidence reasoning in which the similar fact evidence is ‘pooled’ and assessed as a whole.⁴¹⁶

According to the SCC in *Arp*, a special direction is required in multi-count identity cases. The evidence relating to each count can only be used on the other counts if the jury first finds ‘that the manner of the commission of the offences is so similar that it is likely they were committed by the same person’.⁴¹⁷ If jury members do not conclude that it is likely that the same person committed all the offences, the evidence on each count must be considered separately, and the evidence on other counts must be put out of their minds.⁴¹⁸

Of course, ultimately, for conviction on any count, the jury must be satisfied of guilt beyond reasonable doubt.⁴¹⁹ However, the SCC expressly noted that a jury may use evidence relating to one count to prove guilt beyond reasonable doubt on another count while ultimately acquitting on the first count⁴²⁰; the ‘*Arp* anomaly’.⁴²¹ This result may appear inconsistent with the ‘issue estoppel’ prohibition on evidence of previously charged misconduct for which the defendant was acquitted.⁴²² However, the SCC has held that issue estoppel has no application to other counts within multi-count indictments that have not yet been decided.⁴²³

3. New Zealand

New Zealand evidence law is governed by the *Evidence Act 2006* (EA). This is fairly comprehensive legislation with coverage comparable to that of Australia’s Uniform Evidence Law. Part 2 of the EA deals with admissibility. The propensity provisions appear in Subpart 5, which also covers ‘veracity’. The EA draws no distinction between tendency and coincidence evidence, nor do the courts. The treatment of propensity evidence under the EA is quite similar to its treatment under the common law – that is, the evidence is excluded but may gain admission if its probative value exceeds its prejudicial risk.⁴²⁴ Nevertheless, the Supreme Court in *Mahomed v The Queen*⁴²⁵ stated that:

We do not consider a great deal is now to be gained from an examination of pre-*Evidence Act* case law. The Act substantially codified that case law and it is preferable, and consistent with s 10(1), to focus firmly on the terms of the Act; albeit the application or interpretation

⁴¹⁴ Paciocco and Stuesser, 85.

⁴¹⁵ *R v B (M)* (2011) 267 CCC (3d) 72.

⁴¹⁶ See §1.10.

⁴¹⁷ [1998] 3 SCR 339 [80].

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid* [76].

⁴²¹ Paciocco and Stuesser, 65–66.

⁴²² Paciocco and Stuesser, 66, citing *Mahalingan* (2006) 80 OR (3d) 35 [71]–[72].

⁴²³ *Mahalingan* [2008] 3 SCR 316 [70]–[73].

⁴²⁴ For example *R v Holtz* [2003] 1 NZLR 667.

⁴²⁵ *Mahomed v The Queen* [2011] 3 NZLR 145.

of a particular provision in the Act may sometimes benefit from a consideration of the previous common law.⁴²⁶

3.1 Scope of exclusion

Prosecution evidence relating to a defendant's other misconduct is subject to exclusion under s 43(1) which provides that:

The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.

'Propensity evidence' is defined by s 40(1)(a) as 'evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved'. (Section 40(1)(b) excludes from the definition evidence of the conduct that constitutes the charged offence.)

The exclusion appears to be broad in the sense that it is not limited to evidence adduced for the purpose of invoking propensity reasoning. The exclusion extends to any evidence that 'tends to show' the defendant's propensity.⁴²⁷ Authorities imposing a narrower operation on the exclusion⁴²⁸ were rejected by the minority in *Mahomed*.⁴²⁹

It should be emphasised that the definition of 'propensity evidence' in the New Zealand EA is broader than in the law of other jurisdictions. Whereas in other contexts (including the other chapters of this report) the term 'propensity evidence' is reserved for evidence being used for a propensity *purpose*, in the New Zealand context (and in this chapter) the term covers evidence *revealing* a defendant's other misconduct and potential propensity for

⁴²⁶ Ibid [4]. Section 10 provides that:

- (1) This Act—
 - (a) must be interpreted in a way that promotes its purpose and principles; and
 - (b) is not subject to any rule that statutes in derogation of the common law should be strictly construed; but
 - (c) may be interpreted having regard to the common law, but only to the extent that the common law is consistent with—
 - (i) its provisions; and
 - (ii) the promotion of its purpose and its principles; and
 - (iii) the application of the rule in section 12.

- (2) Subsection (1) does not affect the application of the *Interpretation Act 1999* to this Act.

⁴²⁷ It is also broad in the sense that it is not limited to a propensity for *misconduct*, an aspect that raised questions about the defendant's traditional entitlement to present good character evidence: *Wi v The Queen* [2010] NZSC 121. This issue is not relevant to this report. The exclusion is potentially narrow in another respect. It extends only to evidence showing the defendant's '*propensity to act in a particular way*' (emphasis added). Presumably general propensities, though not caught by the exclusionary rule, would be excluded anyway as irrelevant (s 7) or under the general exclusionary discretion (s 8). Note that the qualifier 'particular' is contained in the exclusionary provision, not the admissibility test. Compare the reference to 'similarities' in the exclusionary coincidence rule in the Australian Uniform Evidence Law s 98(1).

⁴²⁸ For example *R v R* [2008] NZCA 342.

⁴²⁹ [2011] 3 NZLR 145 [60]–[61] (minority). However, this proposition is not necessarily wholly immune from qualification: *ibid* [52], [60]; Mathieson, 195–7.

misconduct. In the New Zealand context, the term ‘propensity evidence’ may be used to refer to evidence that is to be used for a non-propensity purpose.

3.2 Admissibility test: probative value over prejudicial risk

Propensity evidence can gain admission under s 43(1) where it ‘has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant’. This essentially replicates the common law balancing test for admissibility that had been developed prior to the passage of the EA.⁴³⁰ However, the EA provisions have the advantage of making it clear that propensity reasoning is not ‘forbidden’ or ‘prohibited’.⁴³¹

3.3 The nature of the issue in dispute

Sections 43(2) and (3) of the EA provide legislative guidance as to how probative value should be assessed.

Section 43(2) provides that ‘the Judge must take into account the nature of the issue in dispute’. This reflects the fundamental proposition that relevance is a relational concept and whether or not evidence is relevant depends on what is in issue. In *N v R*⁴³², the defendant faced charges of digitally penetrating a 12-year-old while she was asleep and intoxicated. The prosecution adduced evidence of the defendant’s prior conviction involving sexual intercourse with a 13-year-old girl. The defendant had pleaded guilty to the earlier charge on the basis that the intercourse was consensual. The Court considered that the prior conviction, showing the defendant’s sexual attraction to pubescent girls, would be probative and admissible if the issue was identity. However, if the defendant admitted indecent assault but denied penetration, the prior conviction would be inadmissible. In this case, the admission would itself demonstrate the defendant’s sexual attraction to pubescent girls and the prior conviction would add nothing. Moreover, the defendant’s previous *consensual* intercourse would lack probative value on whether he had penetrated the sleeping, intoxicated complainant who was incapable of giving or withholding consent.⁴³³

Note that s 9(2) of the EA permits a defendant to make an admission so as to ‘dispense with proof of that fact’. *Ah You v The Queen*⁴³⁴ concerned charges of murdering an elderly woman in her home. If the issue had been identity, evidence that the defendant had committed other similar misconduct – entering homes, threatening occupants and using low-level violence – would have been relevant and possibly admissible. In this case, the defendant admitted that he had entered the home and attacked the victim causing her death, but denied he had the requisite mental state. This rendered the evidence of the

⁴³⁰ *R v Holtz* [2003] 1 NZLR 667.

⁴³¹ McDonald, 194.

⁴³² [2012] NZCA 99.

⁴³³ *M v R* [2014] NZCA 149 is similar. D was charged with indecent assault and rape arising out of a single incident. D pleaded guilty to the lesser charge and on trial for rape denied penetration. The Court of Appeal held that evidence that the defendant had committed prior indecent assaults on other women was wrongly admitted because it was irrelevant to the outstanding issue of penetration.

⁴³⁴ [2011] NZCA 92; Robertson EA43.06.

other incidents irrelevant since the other attacks did not demonstrate a tendency for attacking with the *mens rea* for murder.

In the leading case of *Mahomed*, the defendants were charged with murder and failure to supply the necessities of life in connection with the death of their 11-week-old daughter. The prosecution adduced evidence that a week or so earlier they had left the child in their van for three hours on a warm day with the window only slightly down. This was held by the majority of Supreme Court to be inadmissible on the murder charges since 'there is really no, or very little, probative coincidence or linkage between thoughtlessly leaving a child in a van and causing the child's death with murderous intent'.⁴³⁵ The minority, however, held that the van evidence was admissible because it showed the defendants 'were prepared to expose [their daughter] to risk'.⁴³⁶ As Mahoney *et al* note, the difference is in how broadly the 'issue in dispute' was framed, a choice that can be 'crucial to the decision of admissibility'.⁴³⁷

Further regarding issue specification, there is authority that a court is going to be more reluctant to admit propensity evidence '[w]here the relevant issue is very broad ... than where the issue can be defined more narrowly'.⁴³⁸ A number of decisions have suggested that the issue of the complainant's credibility is 'too broadly phrased to be helpful'.⁴³⁹ This may pose an obstacle to the admissibility of evidence of other alleged victims in support of the complainant's testimony. However, the issue may be avoided by characterising the issue as one of commission rather than complainant credibility. See §§2.4 and 2.6 for similar principles in Canadian law.

3.4 Probative value

Section 43(3) provides a non-exhaustive list of factors that may be considered in assessing probative value:

When assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:

- (a) the frequency with which the acts, omissions, events, or circumstances which are the subject of the evidence have occurred;
- (b) the connection in time between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried;
- (c) the extent of the similarity between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried;
- (d) the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried;

⁴³⁵ [2011] 3 NZLR 145 [12] (majority).

⁴³⁶ *Ibid* [74] (minority).

⁴³⁷ Mahoney *et al*, 224.

⁴³⁸ *Freeman v The Queen* [2010] NZCA 230 [21].

⁴³⁹ *Vuleitch v R* [2010] NZCA 102 [31]; see also *M v R* [2010] NZCA 219 at [29]–[31]; Robertson EA43.06.

- (e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility;
- (f) the extent to which the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.

In *Mahomed*, the Supreme Court majority indicated that '[a]lthough not couched as mandatory considerations it will usually be appropriate to consider them, to the extent they are relevant'.⁴⁴⁰ In *R v Healy*⁴⁴¹, the Court of Appeal indicated that '[t]he ordinary principles applicable to this sort of discretionary exercise are such that the facts of a particular case may mean it is wrong for a court to simply ignore one of the listed factors'.⁴⁴² The Court added that 'the section does not envisage a "checking off" of all of the s 43(3) factors followed by some sort of arithmetical "totting up" of what is present against what is not ... and in some cases the probative value ... may derive from the presence of one of the s 43(3) factors alone'.⁴⁴³ Cases have also recognised that a deficiency in one factor may be made up by the strength of another factor.

In considering these factors, the courts have generally not been too demanding in child sexual assault cases. With regard to (a) frequency, the Court of Appeal in *R v Taea*⁴⁴⁴ adopted a passage of the English Court of Appeal in *Hanson*⁴⁴⁵, where it was suggested that a single prior conviction would generally not be admissible as showing propensity, except where it shows 'unusual behaviour' such as '[c]hild sexual abuse'.⁴⁴⁶

Paragraph (d), the factor relating to 'number of other allegations', raises similar consideration to that of paragraph (a) (frequency) and again the courts have not been too demanding in child sexual assault cases. In *R v Healy*⁴⁴⁷, the Court of Appeal upheld the cross-admissibility of the evidence of just two complainants, each testifying as to a single incident.

With regards to (c) (similarity) and (f) (unusualness), the majority in *Mahomed* held that it 'is necessary ... that the propensity have some specificity about it ... linked in some way with the conduct or mental state alleged to constitute the [charged] offence'.⁴⁴⁸ Commentators note the potential for reference to statistical evidence in connection with assessments of 'unusualness'.⁴⁴⁹ It seems that prosecution attempts to adduce statistical evidence have not yet been fully successful.⁴⁵⁰ Despite the observation in *Mahomed* regarding specificity, the courts have not been too demanding in child sexual assault cases. In *Healy*, as mentioned above, the prosecution adduced just one other allegation. In admitting it, the Court suggested that 'there is considerable similarity in the acts and

⁴⁴⁰ [2011] 3 NZLR 145 [6].

⁴⁴¹ (2007) 23 CRNZ 923.

⁴⁴² *Ibid* [62].

⁴⁴³ *Ibid*.

⁴⁴⁴ [2007] NZCA 119.

⁴⁴⁵ [2005] 1 WLR 3169 [9].

⁴⁴⁶ [2007] NZCA 119 [38].

⁴⁴⁷ (2007) 23 CRNZ 923.

⁴⁴⁸ [2011] 3 NZLR 145 [3].

⁴⁴⁹ Mahoney *et al*, 232; McDonald, 196.

⁴⁵⁰ Mahoney *et al*, 232, citing *Pillai v The Queen* HC Auckland (11 Dec 2008).

circumstances of the alleged offending⁴⁵¹, but this did not include anything in the nature of a striking similarity or signature.⁴⁵²

[B]oth took place in the context of the life of [the] Centrepont [community] where the appellant was in a position of some authority. It is not surprising that neither complainant said that this was why she accompanied the appellant but there is sufficient in the evidence of both complainants as to the way in which Centrepont operated from which to draw that inference.

Both girls on their evidence were largely without parental support and so alone in an openly sexual environment which, combined with their ages, did make them vulnerable. It is open to infer on the current state of the evidence that the appellant would have been well aware of that.

The Judge was right to determine that the evidence had probative value because of the combination of similarities and unusual features in terms of s 43(3). Those features are apparent in the nature of the approaches to both complainants in the context of opportunistic offending with an invitation to the complainants to go along with him at which point he then engaged in similar activity for which he was immediately apologetic.

The Court of Appeal in *Robin v The Queen*⁴⁵³ noted a 'line of authority which establishes that sexual activity with children is in itself unusual, even where it does not involve unusual acts'.⁴⁵⁴ In *Vuletitch v The Queen*⁴⁵⁵, it was said that in this respect, child sexual assault is comparable with arson and distinguishable from sexual offending against adult women.⁴⁵⁶ In *Smith v The Queen*⁴⁵⁷, the Court of Appeal said '[i]t is very unusual ... for adult men to want to engage in sexual activity with very young children', and that a man would be 'very unlucky' to have two sets of children independently making such false allegations. In *M v The Queen*⁴⁵⁸, the Court held that this 'approach is not confined to ... very young complainants'.⁴⁵⁹ That case involved reports of 'uninvited sexual advances' by the defendant when he was aged 50 to 64, against three complainants aged between 11 and 15. (The age difference between the defendant and the alleged victim is important. If the defendant is close in age to the young alleged victim, the evidence will lose probative value.⁴⁶⁰)

Similarly, the courts do not generally attach great significance to differences in detail between the acts involved in different child sexual assaults. In *Rhodes*⁴⁶¹, the defendant was charged with, among other things, having digitally penetrated the young complainant's vagina, and penile penetration of her anus. Evidence that the defendant had convictions for having inserted a string of beads into the complainant's sister's anus and a vibrator into her vagina was held admissible as 'within the same spectrum or category of conduct'.⁴⁶²

⁴⁵¹ (2007) 23 CRNZ 923 [59].

⁴⁵² Ibid [59]–[61].

⁴⁵³ [2013] NZCA 105.

⁴⁵⁴ Ibid [25].

⁴⁵⁵ [2010] NZCA 102.

⁴⁵⁶ Ibid [38].

⁴⁵⁷ [2010] NZCA 361 [17].

⁴⁵⁸ [2013] NZCA 448.

⁴⁵⁹ Ibid [30].

⁴⁶⁰ *Stark v The Queen* [2015] NZCA 90.

⁴⁶¹ [2012] NZCA 269.

⁴⁶² Ibid [38].

First, and at a general level, it demonstrates [the defendant's] tendency to engage in diverse forms of sexual activity with young persons who spend time in his company. More particularly, it demonstrates that he was prepared to insert objects in the vagina and/or anus of a young person in his care.⁴⁶³

The Court⁴⁶⁴ referred to *Hetherington v The Queen*⁴⁶⁵, in which the Court described it as 'artificial' to 'draw a distinction based on severity, when the relevant acts fall within the same spectrum or category of offending'.⁴⁶⁶ The 'degree of similarity is not diminished' and 'is complemented ... by the unusual tendency of an adult male to engage in sexual activity with young girls'.⁴⁶⁷

However, in some cases, the courts have attached significance to such differences. *R v S*⁴⁶⁸ is a child sexual assault case in which the prosecution relied upon evidence of frequent sexual assaults of other alleged victims. The Court of Appeal held that '[t]he frequency of the acts against JR and HR ... will only be of relevance if the acts were similar and thus probative'.⁴⁶⁹ Actually, the Court of Appeal held that it was a 'point of difference' that the defendant was alleged to have only committed a 'single act' against the complainant.⁴⁷⁰ The Court also noted that:

Material differences in the acts cannot be ignored ... A similar feature of offending (for instance oral sex leading to anal sex) is a probative factor, but ... it is also necessary to recognise any significant differences in the particular act, such as differences between the complainants in the sequences of the sexual acts.⁴⁷¹

In *D v The Queen*⁴⁷², the Court of Appeal held that pornography on the defendant's computer showing adults having sexual contact with children was inadmissible on charges of sexual grooming and indecent assault of a 15-year-old.

With regard to the required connection in time (paragraph (b)), the Court of Appeal has held that there is no 'particular time (such as 20 years) [which] may be used as a litmus test. In each case, the balance between probative value and prejudicial effect must be carefully weighed'.⁴⁷³ An extended time lag may be offset by distinctive similarities – paragraphs (c) and (f). In *L v The Queen*⁴⁷⁴, the defendant was charged with fraud and the Court of Appeal upheld convictions relating to fraud 20 years earlier. Despite the considerable time gap there was a shared 'particular feature'. The earlier offences involved 'exactly the same type of conduct ... such a special and distinctive feature ... that it remains highly probative'.⁴⁷⁵

⁴⁶³ Ibid [39].

⁴⁶⁴ At ibid [37].

⁴⁶⁵ [2012] NZCA 88.

⁴⁶⁶ Ibid [20].

⁴⁶⁷ Ibid.

⁴⁶⁸ [2011] NZCA 612.

⁴⁶⁹ Ibid [28].

⁴⁷⁰ Ibid [28].

⁴⁷¹ Ibid [46].

⁴⁷² [2013] NZCA 260.

⁴⁷³ *Lowe v The Queen* [2011] NZCA 400 [27].

⁴⁷⁴ [2012] NZCA 262.

⁴⁷⁵ Ibid [31].

In *K v The Queen*⁴⁷⁶, the defendant was charged with the indecent assault of his stepdaughter in 2005 when she was 15 years old. The Court upheld propensity evidence relating to similar misconduct in 2013. Both occasions involved the defendant allegedly having sexual contact with the alleged victim and then taking a photograph of her ‘private parts’, which was described as ‘highly unusual’.⁴⁷⁷ In *R v Bevin*⁴⁷⁸, the Court of Appeal upheld the admissibility of a conviction for a similar sexual offence against another girl 22 years earlier. While accepting that the time gap reduces its probative value, there were in this case similarities with the charged offence and, in addition, the defendant had admitted that he was still sexually attracted to girls. Robertson cites authority that ‘propensity evidence showing the defendant’s continuing state of mind (an unusual interest in young girls) may not be amenable to connection in time analysis’.⁴⁷⁹

The probative value assessment is contextual. *R v Holtz*⁴⁸⁰ is authority for the proposition that ‘propensity evidence that might not otherwise carry a sufficiently high degree of probative value may yet be admissible on the foundation of other evidence in the case that indicates the defendant’s guilt’. Mahoney *et al* describe this as ‘probably the most important of the “other matters”’ not expressly listed in s 43(3).⁴⁸¹ It can play a significant role in child sexual assault cases where the complainant’s direct evidence of the defendant’s guilt can provide a foundation for the admission of the evidence of other alleged victims.⁴⁸²

3.5 Complainant credibility and collusion

Robertson suggests that it is ‘not clear’ whether, as a general matter, the reliability of evidence is a question for the judge at the admissibility stage or for the jury at the proof stage.⁴⁸³ However, with regard to the probative value and admissibility of similar allegations against the defendant, s 43(3)(e) specifically refers to ‘whether the allegations ... may be the result of collusion or suggestibility’. This modifies the New Zealand common law, which previously followed the House of Lords in *R v H*⁴⁸⁴, requiring the trial judge to assume the truth of the other allegations.

Clearly this provision covers deliberate falsification of an allegation as well as false allegations with an unconscious origin. In *R v A*⁴⁸⁵, evidence from another alleged victim that the defendant had committed similar sexual assaults against him was excluded because these had surfaced as recovered memories during hypnotherapy.⁴⁸⁶

⁴⁷⁶ [2014] NZCA 393.

⁴⁷⁷ *Ibid* [46].

⁴⁷⁸ [2014] NZCA 637.

⁴⁷⁹ Robertson [43.07], citing *Snell-Scasbrook v The Queen* [2015] NZCA 195. The author was unable to find this unreported decision to determine its authority.

⁴⁸⁰ [2003] 1 NZLR 667; Robertson [43.07]; Mahoney *et al*, 225.

⁴⁸¹ Mahoney *et al*, 225.

⁴⁸² See §§2.4 and 2.6.

⁴⁸³ Robertson [43.07]; see also McDonald, 192; Richard Mahoney, ‘Evidence’ [2010] NZLRev 433, 436; Mahoney *et al*, 229–230.

⁴⁸⁴ [1995] 2 AC 596; Mahoney *et al*, 229; see §1.4.

⁴⁸⁵ [2010] NZCA 124.

⁴⁸⁶ *Ibid* [17]. The author has not been able to find this decision to confirm whether the other alleged victim’s complaint can be traced back to those of the complainant – whether the hypnotherapist knew of the complainant’s allegations.

In *R v Wyatt*⁴⁸⁷, the Court of Appeal pointed out that the possibility of collusion or suggestion is not an automatic bar to admission. The effect of s 43(3)(e) is that ‘evidence of collusion or suggestibility ... is a matter that can be put into the mix along with other matters’. The defence must be able to point to evidence of collusion. ‘Speculation is an insufficient basis.’⁴⁸⁸ Furthermore, the section requires something more than mere opportunity for collusion, which would almost invariably be present if alleged victims were members of the same family.⁴⁸⁹

Citing Court of Appeal authority, *Mahoney et al* suggest that in determining the probative value of other allegations of misconduct, the trial judge should not only consider whether the circumstances support the defence claim of collusion or suggestion, but also the quality of the evidence such as lack of detail and witness uncertainty.⁴⁹⁰ The authors note that their view is controversial, citing authority to the contrary.⁴⁹¹

3.6 Prejudicial effect

Section 43(4) provides guidance on assessing the risk of prejudice:

When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters,—

- (a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
- (b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.

While the trial judge has a discretion whether to consider s 43(3) factors going to probative value, s 43(4) makes the consideration of these types of prejudice mandatory. Paragraph (a) corresponds to what is widely known as ‘moral prejudice’ and paragraph (b) to ‘reasoning prejudice’.⁴⁹² Both are concerned with the potential impact of the evidence against the defendant over and above its genuine probative value.⁴⁹³

A further kind of prejudice is particularised in s 8(2):

In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

In *R v SJM*⁴⁹⁴ the Court of Appeal upheld the trial judge’s decision to allow cross-admissibility and joinder of the charges of sexual offending against two boys. Referring to EA s 8(2), defence counsel argued that the joinder would hinder the defendant’s right to offer an effective defence. The defendant wished to testify in response to the allegations of

⁴⁸⁷ [2007] NZCA 436.

⁴⁸⁸ *Y v The Queen* [2010] NZCA 458 [21].

⁴⁸⁹ *B v The Queen* [2013] NZCA 443 [8].

⁴⁹⁰ *Mahoney et al*, 229–230, citing *Bedenknecht v The Queen* [2010] NZCA 92 and *R v A* [2010] NZCA 124. *R v A* is the ‘recovered memory’ case mentioned in the text. Mathieson, 216, suggests that ‘sharply recovered memory evidence should probably be regarded with even greater suspicion’.

⁴⁹¹ *Mahoney et al*, 230 fn1595.

⁴⁹² See §2.3.

⁴⁹³ *Mahomed* [2011] 3 NZLR 145 [7] (majority).

⁴⁹⁴ [2008] NZCA 193.

one boy but not those of the other boy, but if the counts were heard together he could be cross-examined in connection with both. The Court of Appeal held that the trial judge had given this argument due consideration – albeit under s 43(4) rather than s 8(2) – and that the defendant’s dilemma was a ‘typical consequence of joinder’.⁴⁹⁵ The Court held that this did not constitute ‘unfair prejudice’.⁴⁹⁶

The prejudice that may prevent propensity evidence being admitted is defined quite narrowly by the EA. Section 43(1) refers to ‘the risk that the evidence may have an unfairly prejudicial effect *on the defendant*’.⁴⁹⁷ This contrasts with the general discretion to exclude evidence under s 8(1)(a), which refers more broadly to ‘the risk that the evidence will ... have an unfairly prejudicial effect *on the proceeding*’.⁴⁹⁸ Section 43(1) may not include the resource implications of multiplying the number of issues and opening up satellite litigation. It is interesting to note that this consideration has received relatively little attention from New Zealand textbook writers. This may not matter too much since satellite litigation would also present the risk of prejudice to the defendant from jury confusion and distraction. The Supreme Court in *Mahomed* suggested the difference between s 43(1) and s 8(1)(a) was insignificant.⁴⁹⁹

In assessing whether the prejudicial risk does outweigh probative value, ‘the court may need to take into account the extent to which it considers a “proper use” direction in the trial judge’s summing-up is likely to guard against the risk of improper use’.⁵⁰⁰

In *Hudson v The Queen*⁵⁰¹, the Court of Appeal noted that the risk of prejudice relating to the defendant’s previous sexual assaults had been lessened by the evidence taking the form of agreed statements rather than victim testimony.⁵⁰² In *Buddle v The Queen*⁵⁰³, the Court indicated that presentation of a purported ‘agreed’ statement may lead to a miscarriage of justice if, in reality, the defendant denies the allegations.

3.7 Balancing test

To be admissible under s 43, the probative value of the evidence must outweigh its prejudicial risk. The Law Commission’s recommendation of a potentially more pro-defendant formula – one that required probative value to ‘clearly outweigh’ prejudicial risk – was not adopted.⁵⁰⁴

As has been widely noted, the balancing formula in the s 43 admissibility test closely resembles the one appearing in the s 8 general exclusion provision.⁵⁰⁵ One apparent

⁴⁹⁵ Ibid [35].

⁴⁹⁶ Ibid [34].

⁴⁹⁷ Emphasis added.

⁴⁹⁸ Emphasis added. The common law exclusion of propensity evidence was believed to operate on this broader basis too: Robertson 43.04.

⁴⁹⁹ [2011] 3 NZLR 145 [66] (minority).

⁵⁰⁰ Ibid [7] (majority).

⁵⁰¹ [2010] NZCA 417.

⁵⁰² Ibid [35]; see also *Mahomed* [2011] NZLR 145 [75].

⁵⁰³ [2013] NZCA 437.

⁵⁰⁴ New Zealand Law Commission (Report 55, 1997) *Evidence Volume 2: Evidence Code and Commentary*, 120.

⁵⁰⁵ *Mahomed* [2011] 3 NZLR 145 [66]–[67] (minority).

difference⁵⁰⁶ is that s 43 puts the burden on the party offering the evidence (the prosecution), whereas s 8 puts the burden on the party seeking to have the evidence excluded (the defence). In theory this would mean that evidence would be excluded under s 43 but admitted under s 8 in cases where the probative value is equal to prejudicial risk⁵⁰⁷ or it is unclear which is greater. Commentators have suggested this is not a significant difference⁵⁰⁸, a view the Supreme Court adopted in *Mahomed*.⁵⁰⁹ However, given the diverse natures of the two things being compared, it may often be unclear where the balance lies, increasing the scope for a difference in burden allocation producing different results.⁵¹⁰

Section 43 operates more strongly for the defence, so that if evidence gains admission under s 43 there is no scope for its exclusion under s 8.⁵¹¹

The balancing exercise under s 43 clearly involves a degree of judgement by the trial judge. The Court of Appeal has been unwilling to constrain this discretion. In *Vuleitch v The Queen*⁵¹², Baragwanath J expressed concern about the subjectivity of the balancing test and offered some basic guidelines: '[T]he greater the risk of improper prejudice ... the more compelling must be the probative value of the propensity evidence'; and '[T]he stronger the Crown case in respect of the issue ... the higher the prospect of securing admission of the evidence'.⁵¹³ However, the majority rejected these propositions as adding 'unwarranted gloss to the statutory language'.⁵¹⁴ Mahoney *et al* express surprise at the controversy, 'given that [the dissentient] appears to do little more than restate the test set by s 43(1)'.⁵¹⁵

Mahoney *et al* note that despite the guidance offered on probative value assessment in s 43(3) – and on prejudicial risk in s 43(4) – the section 'does not provide any real assistance in determining the tipping point at which s 43(1)'s admissibility test has been met in any particular case. We are still left with the unpredictability ... that was a feature ... before the Act'.⁵¹⁶

3.8 Relationship evidence

As with the jurisdictions considered above⁵¹⁷, the term 'relationship evidence' has no legal significance. However, this kind of evidence – of other misconduct by the defendant towards the complainant – is common in child sexual assault cases, and it is worth considering how the courts have treated it.

⁵⁰⁶ Another difference, noted in the previous section, is the broader notion of prejudice in s 8.

⁵⁰⁷ *Mahomed* [2011] 3 NZLR 145 [66] (minority).

⁵⁰⁸ McDonald, 171; Mahoney *et al*, 223; Mathieson, 205.

⁵⁰⁹ [2011] 3 NZLR 145 [5], [66].

⁵¹⁰ Compare the English experience (see §1.11) where the CJA had the effect of shifting the burden in the balancing test from the prosecution to the defence. Commentators suggested that this would make little difference, yet admissibility was opened up considerably.

⁵¹¹ *Mahomed* [2011] 3 NZLR 145 [5] (majority).

⁵¹² [2010] NZCA 102.

⁵¹³ *Ibid* [64].

⁵¹⁴ *Ibid* [27].

⁵¹⁵ Mahoney *et al*, 233.

⁵¹⁶ Mahoney *et al*, 225.

⁵¹⁷ See §§1.5 and 2.8.

As mentioned above, the exclusionary rule operates broadly, encompassing evidence that does not rely on propensity or coincidence reasoning. Authorities to the contrary⁵¹⁸ were rejected by the minority in *Mahomed*.⁵¹⁹ Previously, evidence of the defendant's uncharged misconduct to the complainant was considered subject to 'a less exacting test of admissibility than s 43'.⁵²⁰ But now such evidence cannot avoid the scope of the exclusionary rule by being classified as background evidence.

Despite the clarification in *Mahomed*, Mahoney *et al* suggest that relationship evidence is a 'common example where propensity evidence is admitted despite a lack of marked similarity with the offence being tried'.⁵²¹ Furthermore, this may extend to evidence of a defendant's violence or sexual abuse against other members of the family. In *R v R*⁵²², the defendant was charged with a series of sexual and physical assaults on his wife and daughters, and a single count of wilful ill-treatment of his intellectually disabled son. Notwithstanding the different nature of the latter count, the Court of Appeal upheld general cross-admissibility because 'it would be artificial and contrary to justice for the evidence [relating directly to the son] to be considered in isolation from other evidence which serves to expose the full dynamics of the family'.⁵²³

In *Perkins v The Queen*⁵²⁴, the Court of Appeal suggested that because its use 'will not normally depend upon ideas of coincidence [or propensity] ... the risk of unfair prejudice associated with such evidence is likely to be less than with orthodox similar fact evidence'.⁵²⁵ However, not all of the uses contemplated by the Court in *Perkins* appear to avoid propensity reasoning. To say that the relationship evidence has 'bearing on the background or the nature of the relationships between those involved' begs the question. So too does the suggestion that 'where violence erupts in the familial context the underlying family dynamics are relevant to explain why and in what context alleged incidents occurred, and the effect of them'.⁵²⁶ If, as the Court suggests, '[t]he rationale for its admission rests on it establishing hostility on the part of the defendant to the victim and the violence of its expression'⁵²⁷, this appears to entail propensity and/or coincidence reasoning.

As discussed above in §3.3, in *Mahomed*, relationship evidence adduced for a propensity purpose was held to have been wrongly admitted by a majority of the Supreme Court. The Court was reasonably careful in determining the precise purpose for which the evidence was adduced. The Court was not prepared to admit the evidence simply because it shed light on 'family dynamics'.⁵²⁸

⁵¹⁸ For example *R v R* [2008] NZCA 342.

⁵¹⁹ [2011] 3 NZLR 145 [60]–[61] (minority). However, this proposition is not necessarily wholly immune from qualification: *ibid* [52], [60]; Mathieson, 195–7.

⁵²⁰ *R v Daken* [2010] NZCA 212 [31].

⁵²¹ Mahoney *et al*, 227.

⁵²² [2013] NZCA 433.

⁵²³ *Ibid* [29].

⁵²⁴ [2011] NZCA 665.

⁵²⁵ *Ibid* [20].

⁵²⁶ *Ibid* [21].

⁵²⁷ *Ibid* [20].

⁵²⁸ See Mahoney *et al*, 228.

3.9 Acquittals

Evidence of a defendant's other misconduct may be admissible as propensity evidence, notwithstanding that the defendant was acquitted of charges arising from the other misconduct.⁵²⁹ There is no bar against the prosecution adducing such evidence. Admissibility is to be determined by the application of the s 43(1) balancing test. This approach, taken at common law, is unaffected by the EA.⁵³⁰

While the fact of acquittal *per se* does not prevent admission of the propensity evidence, the prosecution may still face obstacles. The Court hearing the current charges will be reluctant to invest time by simply retrying the earlier charges, calling and examining the witnesses that appeared at the earlier trial.⁵³¹ The Court will have added concerns if the passage of time means that the defendant will now have greater difficulty responding to the allegations of other misconduct than at the earlier trial.⁵³²

Courts will be more prepared to allow the admission of acquitted misconduct if the evidence relating to the misconduct is stronger than at the original trial. For example, in *T v The Queen*⁵³³, the Court considered that the alleged victim of the other misconduct, now four years older than at the previous trial, would have a greater capacity for describing the defendant's sexual misconduct towards her.⁵³⁴ In many cases, of course, there will be fresh evidence of the other misconduct, in the form of the present complainant's allegation that the defendant committed a similar sexual assault against him or her.

3.10 Severance

Where multiple complainants have made similar accusations against the defendant, the prosecution may combine charges on the same charging document. This raises related issues of cross-admissibility and severance. In New Zealand, these two questions are closely linked.

In *McGowan v The Queen*⁵³⁵, the Court of Appeal held that 'in order to consider severance fully, a decision on admissibility of the propensity evidence needed to be made'.⁵³⁶ In *R v O*⁵³⁷, the Court described the cross-admissibility determination as 'the starting point ... indeed the decisive point'⁵³⁸ for determining severance.

The procedural issue of severance may fall to be determined at an earlier point in time than cross-admissibility. In *L v The Queen*⁵³⁹, the defendant appealed against a pre-trial decision

⁵²⁹ *Fenemor v The Queen* [2012] 1 NZLR 298 [8]–[9]; Robertson 43.01(c).

⁵³⁰ *R v Degnan* [2001] NZLR 280 (CA), following *R v Z* [2000] 2 AC 483.

⁵³¹ *Pule v The Queen* [2013] NZCA 468 [15]–[16].

⁵³² *Than v The Queen* [2011] NZCA 25; *Blackburn v The Queen* [2011] NZCA 365; *Thomas v The Queen* [2011] NZCA 443.

⁵³³ [2014] NZCA 364.

⁵³⁴ *Ibid* [31].

⁵³⁵ [2011] NZCA 159.

⁵³⁶ *Ibid* [12], citing *R v van Wakeren* [2007] NZCA 509.

⁵³⁷ [2012] NZCA 475.

⁵³⁸ *Ibid* [20], citing *R v W* [1995] 1 NZLR 548, 555.

⁵³⁹ [2014] NZCA 31.

not to sever the counts. The Court of Appeal held that '[t]he strong likelihood that there will be some cross-admissibility is sufficient to dispose of the appeal'.⁵⁴⁰

In *M v The Queen*⁵⁴¹, the Court of Appeal said that while the 'general principle' is that different counts should be severed in the absence of cross-admissibility, the question is ultimately one of 'the requirements of justice'.⁵⁴²

[T]here may be circumstances where allegations are so connected in time and circumstance that it is necessary to try counts together in order to present a case on a realistic rather than an artificial basis. The discretion to grant severance is not likely to be exercised where it would be contrary to the requirements of justice to deny the jury the advantage of the full picture.⁵⁴³

In *Churchis v The Queen*⁵⁴⁴, the Court of Appeal held that:

The practicalities of the criminal process may be taken into account including the degree of connection between the charges; the impact of successive trials on the accused and witnesses; and the likely effect of publicity of the first and subsequent trials ... The discretion is wide. In the end, what is required is a balancing between the legitimate interests of an accused and the public interest in the fair and efficient despatch of the Court's business.⁵⁴⁵

3.11 Judicial directions

In *S v The Queen*⁵⁴⁶, the trial judge gave a direction that was considered to exacerbate rather than mitigate the risk of prejudice. The defendant was convicted of a series of offences against his wife and son. The trial judge had admitted evidence alleging similar physical and sexual abuse of his wife when the family lived in India prior to moving to New Zealand. The defendant denied the alleged earlier abuse. The Court of Appeal criticised the trial judge for warning the jury not to reason that 'just because he ... was a bad man in India that he is going to be a bad man here', indicating that '[t]he direction should have been expressed in a much more conditional sense'.⁵⁴⁷

In *R v Stewart*⁵⁴⁸, the Court of Appeal provided detailed advice on a seven-step jury direction regarding the appropriate use of propensity evidence.⁵⁴⁹ The Court indicated that trial judges should not 'follow a specific formula' but 'tailor the direction to the needs of the particular case'.⁵⁵⁰ Despite these qualifications, the Supreme Court in *Mahomed* questioned the 'utility and content' of this advice.⁵⁵¹ The Court's doubts partly stemmed from the fact that 'propensity evidence' in the EA was defined very broadly to include evidence adduced

⁵⁴⁰ Ibid [19]; discussed in Robertson, EA43.01(b).

⁵⁴¹ [2013] NZCA 239.

⁵⁴² Ibid [16].

⁵⁴³ Ibid [17]; discussed in Robertson, EA43.01(b).

⁵⁴⁴ [2014] NZCA 281.

⁵⁴⁵ The author has been unable to find this decision to provide a pinpoint reference; discussed in Robertson, EA43.01(b).

⁵⁴⁶ [2014] NZCA 478.

⁵⁴⁷ Ibid [29].

⁵⁴⁸ [2008] NZCA 429.

⁵⁴⁹ Ibid [32].

⁵⁵⁰ Ibid [41].

⁵⁵¹ [2011] 3 NZLR 52 [7] fn1 (majority), agreeing with [84] (minority).

for both propensity and non-propensity purposes. The *Stewart* direction appeared to only apply to evidence that relied on propensity reasoning.

In *Mahomed*, the minority suggested that a propensity evidence direction should:⁵⁵²

- (a) *Identify the evidence in question and explain why it has been led and the legitimate respects in which it might be taken into account by the jury.* We see no need for the judge to define ‘propensity’ ... In cases in which a demonstrated propensity could legitimately be a stepping stone in the reasoning process of the jury, that should be identified using concrete language addressed not to ‘propensity’ as an abstract concept, but rather specifically to the particular pattern of behaviour or thinking which is in issue. In most cases, the legitimate reasoning available to the jury will be based around coincidence or probability. That should be explained to the jury in simple and direct language addressed to the particular facts and what is said to be the implausible coincidence or how the evidence otherwise bears on the probability of the defendant being guilty. This is likely to require a discussion of the similarities involved in the conduct alleged. Where there are factors which may explain the postulated coincidence (for example, suggested collusion between the witnesses) that too should be addressed. We see no need for the judge to otherwise go through the s 43(3) criteria ... These criteria are addressed to the admissibility decision the judge must make and not the factual assessment which is for the jury.
- (b) *Put the competing contentions of the parties.*
- (c) *Caution the jury against reasoning processes which carry the risk of unfair prejudice associated with the propensity evidence.* This should usually be along the lines that the fact that the defendant has or may have offended on other occasions does not establish guilt and that the only legitimate reasoning process available to the jury is the one which has been outlined.

This advice on jury directions turns largely upon the how the admissible propensity evidence is to be used. In *Mahomed*, the minority adopted Spencer’s distinction between three types of cases.⁵⁵³ In ‘scenario one’, there is ‘practically irrefutable evidence that the defendant has a particular propensity’ such as a series of prior convictions. In ‘scenario two’, the defendant is circumstantially linked with a series of harms, as in, for example, the ‘brides in the bath’ case: the defendant married several times, and each time his new wife drowned soon after the wedding, enabling him to obtain a payout on life insurance.⁵⁵⁴ In ‘scenario three’, the defendant is the subject of a series of complaints from alleged victims.

The first scenario involving evidence of prior convictions clearly involves a sequential propensity inference – reasoning from the defendant’s proven misconduct, to a conclusion about his propensity for misconduct, to his guilt of the charged offence. However, ‘underpinning, or at least closely associated with, this approach, will usually be coincidence reasoning’.⁵⁵⁵ The strength of the prior conviction evidence can be expressed in terms of the ‘implausible coincidence that of all the people the complainant chose to make a false complaint about, someone who just happened to have a proclivity to act in the way alleged was picked’.⁵⁵⁶

⁵⁵² Ibid [95].

⁵⁵³ [2011] 3 NZLR 52 [85], citing Spencer [4.67]–[4.70].

⁵⁵⁴ *R v Smith* (1915) 11 Cr App R 229.

⁵⁵⁵ [2011] 3 NZLR 52 [85].

⁵⁵⁶ Ibid [51].

The coincidence reasoning in scenarios two and three is more obvious. For example, in scenario three, '[t]he evidence of each witness supports that of the others because of the unlikelihood [of the coincidence] that independent witnesses would make up similar stories'.⁵⁵⁷ The defendant's propensity only comes in at a later stage.

[T]he relevant propensity attributed to the defendant is not really a stepping stone on the way to a conclusion that the defendant is guilty. Instead the conclusion that the defendant has such a propensity is essentially a corollary – and thus down-stream – of a finding that the charges have been made out.⁵⁵⁸

This has a bearing on the risk of prejudice:

[S]cenario one involves the greatest and most obvious risk of unfair prejudice because the jury will inevitably conclude that the defendant is a person of bad character whereas in simple scenario two and three cases a conclusion that the defendant is a person of bad character will usually be a consequence of a conclusion that the defendant is guilty rather than a stepping stone to that conclusion.⁵⁵⁹

The minority referred to an English 'scenario two' case, where it was held that the trial judge had not been obliged to give a 'bad character' direction.⁵⁶⁰ However, the New Zealand minority noted that there is a risk of the jury adopting sequential propensity reasoning in scenarios two and three, particularly if the evidence relating to one or more of the other incidents is strong. For this reason 'it will generally be prudent to assume that there is a risk of unfair prejudice in all three scenarios' and to give a propensity direction accordingly.⁵⁶¹ However, where the prosecution evidence 'is not led primarily in reliance on coincidence or probability reasoning, a specific direction may well not be required'.⁵⁶²

The majority in *Mahomed* did not find it necessary to express a concluded view on judicial directions for propensity evidence.⁵⁶³ Mahoney *et al* suggest that as a result, 'the law remains somewhat unsettled'.⁵⁶⁴ The minority view was applied in *KM v The Queen*.⁵⁶⁵ Charges were joined relating to sexual offences against two daughters of the defendant's *de facto* partner. The prosecution did not seek cross-admissibility as propensity evidence, and no propensity direction was given. The defendant was convicted. On appeal, relying on the minority in *Mahomed*, the Court rejected the defendant's argument that a propensity direction should have been given, as there was no risk of propensity reasoning.⁵⁶⁶

It seems that it was open to the jury in *KM v The Queen* to combine the evidence relating to the different complainants as background evidence. The Court of Appeal quoted from *R v S*⁵⁶⁷: '[W]here allegations are interwoven or interconnected the desirability of presenting

⁵⁵⁷ Ibid [85].

⁵⁵⁸ Ibid.

⁵⁵⁹ Ibid [89].

⁵⁶⁰ Ibid [89]; *R v Wallace* [2008] 1 WLR 572.

⁵⁶¹ [2011] 3 NZLR 52 [89]; also at [91]–[92].

⁵⁶² Ibid [92].

⁵⁶³ Ibid [7], [17].

⁵⁶⁴ Mahoney *et al*, 236.

⁵⁶⁵ [2014] NZCA 120.

⁵⁶⁶ Ibid [21].

⁵⁶⁷ [1998] 3 NZLR 392 (CA).

the case on a realistic rather than an artificial basis will usually point against severance.’⁵⁶⁸ The evidence of the different complainants is available ‘to convey a realistic picture of the family environment and of the way the appellant treated his step-daughters’.⁵⁶⁹ However, the trial judge was not in error in failing to tell the jury about how it could use the evidence. ‘[T]he Judge directed the jury to consider each count separately. It was not suggested to the jury, by the Judge or anyone else, that they could use evidence of one charge in considering another ... [W]e are not satisfied that any unfairness arose as a result.’⁵⁷⁰

*Perkins v The Queen*⁵⁷¹ concerned relationship evidence. The Court of Appeal suggested that little would be required in terms of a judicial direction.

Its relevance as bearing on the background or the nature of the relationships between those involved will usually be sufficiently obvious as to not require particular explanation ... It is not always necessary to direct the jury in relation to such evidence. The risk of unfair prejudice associated with such evidence is likely to be less than with orthodox similar fact evidence and is usually addressed simply by the judge warning the jury in general terms about being influenced by prejudice or emotion.⁵⁷²

However, as noted above in §3.8, it is not clear that all of the various uses of the relationship evidence envisioned by the Court in *Perkins* did avoid propensity reasoning. Using the evidence to establish ‘family dynamics’ and ‘in what context alleged incidents occurred’⁵⁷³ might conceivably avoid propensity reasoning, although the Court did not substantiate this claim. However, using the evidence to ‘establish hostility on the part of the defendant to the victim and the violence of its expression’⁵⁷⁴ appears to entail propensity and/or coincidence reasoning.

In *Hannigan v The Queen*⁵⁷⁵, the defendant appealed against an arson conviction. The prosecution had produced evidence of the defendant’s previous attempts to set fire to his house. The defendant appealed on the ground that a propensity direction should have been given. The Court of Appeal, purporting to follow the minority in *Mahomed*, dismissed the appeal, holding that ‘the evidence was not led primarily in reliance on coincidence or probability reasoning. Therefore no specific direction was required.’⁵⁷⁶ But the reasoning is poor and contradictory. The Court of Appeal classified the case as ‘scenario two’, which, in *Mahomed*, was recognised as involving coincidence reasoning.⁵⁷⁷ Perhaps surprisingly, the Supreme Court refused leave to appeal, indicating that ‘[t]here was no good reason for the Judge to give a “propensity evidence” direction in the context of this trial’.⁵⁷⁸

⁵⁶⁸ Ibid 400.

⁵⁶⁹ Ibid.

⁵⁷⁰ [2014] NZCA 120 [25].

⁵⁷¹ [2011] NZCA 665.

⁵⁷² Ibid [20].

⁵⁷³ Ibid [21].

⁵⁷⁴ Ibid [20].

⁵⁷⁵ [2012] NZCA 133.

⁵⁷⁶ Ibid [22].

⁵⁷⁷ Ibid [20].

⁵⁷⁸ [2013] NZSC 41 [2].

New Zealand trial and appeal courts, like those in other jurisdictions, appear to have trouble understanding the inferential structure of coincidence and propensity evidence.⁵⁷⁹ However, they have recognised that there is no need for special principles regarding the standard of proof applicable to propensity evidence. ‘Individual items need not be proven beyond reasonable doubt before a valid conclusion of guilt can be reached.’⁵⁸⁰ The Court of Appeal in *R v Guo*⁵⁸¹, citing the High Court of Australia in *Shepherd v The Queen*⁵⁸² as well as New Zealand authority, held:

[F]rom the point of view of the jury, there was no need to make a specific and stand-alone finding ... that the appellant had [committed the other misconduct]. Approaching that issue on a stand-alone basis would have been illogical because [of] the more direct evidence relating to [the charged offence]. What was required of the jury was a holistic finding, based on the evidence as a whole, in relation to the [charged offence].⁵⁸³

4. United States of America

4.1 Context

For several reasons, this report will not go into as much detail with the law governing other-misconduct evidence in the United States (US). First, the comparative approach is less useful because the US approach to tendency and coincidence evidence is very different from that in Australia and other common law jurisdictions. As outlined below, US law could be considered to be at an earlier stage of development. On the face of it, the exclusionary rule still operates in an absolute fashion; propensity reasoning is still forbidden. US law is also extremely inconsistent; court practices frequently diverge from what appears to be the law. Other jurisdictions have recognised that the absolute prohibition on propensity reasoning is unsustainable and have developed a principled exception for propensity evidence where its probative value exceeds its prejudicial risk. The US courts have admitted probative propensity evidence while ostensibly maintaining the absolute prohibition, by turning a blind eye to the way in which the evidence is to be used.

A third reason for not attempting a comprehensive discussion of US evidence law is that its complex institutional structure – with numerous state jurisdictions and several federal jurisdictions – makes it difficult to provide a succinct statement of the law and its interpretation. Mueller and Kirkpatrick suggest the ‘mass of appellate opinions’ are ‘like pebbles on a beach (“as the sands of the sea”, as McCormick said) because every case is different, and yet many are like many others, and they can be seen one by one or as a huge mass, but there are few themes, little hard law, and few bright lines’.⁵⁸⁴ Similar statements have been made in other jurisdictions⁵⁸⁵; however, the polycentric nature of US criminal law heightens the difficulty.

⁵⁷⁹ See also Mahoney *et al*, 236. English, Canadian and US courts are similarly challenged: see §§1.10, 2.11 and 4.4.

⁵⁸⁰ Mahoney *et al*, 221, fn1550.

⁵⁸¹ [2009] NZCA 612 [49].

⁵⁸² (1990) 170 CLR 573.

⁵⁸³ [2009] NZCA 612 [50]. This passage contains a possible circularity, which the author has removed in the edit.

⁵⁸⁴ Mueller and Kirkpatrick, section 4.28.

⁵⁸⁵ See §§1.7, 1.11, 2.5 and 3.7.

Despite this, the US treatment of tendency and coincidence evidence still has some interesting lessons for Australia. The absolute prohibition on propensity reasoning in the US has been particularly difficult to maintain in the area of sexual offences. Courts have found ways of admitting the evidence, despite the prohibition, often by pretending that the evidence has a non-propensity use. Various jurisdictions, at common law and by legislation, have created ad hoc exceptions to the absolute prohibition for propensity evidence of sexual offences. Most notably, in the 1990s, statutory exceptions were introduced into the Federal Rules of Evidence: FRE 413–415.

The US experience, then, demonstrates the perceived strong value of other-misconduct evidence in child sexual assault cases, and a test of the wisdom and workability of developing specific categories of admissibility to facilitate the prosecution of child sexual assault.

4.2 Scope of the exclusion

US common law and statutory exclusionary rules bear a close resemblance to the early Australian common law principles expressed in *Makin v Attorney-General for New South Wales*:⁵⁸⁶

It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment *for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried*.⁵⁸⁷

Similar to this, for example, is FRE 404(b)(1), which states that ‘[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character’.

The exclusionary rule under FRE 404(b)(1) ‘bars not evidence as such, but a theory of admissibility’.⁵⁸⁸ Other-misconduct evidence cannot be admitted for use in propensity or character reasoning. The exclusionary rule prohibits the two-step inference – that is, from the defendant’s commission of other misconduct to the defendant’s possession of a propensity for misconduct, and from there to the defendant’s commission of the charged offence as an expression of that propensity.⁵⁸⁹ However, other-misconduct evidence adduced for a non-propensity purpose is not subject to the exclusionary rule.

4.3 Categories of admissibility

The exclusionary rule prevents other-misconduct evidence from being admitted for a propensity purpose. However, as FRE 404(b)(2) expressly recognises, evidence revealing a defendant’s other misconduct may be admitted for ‘another purpose’. The rule provides a non-exhaustive list: ‘such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident’. Corresponding lists exist at

⁵⁸⁶ [1894] AC 57 (PC); see §2.1.

⁵⁸⁷ Ibid 65 (emphasis added).

⁵⁸⁸ *US v Crowder* 141 F3d 1202 (DC Cir, 1996).

⁵⁸⁹ Mueller and Kirkpatrick, section 4.28.

common law. For example, in *People v Molineux*⁵⁹⁰, Judge Werner referred to a list of ‘recognised exceptions’ to the exclusionary rule.⁵⁹¹

Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

As Broun notes, some of these admissible categories are ‘phrased in terms of intermediate inferences sought to be drawn (such as plan or motive) while others are phrased in terms of ultimate facts (such as knowledge, intent or identity)’.⁵⁹²

On the face of it, these admissible categories are not true exceptions to the exclusionary rule. They are examples of types of evidence that supposedly lie beyond the scope of the exclusionary rule. Broun describes them as ‘quasi-exceptions’.⁵⁹³ They do not trespass on the absolute prohibition on propensity reasoning.

It is an interesting question why the US, unlike other common law jurisdictions, has maintained, in form anyway, the absolute prohibition. There is insufficient space to explore the question here in any detail, but the answer is probably to be found in the stronger historical attachment to constitutional rights in the US. While the US courts have described the dangers posed by evidence of a defendant’s other misconduct in similar terms to the courts of other common law jurisdictions⁵⁹⁴, US courts have also suggested that ‘the rule has constitutional underpinnings’.⁵⁹⁵ Given its full force, the exclusionary rule gives US defendants an absolute right not to be judged on the basis of their character. This has been viewed as a corollary of the presumption of innocence and an element of due process.⁵⁹⁶ The defendant ‘starts his life afresh when he stands before the jury’.⁵⁹⁷ In other common law jurisdictions the law has lost this strong moral dimension and moved towards a pragmatic instrumental balancing of the benefits of admission against the costs.

However, in practice, the attachment to the absolute prohibition of propensity reasoning in the US has proved unsustainable. Courts regularly admit other-misconduct evidence under the category headings without properly ensuring that the evidence does not entail

⁵⁹⁰ 168 NY 264 (NY, 1901).

⁵⁹¹ Ibid 293; see also ibid 335 (O’Brien J); 351 (Gray J). On one view, Lord Herschell also took this approach in *Makin v Attorney-General for NSW*, suggesting that evidence may be admissible ‘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’: [1894] AC 57, 65.

⁵⁹² Broun, 1031–2.

⁵⁹³ Broun, 1032.

⁵⁹⁴ Broun, 1031: ‘the dangers of prejudice, confusion and time-consumption outweigh the probative value’. Mueller and Kirkpatrick (section 4.28) focus on the ‘jury misuse’ of the evidence for prohibited propensity reasoning.

⁵⁹⁵ Broun, 1029; Mueller and Kirkpatrick, section 4.84; for example *US v Daniels* 770 F2d 1111, 1118 (DC Cir, 1985); *US v Enjady* 134 F3d 1427, 1430–34 (10th Cir, 1998).

⁵⁹⁶ For example *US v Daniels* 770 F 2d 1111, 1118 (DC Cir, 1985); Broun, 1030.

⁵⁹⁷ *People v Zackowitz* 172 NE 466, 468 (NY, 1930).

propensity reasoning. Despite ‘purportedly non-character theories, there are implicit propensity inferences’.⁵⁹⁸

4.4 General categories of admissibility in child sexual assault cases

The tendency of courts to admit other-misconduct evidence notwithstanding its potential reliance on propensity reasoning appears to be stronger in sexual abuse cases.

For example, properly applied, the non-character ‘plan’ category demands that the other misconduct and the charged offence should be so strongly connected as to demonstrate a ‘single continuing conception or plot’.⁵⁹⁹ The evidence should ‘support an inference that the defendant ... formed a plan or scheme that contemplated commission of the charged crime’.⁶⁰⁰ However, this category of admissibility has often been relaxed, particularly in sex offence cases. The ‘liberal standard to establish the existence of a common scheme or plan in sex crime cases ... does not focus on the existence of an overall scheme or plan in the defendant’s mind’.⁶⁰¹ This enables evidence of the defendant’s other child sexual assaults to gain admission simply on the basis of a degree of similarity with the charged offence. In *State v Davidson*⁶⁰², a ‘greater latitude’ rule was applied to allow the admission of a previous sexual touching of an adolescent girl, ostensibly to show a ‘plan’ to commit the more serious charged offence which was seemingly unrelated. In these ‘spurious plan cases’⁶⁰³ the ostensible basis of admission ‘often smacks of a thin fiction that merely disguises what is in substance the forbidden general propensity inference’.⁶⁰⁴

The admissible category of ‘identity’ evidence is strongly associated with the *modus operandi* theory. The theory is that the other-misconduct evidence and the charged offence display such striking similarities as to be considered to share the defendant’s ‘signature’, ‘hallmark’ or ‘calling card’.⁶⁰⁵ The other-misconduct evidence is not relied upon to demonstrate the defendant’s propensity for that kind of misconduct. Rather, it reveals the defendant’s distinctive *modus operandi*, which was also employed with the charged offence. *Modus operandi* evidence resembles trace evidence – the defendant’s *modus operandi* is comparable to the defendant’s fingerprint or DNA profile.⁶⁰⁶ Courts have recognised that the signature need not consist of a single shared unique feature; it may be the combination that is highly distinctive.⁶⁰⁷ Although a non-propensity theory, the *modus operandi* theory

⁵⁹⁸ Edward J Imwinkelreid, ‘An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-character Theory of Logical Relevance, the Doctrine of Chances’ (2006) 40 *University of Richmond Law Review* 419, 440, discussing Richard B Kuhns, ‘The Propensity to Misunderstand the Character of Specific Acts Evidence’ (1981) 66 *Iowa L Rev* 777, 803; see also, for example, David P Leonard, ‘In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character’ (1998) 73 *Indiana Law Journal* 1161, 1179; Kenneth J Melilli, ‘The Character Evidence Rule Revisited’ [1998] *Brigham Young University Law Review* 1547, 1569.

⁵⁹⁹ *People v Tassell* 36 Cal 3d 77 (1984), overruled in *People v Ewoldt* 7 Cal 4th 380 (1994).

⁶⁰⁰ Mueller and Kirkpatrick, section 4.35.

⁶⁰¹ *State v DeJesus* 288 Conn 418 (2008).

⁶⁰² 613 NW2d 606, 617 (Wis, 2000).

⁶⁰³ Mueller and Kirkpatrick, section 4.35.

⁶⁰⁴ *Ibid*; see also Leonard, section 9.4.2.

⁶⁰⁵ Broun, 1036; Mueller and Kirkpatrick, section 4.36; Leonard Chapter 13.

⁶⁰⁶ On predictive propensity evidence versus postdictive trace evidence, see in particular Chris W Sanchirico, ‘Character Evidence and the Object of the Trial’ (2001) 101 *Columbia Law Review* 1227, 1234–5, 1259–62.

⁶⁰⁷ Leonard, section 13.6.

maps onto propensity reasoning quite closely. Its strength depends on the same factors, such as the number of similarities, their unusualness, the frequency with which the *modus operandi* has been employed, and over what time frame it has been employed.

As Broun notes, ‘the courts tend to find distinctive similarities in sex cases more readily than in other situations’.⁶⁰⁸ Broun cites a case where the defendant was:

... singled out as rapist and killer of [an] eight-year-old girl by prior California conviction involving a 17-year old victim, where both bodies were found in remote areas with clothes removed, shoes placed side by side, blouses torn open in front, gagged with socks, hands tied behind back with articles of clothing, and indications of vaginal and oral sex.⁶⁰⁹

In most child sexual assault cases identity is not in issue. The issue tends to be commission, or whether the touching or other conduct was of a sexual nature (rather than innocent or accidental). Some jurisdictions have extended the *modus operandi* theory in sexual offence cases to address such issues.⁶¹⁰ Furthermore, there is authority that less similarity and specificity is required where the other-misconduct evidence goes to issues other than identity.⁶¹¹ As discussed above, it is difficult to understand why an admissibility test should apply more strictly to identity.⁶¹² It may be that in identity cases the other-misconduct evidence generally has more work to do because of the absence of other evidence. In sexual assault cases with commission or consent in issue, there is typically direct evidence from the complainant.

A further admissibility category covers evidence adduced to negate accident or mistake. In child sexual assault cases this has been used, for example, to rebut the defendant’s claim that he touched his daughter’s genitalia accidentally in the course of mock wrestling.⁶¹³ Recent cases involve charges of soliciting underage girls for sex over the internet, with evidence of the defendant’s prior sexual misconduct with other children being used to rebut the defence that the defendant did not know the girl’s age.⁶¹⁴ Mueller and Kirkpatrick note:

Very often this use of other crimes is troubling because in the end it usually involves a kind of particularised propensity or character inference ... The defendant harbored a criminal intent on a prior occasion when he was doing something that has common elements with what he was apparently doing on the occasion of the charged offence, so on the latter occasion he likely harbored the same intent ... (he did it before, so he is the sort who behaves that way and probably did it this time).⁶¹⁵

The prosecution may argue that the evidence relies upon coincidence reasoning, known in the US as ‘the doctrine of chances’⁶¹⁶, rather than propensity reasoning. The argument is that it is improbable, for example, that the defendant accidentally touched his daughter’s genitalia on so many separate occasions. Rejecting this improbable coincidence, the

⁶⁰⁸ Broun, 1036 fn27.

⁶⁰⁹ Broun, 1036 fn27, citing *State v Roscoe* 145 Ariz 212 (1984).

⁶¹⁰ Broun, 1036 fn27; for example *State v Huey* 699 P2d 1290 (Ariz, 1985).

⁶¹¹ Leonard, section 13.3 fn2; Mueller and Kirkpatrick, section 4.36; *US v Myers* 550 F2d 1036, 1045 (5th Cir, 1977); *State v Langley* 680 So2d 717, 721 (La Ct App, 1996).

⁶¹² See §2.6; see also Leonard, section 13.3 fn2.

⁶¹³ *State v Craig* 219 Neb 70 (1985).

⁶¹⁴ *US v Hensley* 574 F3d 384 (7th Cir, 2009); *US v Cherer* 513 F3d 1150 (9th Cir, 2008).

⁶¹⁵ Mueller and Kirkpatrick, section 4.34.

⁶¹⁶ *Ibid*; see also Leonard, section 9.4.2(b).

touching must have been deliberate. While still a little controversial, some US jurisdictions accept coincidence reasoning as a non-character theory.⁶¹⁷ The practical and conceptual difficulty of drawing the distinction has been commented on above.⁶¹⁸

The 'motive' category of admissible evidence has also been misused in some cases. Other-misconduct evidence may prove motive through non-propensity reasoning. For example, in a murder case, the prosecution theory may be that the defendant committed an earlier offence, the murder victim knew of this, and the defendant committed the charged murder to prevent the victim disclosing it.⁶¹⁹ However, in other cases the motive evidence consists of previous similar conduct by the defendant towards the complainant or victim – described in this report as relationship evidence. The use of this evidence then 'verges on ordinary propensity reasoning ... "motive" ... is just another word for propensity'.⁶²⁰ Broun cites cases where 'earlier acts of child molesting' have been introduced as motive evidence of this kind.⁶²¹

Another widely recognised admissibility category – one that does not expressly appear in the FRE 404(b)(2) or the *Molineux* lists above – covers evidence that provides background to or 'completes the story' of the charged offence. This concept is related to the obscure notions of *res gestae* and 'inexplicably intertwined evidence'⁶²², which have 'proved elastic and invited abuse'.⁶²³ Some jurisdictions have rejected this theory. In *US v Bowie*⁶²⁴, for example, the court held 'there is no general "complete the story" or "explain the circumstances" exception to Rule 404(b) in this Circuit ... and [the rule] should not be disregarded on such a flimsy basis'. Admissibility requires the evidence to be based upon some other non-propensity theory.

Broun expresses support for a 'narrow quasi-exception'. It should be available only:⁶²⁵

- (1) when reference to other crimes is essential to a coherent and intelligible description of the offense at bar, (2) when the incomplete story that the defendant would prefer leaves a gap that would frustrate 'the jurors' expectations about what proper proof should be'⁶²⁶, or (3) when the material in question is necessary to a fair understanding of the behavior of individuals involved in the criminal enterprise or the events immediately leading up to them.

⁶¹⁷ Mueller and Kirkpatrick, section 4.34. Broun, 1040. It is interesting to note the shift in position by Imwinkelreid on this, from opposition – in Edward J Imwinkelreid, 'The use of evidence of an accused's uncharged misconduct to prove mens rea: The doctrines which threaten to engulf the character evidence prohibition' (1990) 51 *Ohio State Law Journal* 575 – to support in Edward J Imwinkelreid, 'An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-character Theory of Logical Relevance, the Doctrine of Chances' (2006) 40 *University of Richmond Law Review* 419.

⁶¹⁸ See §§1.10, 2.4, 2.11 and 3.11.

⁶¹⁹ For example *US v Siegel* 536 F 3d 306 (4th Cir, 2008).

⁶²⁰ Broun, 1043; see also Leonard, section 8.5.3.

⁶²¹ Broun, 1043, fn50, citing *State v Wells* 289 Kan 1219 (2009); *State v Kirsch* 139 NH 647 (1995).

⁶²² Mueller and Kirkpatrick, section 4.33; Broun, 1054.

⁶²³ Mueller and Kirkpatrick, section 4.43.

⁶²⁴ 232 F3d 923, 929 (DC Cir 2000); see also *US v Green* 617 F3d 233 (3d Cir 2010); Andrew Todd Campbell, 'United States v Green: Rejecting the "inextricably intertwined" test when determining whether evidence is "intrinsic" or "extrinsic" under rule 404(b)' (2010) 34 *American Journal of Trial Advocacy* 459.

⁶²⁵ Broun, 1053–4.

⁶²⁶ *Old Chief v US* 519 US 172, 188 (USSC, 1997).

Notwithstanding Broun's suggestion to the contrary, these requirements do not preclude propensity reasoning.⁶²⁷ In a child sexual assault case, knowing that the defendant had committed other child sexual assaults and had a propensity for child sexual assault would make the complainant's account of an otherwise isolated assault more 'coherent and intelligible' and less 'frustrat[ing]', and would add to the jury's 'understanding of the [defendant's] behavior'. Mueller and Kirkpatrick suggest that the purpose of this category of admission is 'to complete a picture by providing context and meaning for the central events, not to paint other pictures of criminality or misbehavior'.⁶²⁸ But these purposes are not mutually exclusive. The former could be achieved by the means of the latter.⁶²⁹

4.5 Specific provision for admissibility in child sexual assault cases

As discussed in the previous section, courts have often admitted propensity evidence in child sexual assault cases by fitting them within one of the categories listed in FRE 404(b)(2) or a corresponding common law list. Often this has involved 'stretching to find a nonpropensity purpose'.⁶³⁰ However, some jurisdictions have created admissibility categories specifically for child sexual offence cases.

Over time and across jurisdictions these have been given various labels such as 'lewd disposition',⁶³¹ 'lustful disposition',⁶³² 'depraved sexual instinct',⁶³³ and 'paedophile exception'.⁶³⁴ They have also had various scopes of operation. In some jurisdictions the exception is limited to other alleged misconduct against the complainant⁶³⁵ or children within the same household,⁶³⁶ while other jurisdictions extend the exception's operation to other similar misconduct against other children.⁶³⁷ Originally these exceptions were created at common law, but more recently they have been given legislative form. Mueller and Kirkpatrick emphasise that even jurisdictions that have expressly rejected the exception for child sexual assault 'generally concede that other acts are to be admitted more liberally here than in other cases'.⁶³⁸

These specific admissibility categories are true exceptions to the exclusionary rule, expressly permitting evidence of a defendant's other misconduct to be used for a propensity purpose. This is apparent from the term 'lewd disposition', for example. Arizona Rule 404(c) provides for the admission of 'evidence of other crimes, wrongs, or acts ... if relevant to show that the defendant had a character trait giving rise to an *aberrant sexual propensity* to commit

⁶²⁷ Broun's use of the term 'quasi-exception' as opposed to 'true exception' suggests that he views this as a non-propensity theory. See *ibid* 1032.

⁶²⁸ Mueller and Kirkpatrick, section 4.43.

⁶²⁹ Compare problematic efforts of New Zealand's courts to identify non-propensity uses of relationship evidence: see §3.8.

⁶³⁰ Broun, 1047.

⁶³¹ For example *Burke v State* 624 P2d 1240 (Alaska 1980).

⁶³² For example *State v Parsons* 589 SE2d 226, 234 (W Va, 2003).

⁶³³ For example *Brackens v State* 480 NE2d 536 (Ind 1985).

⁶³⁴ For example *Flanery v State* 208 SW3d 187 (Ark, 2005).

⁶³⁵ For example *State v Searle* 125 Mont 467 (1952).

⁶³⁶ For example *State v Mohapatra* 880 A2d 802, 806 fn4 (RI 2005).

⁶³⁷ For example *State v Ferrero* 274 P3d 509, 511 (2012).

⁶³⁸ Mueller and Kirkpatrick, section 4.86, citing *State v Davidson* 613 NW2d 606, 617 (Wis, 2000).

the offense charged'.⁶³⁹ In *State v DeJesus*⁶⁴⁰, the Connecticut Supreme Court, referring to 'strong public policy reasons', recognised a 'limited exception to the prohibition on the admission of uncharged misconduct evidence in sexual assault cases to prove that the defendant had a *propensity to engage in aberrant and compulsive criminal sexual behavior*'.⁶⁴¹

Perhaps the most significant legislative exceptions to the exclusionary rule are FRE 413 and 414, for evidence of other sexual assaults and child molestation offences in criminal trials:⁶⁴²

Rule 413 Similar Crimes in Sexual Assault Cases

- (a) **Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant. ...

Rule 414 Similar Crimes in Child Molestation Cases

- (a) **Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant....

As Broun notes, '[b]oth the manner in which Congress adopted these rules and their content have been the subject of widespread criticism'.⁶⁴³ The US Judicial Conference, the American Bar Association and most academic commentators expressed opposition to the new rules, which were a political response to a series of high-profile child sexual abuse cases involving men with previous convictions for child molesting.⁶⁴⁴

A minority of commentators have offered support for admitting propensity evidence in sex offence cases.⁶⁴⁵ One justification, noted in §1.11, is that recidivism data, properly understood, shows that sex offenders display a high comparative propensity for reoffending. The argument is not simply that sex offenders have higher recidivism rates; indeed, the data on this is incomplete and uncertain.⁶⁴⁶ The point is that someone who has committed a prior sex offence is far more likely to commit a sex offence than someone without that history. The comparative propensity for sex offences is particularly high.⁶⁴⁷

⁶³⁹ Emphasis added.

⁶⁴⁰ 953 A2d 45 (2008).

⁶⁴¹ Ibid 49 (emphasis added).

⁶⁴² Note also FRE 415 which operates in civil trials.

⁶⁴³ Broun, 1048, citing numerous law journal articles at fn71.

⁶⁴⁴ Mueller and Kirkpatrick, section 4.83, citing critical law journal articles at fn5 and fn7; see also ibid section 4.85.

⁶⁴⁵ For example Roger Park, 'The Crime Bill of 1994 and the Law of Character Evidence: Congress was right about consent defense cases' (1995) 22 *Fordham Urban Law Journal* 271.

⁶⁴⁶ See Mueller and Kirkpatrick, sections 4.83 and 4.85. The data on recidivism of child sex offenders is likely to be particularly incomplete given low reporting rates and the practical and ethical difficulties with surveying children.

⁶⁴⁷ Mueller and Kirkpatrick, in section 4.83, criticise the comparative propensity approach, but they seem to misunderstand it. Contrary to their view, it does not depend upon a parallel being drawn between propensity reasoning and DNA profiling, and is not undermined by 'profound differences' between the two. See, for example, Redmayne, 35–41.

A second justification for admitting propensity evidence in sex offence cases is that there is a greater need in these cases to overcome the problem of significant under-enforcement.⁶⁴⁸ Acquaintance sexual assault is infrequently reported, and even if it is reported, there is often very little evidence available to the prosecution other than the complainant's testimony. In the face of the defendant's denial or claim of consent it can be especially difficult for the prosecution to prove guilt to the requisite degree.⁶⁴⁹ Some commentators question this. Broun, for example, suggests that 'many crimes are difficult to prove, and it is not clear why prosecutors should have special dispensations when it comes to proving sex crimes'.⁶⁵⁰ Sanchirico says 'compared to homicide, in which the victim is obviously not available to say anything at all, the "he said, she said" aspect of sex offenses seems more like a blessing than a problem'.⁶⁵¹ But these views are contradicted by empirical data of low reporting and enforcement rates for sexual offences.⁶⁵²

The argument that other-misconduct evidence should be more readily admitted in cases of special need has been accepted in other types of cases. For example, in prosecutions of uttering a false note or receiving stolen goods it can be difficult for the prosecution to rebut the defendant's claimed lack of knowledge. These offences have been recognised as forming 'distinct classes in which the intent is not to be inferred from the commission of the act and in which proof of intent is often unobtainable except by evidence of successive repetitions of the act'.⁶⁵³

The creation of specific islands of admissibility presents technical issues⁶⁵⁴ and potential cliff-edge effects. FRE 413 and FRE 414 provide detailed definitions of what constitutes a sexual assault offence and a child molestation offence respectively:

⁶⁴⁸ This was referred to in *Johnson v Elk Lake School District* 283 F3d 138, 155 (3d Cir, 2002), applying FRE 415; *US v Woods* 484 F2d 127, 133 (4th Cir 1973), a case involving serial infanticide by suffocation.

⁶⁴⁹ See, for example, Leonard, section 8.5.3; Mueller and Kirkpatrick, section 4.85.

⁶⁵⁰ Broun, 1050, fn78, citing Gregg, 'Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offences' (1965) 6 *Arizona Law Review*, 212, 235 (1965).

⁶⁵¹ Chris W Sanchirico, 'Character Evidence and the Object of the Trial' (2001) 101 *Columbia Law Review* 1227, 1301; see also Kenneth J Melilli, 'The Character Evidence Rule Revisited' [1998] *Brigham Young University Law Review* 1547, 1587.

⁶⁵² Conviction rates for homicide and sexual assault are similar, at around 70 per cent: Australian Bureau of Statistics, *Criminal Courts 4513: 2013–14* (2015), Table 12 (NSW). For obvious reasons, the police learn of most homicides, but only 10 or 20 per cent of sexual assaults of adults are reported. Reliable data for child victims is difficult to obtain but reporting rates for child victims are probably even lower: Cindy Tarczon and Antonia Quadara, 'The nature and extent of sexual assault and abuse in Australia' (Australian Centre for the Study of Sexual Assault, 2012), 2; Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* Report No 4523 (2004) 58; Australian Institute of Family Studies, 'The Prevalence of Child Abuse and Neglect', CFCA Resource Sheet, July 2013. Of the homicides police learn about, the vast bulk are solved. The Australian Institute of Criminology reports that 88.5 per cent of the homicides between 1 July 1989 and 30 June 2000 were solved by October 2001. In most homicide cases, 'solved' means the police have gathered sufficient evidence for prosecution: Jenny Mouzos and Damon Muller, 'Solvability Factors of Homicide in Australia: An Exploratory Analysis' (Australian Institute of Criminology, 2001) 2–3. The corresponding figure for sexual assault is far lower. In Australia, 180 days after a reported sexual assault, less than 25 per cent of investigations have led to a prosecution: Australian Bureau of Statistics, *Sexual Assault in Australia* (above), 74–5.

⁶⁵³ *Molineux* 168 NY 264, 298 (NY, 1901); see also *Commonwealth v Charles* 14 Phila Rep 663 (1871).

⁶⁵⁴ Both rules also include notice provisions: '(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary

Rule 413 Similar Crimes in Sexual Assault Cases

(d) Definition of “Sexual Assault”

In this rule ... “sexual assault” means a crime under federal law or under state law (as “state” is defined in 18 USC §513) involving:

- (1)** any conduct prohibited by 18 USC chapter 109A;
- (2)** contact, without consent, between any part of the defendant’s body — or an object — and another person’s genitals or anus;
- (3)** contact, without consent, between the defendant’s genitals or anus and any part of another person’s body;
- (4)** deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (5)** an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

Rule 414 Similar Crimes in Child Molestation Cases

(d) Definition of “Child” and “Child Molestation”

In this rule ...:

- (1)** “child” means a person below the age of 14; and
- (2)** “child molestation” means a crime under federal law or under state law (as “state” is defined in 18 USC §513) involving:
 - (A)** any conduct prohibited by 18 USC chapter 109A and committed with a child;
 - (B)** any conduct prohibited by 18 USC chapter 110;
 - (C)** contact between any part of the defendant’s body — or an object — and a child’s genitals or anus;
 - (D)** contact between the defendant’s genitals or anus and any part of a child’s body;
 - (E)** deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or
 - (F)** an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

These definitions need to be applied both to the charged offence and to the other-misconduct evidence. The other misconduct need not have resulted in charges or convictions for a sex offence or child molestation offence – the rules allow the admissibility of evidence that the defendant committed other offences. But there are various situations in which probative evidence of other misconduct will not fall within these definitions. First, the definitions do not cover sexual conduct or communications falling short of a criminal offence. The defendant’s grooming of potential victims may not be covered.⁶⁵⁵ Second,

of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.’

⁶⁵⁵ Mueller and Kirkpatrick, section 4.84; *US v Blue Bird* 372 F3d 989, 993 (8th Cir, 2004).

some offences with a clear sexual element may not fall within these definitions. There is authority, for example, that FRE 413 does not cover some child pornography offences.⁶⁵⁶

Third, some offences with a sexual element may not be charged as sexual offences. Consider the kind of situation presented by the Australian case, *Pfennig v The Queen*⁶⁵⁷, in which the defendant was charged with the murder of a boy. The prosecution case was that the killing followed an abduction and child sexual assault, and relied on evidence of the defendant having abducted and sexually assaulted another boy. Would FRE 414 apply to the murder trial? Mueller and Kirkpatrick, referring to this type of case, indicate that ‘the point is not free of doubt’ and, rather confusingly, suggest both that the Rules ‘invite a broad application rather than a narrow one’ and that a ‘more restrained reading is correct’.⁶⁵⁸

A particularly noticeable cliff-edge effect arises for FRE 414 in connection with the alleged victim’s age. ‘Child’ is defined as a person under 14 – a sexual offence against a person would fit within the definition of ‘child molestation’ if committed when the person is 13 and 364 days, but not if committed a day later (except in a leap year). However, the importance of this will generally be limited, since it seems that virtually all of the cases covered by FRE 414 will also be covered by FRE 413:

[S]exual assaults covered by Rule 413 include the crimes of child molestation that are referenced in Rule 414 (nearly all of them, at least) because they are sex crimes within the meaning of the descriptive language in Rule 413 (or at least *most* of them are), and of course a “child” in the description of crimes in Rule 414 is also a “person” under Rule 413.⁶⁵⁹

The Rules form exceptions to the FRE 404(b)(1) exclusionary rule rather than operating as broader inclusionary principles. Fitting within the rules does not guarantee admissibility, as the evidence may be subject to exclusion under other provisions, most importantly as discussed below FRE 403, the general discretion to exclude.⁶⁶⁰

4.6 Discretionary exclusion

Other-misconduct evidence that fits within one of the quasi- or true exceptions to the exclusionary rule may still be subject to exclusion by operation of the trial judge’s general discretion. This operates by reference to the familiar balancing test. For example, FRE403 provides that:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

⁶⁵⁶ *US v Courtright* 632 F3d 363 (7th Cir, 2011); but see Mueller and Kirkpatrick, section 4.84 fn47.

⁶⁵⁷ (1995) 182 CLR 461; see *State v Blom* 682 NW2d 578, 612 (Minn 2004).

⁶⁵⁸ Mueller and Kirkpatrick, section 4.84.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ This point was not entirely clear in the Rules, but in 2011 paragraph (c) was added, specifying ‘[t]his rule does not limit the admission or consideration of evidence under any other rule’: Mueller and Kirkpatrick, section 4.84.

Note that this version of the balancing test is asymmetric, leaning towards admission.⁶⁶¹ However, it is not clear that the asymmetry makes much of a difference, given that the quantities involved are diverse in nature, subject to discretionary judgement and not capable of mechanical comparison.⁶⁶²

Where evidence has been admitted for a non-propensity purpose, one of the prejudicial risks will be that the jury nevertheless uses it for the prohibited propensity purpose. Mueller and Kirkpatrick suggest that the risk of the jury wrongly employing propensity reasoning increases with the similarity between the other misconduct and the charged offence.⁶⁶³ While the trial judge, at the invitation of the defendant⁶⁶⁴, should instruct the jury to avoid the propensity reasoning⁶⁶⁵, US courts appear more sceptical than courts of other common law jurisdictions as to whether such instructions are efficacious.⁶⁶⁶

Other-misconduct evidence admitted in a child sexual assault case under FRE 413, FRE 414 or common law equivalent will often be expressly admitted for a propensity purpose. It may be excluded by operation of the general discretion. Mueller and Kirkpatrick note that some courts have indicated that a trial judge should be less prepared to exercise the discretion to exclude evidence that falls within FRE 413 and FRE 414.⁶⁶⁷ Mueller and Kirkpatrick, who oppose the specific admissibility categories, reject this view and suggest that the general discretion to exclude is ‘especially important’ in FRE 413 and FRE 414 cases.⁶⁶⁸

Broun lists a number of factors to be considered in determining whether the trial judge should exercise the discretion to exclude:

[T]he strength of the evidence as to the commission of the other crime⁶⁶⁹, the similarities between the crimes⁶⁷⁰, the interval of time that has elapsed between the crimes⁶⁷¹, the need for the evidence⁶⁷², the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.⁶⁷³

Mueller and Kirkpatrick mention ‘similarity to charged offense’, ‘specificity of the inference’, ‘wrongfulness and emotional impact of the act’, ‘proximity in time and intervening

⁶⁶¹ It resembles UEL s 135 (general exclusion, civil and criminal), rather than the symmetric test in s 137 (general exclusion, prosecution evidence), or s 101 (prosecution tendency and coincidence evidence) where the asymmetry leans towards exclusion.

⁶⁶² See also §§1.7, 1.11, 2.5, 3.7 and 4.1.

⁶⁶³ Mueller and Kirkpatrick, section 4.30, citing *US v Lavelle* 751 F2d 1266, 1278 (DC Cir 1985, citing Mueller and Kirkpatrick).

⁶⁶⁴ Mueller and Kirkpatrick, in section 4.30, indicate that ‘it is important to let defendants decide whether they prefer an instruction or think themselves better off with no special warning’.

⁶⁶⁵ *Kaufman v People* 202 P3d 542, 553 (Colo, 2009).

⁶⁶⁶ Broun, 1058 fn111 citing *US v Daniels* 770 F2d 1111, 1118 (DC Cir, 1985) among a number of authorities.

⁶⁶⁷ *US v Enjady* 134 F3d 1427, 1430–4 (10th Cir, 1998), with regard to FRE 413; Mueller and Kirkpatrick, section 4.84.

⁶⁶⁸ Mueller and Kirkpatrick, section 4.86.

⁶⁶⁹ *Com v Donahue* 519 Pa 532 (1988).

⁶⁷⁰ *US v Lee* 558 F3d 638, 647 (7th Cir, 2009).

⁶⁷¹ *Ibid.*

⁶⁷² *US v Morton* 50 A3d 476, 482 (DC Cir 1985).

⁶⁷³ Broun, 1059, additional citations in internal notes omitted.

circumstances', 'certainty that prior offense occurred' and 'possibility of minimizing prejudice'.⁶⁷⁴ These factors resemble those considered in other common law jurisdictions.⁶⁷⁵

The risk of the other-misconduct evidence rousing the jury's hostility will depend on the nature of the alleged other misconduct. Mueller and Kirkpatrick note that other sexual misconduct with children is likely to be particularly prejudicial in this respect.⁶⁷⁶ Even if the alleged other misconduct was not of a kind to cause immediate physical harm, psychological harm will often appear a likely consequence. Furthermore, child sexual abuse is directed against vulnerable victims, and carries inherent elements of abuse of power, betrayal of trust and deception. The risk of prejudice increases where the alleged other misconduct is worse than the charged offence.⁶⁷⁷

Mueller and Kirkpatrick note that prejudice may be mitigated by limiting the number of other offences that can be proved⁶⁷⁸, and controlling the form and content of the evidence to exclude particularly horrible details.⁶⁷⁹ While jury instructions will also seek to reduce the risk of prejudice, the US courts appears to place less faith in them than other jurisdictions.⁶⁸⁰

Where the other alleged misconduct is not the subject of a conviction, there may be concerns that the evidence will distract or confuse the jury, and consume time and money. Mueller and Kirkpatrick suggest that it may also lead to greater moral prejudice because the jury may take the view that the defendant has not yet been punished for the other misconduct.⁶⁸¹ (Although perhaps propensity reasoning from a prior conviction is more prejudicial than coincidence reasoning from evidence that merely links the defendant with another harm.⁶⁸²)

Given the various bases for admissibility of other-misconduct evidence in child sexual assault prosecutions across a wide range of US jurisdictions, it is difficult to generalise about the stringency with which the evidence is tested for probative value and prejudicial risk. In *Carpentino v State*⁶⁸³ for example, other-misconduct evidence was excluded because of differences in the age (eight and 11) and gender of the alleged victims, notwithstanding that they were brother and sister. In *Owens v State*⁶⁸⁴, the defendant was charged with the

⁶⁷⁴ Mueller and Kirkpatrick, sections 4.84 and 4.86.

⁶⁷⁵ See §§1.3, 2.4 and 3.4.

⁶⁷⁶ Mueller and Kirkpatrick, sections 4.30 and 4.84.

⁶⁷⁷ For example *US v Grimes* 244 F3d 375, 385 (5th Cir, 2001). This has been appreciated in other jurisdictions: see §§1.7 and 2.3.

⁶⁷⁸ Mueller and Kirkpatrick, section 4.84, citing *People v Falsetta* 986 P2d 182, 190 (Cal, 1999); *ibid* section 4.86, citing *US v Never Misses A Shot* 781 F3d 1017 (8th Cir, 2015).

⁶⁷⁹ Mueller and Kirkpatrick, section 4.84, citing *US v Peters* 133 F3d 933 (10th Cir, 1998); *ibid* section 4.86, citing *US v Granbois* 119 Fed App 35, 38 (9th Cir, 2004).

⁶⁸⁰ For examples of jury directions see, for example, *Manual of Model Jury Instructions for Criminal Courts of the Eighth Circuit* (2012) [2.08], [2.09] <http://federalevidence.com/pdf/JuryInst/8th.Crim.2012.pdf>. A direction was considered to lessen the prejudicial risk in *US v Crawford* 413 F3d 873, 874 (8th Cir, 2005).

⁶⁸¹ *Ibid* sections 4.84 and 4.86; see *State v Lawton* 667 A2d 50, 56 (Vt, 1995). But see also §2.9, suggesting doubt about whether the defendant committed the other misconduct may reduce the risk of prejudice.

⁶⁸² In the latter case, 'the propensity of the accused will usually only be established by the verdict. The risk of prejudice is much less': *Pfennig v The Queen* (1995) 182 CLR 461, 530 (McHugh J). See also *Mahomed v The Queen* [2011] 3 NZLR 52 [89], above §3.11.

⁶⁸³ 38 P3d 547, 553–5 (Alaska App, 2002).

⁶⁸⁴ 827 SW2d 911 (Tex App, 1992).

sexual assault of his daughter. The Court held that evidence of sexual assault against the complainant's sister at about the same age should have been excluded. '[N]o evidence was revealed at trial concerning any particularised details or unique qualities of the two acts other than ... general similarities'.⁶⁸⁵ However, in *State v Davidson*⁶⁸⁶, a case in which the defendant was charged with the sexual assault of his 13-year-old niece, the Court noted the 'greater latitude' applying to such cases and held that the defendant's conviction for sexual assault of a six-year-old girl was admissible, citing as similarities the vulnerability of the victims and the considerable risk of exposure. In *US v Tyndall*⁶⁸⁷, a sexual assault of a 67-year-old woman was held to be admissible in relation to charges for a sexual assault on a 13-year-old girl, with the Court referring to the 'strong legislative judgment' favouring admissibility of evidence of sexual offences.

4.7 Standards of proof

Some courts apply a standard of proof to other-misconduct evidence at the admissibility stage or the proof stage. The particular standard varies between jurisdictions, 'ranging from "sufficient ... to support a finding by the jury"⁶⁸⁸ to "a preponderance"⁶⁸⁹, to "substantial",⁶⁹⁰ to "clear and convincing"⁶⁹¹'.⁶⁹² If these standards are satisfied, other-misconduct evidence may be admitted even though the defendant has previously been acquitted on charges relating to the other misconduct.⁶⁹³

Sometimes courts inappropriately apply quite high standards of proof to coincidence evidence. For example, in the murder case *Tucker v State*⁶⁹⁴, the defendant had claimed no knowledge of how the victim, who died from a gunshot, had ended up in the defendant's home. The defendant claimed to have simply found the victim's body there when he woke up in the morning. The Nevada Supreme Court held that evidence that on another occasion the defendant had woken to find another bullet-ridden corpse in his home with no idea how it got there was inadmissible because the prosecution could not provide 'plain, clear and convincing evidence that the defendant committed the [other] offence'. Broun comments that 'this is wrong'.⁶⁹⁵ Coincidence reasoning was being employed to negate the claim that this was an accident and '[t]he whole point of the no-accident theory is to aggregate events that are individually inconclusive but collectively compelling'.⁶⁹⁶ *State v Pitt*⁶⁹⁷ is open to the same criticism. The defendant was charged with child sexual abuse. The State relied on evidence that the defendant had committed other acts of sexual abuse of the complainant and another alleged victim. The Court held that the 'doctrine of chances' was only available

⁶⁸⁵ Ibid 915.

⁶⁸⁶ 613 NW2d 606, 617 (Wis, 2000).

⁶⁸⁷ 263 F3d 848, 849 (8th Cir, 2001); see also *US v Horn* 523 F3d 882, 888–9 (8th Cir, 2008).

⁶⁸⁸ *Huddleston v US* 485 US 681 (USSC 1988).

⁶⁸⁹ *US v Leonard* 524 F2d 1076m 1090–1 (2d Cir 1975).

⁶⁹⁰ *People v Albertson* 145 P 2d 7, 20–22, 30–32 (1944).

⁶⁹¹ *US v Lavelle* 751 F2d 1266, 1276 (DC Cir, 1985).

⁶⁹² Broun, 1055, further internal citations omitted.

⁶⁹³ *Dowling v US* 493 US 342 (USSC 1990); Mueller and Kirkpatrick, section 4.31; Broun, 1055; both noting authorities the other way.

⁶⁹⁴ 412 P 2d 970, 972 (1966).

⁶⁹⁵ Broun, 1040 fn39.

⁶⁹⁶ Ibid.

⁶⁹⁷ 293 P3d 1002 (Or, 2012).

if ‘the jury [is] instructed not to consider the evidence from this point of view until they find the [other misconduct] to have been done’.⁶⁹⁸

Conclusion

This report has surveyed the law governing tendency and coincidence evidence in child sexual assault trials in four other common law jurisdictions. One of the points made by courts and commentators in each of the jurisdictions is that admissibility decisions are highly discretionary and fact-specific, making it difficult to generalise.⁶⁹⁹ While this is true to a degree, some general points flow from this comparative survey.

Child sexual assault cases are often particularly difficult to prosecute due to a lack of evidence supporting the complainant’s testimony. Medical, forensic or opportunity evidence may once have been available, but is often lost through the victim’s understandable delay in reporting the offence. Evidence of a defendant’s other sexual assaults can be particularly valuable in these cases, but it may be subject to exclusion. Traditionally, common law jurisdictions exclude other-misconduct evidence due to the risk that it may prejudice the jury against the defendant. However, there is scope for this evidence to be admitted if it can satisfy the admissibility test.

The common law admissibility test in Canada and the statutory admissibility test in New Zealand require that the probative value of the evidence outweigh its prejudicial risks.⁷⁰⁰ Both jurisdictions recognise that other-misconduct evidence carries the risk of both reasoning prejudice (confusion, distraction and misinterpretation) and moral prejudice (failing to give the defendant the benefit of a reasonable doubt out of repugnance).⁷⁰¹ The two jurisdictions also broadly agree on the features that give the other-misconduct evidence its probative value, the main ones being the frequency of the alleged other misconduct, the similarity with the charged misconduct, the distinctiveness of the similarities, and proximity with the charged misconduct.⁷⁰²

These factors go to the strength of the connection between the other misconduct and the charged offence. Both jurisdictions also recognise that the assessment is contextual, and that the other-misconduct evidence may be valued depending on how it fits with the prosecution case.⁷⁰³ In effect, the other-misconduct evidence can derive support for other prosecution evidence. This is an important consideration in child sexual assault cases where the other-misconduct evidence may derive considerable support from the direct testimony of the complainant.

Despite the broad similarity between the principles in Canada and New Zealand, there is a significant difference in the way the principles are applied to child sexual assault cases. In New Zealand, courts view child sexual assault as inherently unusual, and as a consequence, evidence of other child sexual assaults is generally viewed as sufficiently probative to gain

⁶⁹⁸ Ibid 1009, quoting *State v Leistiko*, 352 Or 172, 184 (2012).

⁶⁹⁹ §§1, 1.11, 2.5 and 3.7.

⁷⁰⁰ §§2.2 and 3.2.

⁷⁰¹ §§2.3 and 3.6.

⁷⁰² §§2.4 and 3.4.

⁷⁰³ §§2.4 and 3.4.

admission without the other assaults and the charged assault sharing any distinctive features.⁷⁰⁴ Canadian courts, it appears, do not view child sexual assault as inherently unusual, and require that the other misconduct and charged offence are unusual in similar respects before the other-misconduct evidence can gain admission.⁷⁰⁵

The law in England and Wales has diverged significantly from the common law. While bad character evidence is still subject to exclusion, the CJA makes propensity evidence presumptively admissible.⁷⁰⁶ In practice, the prosecution faces a slight hurdle in that the Court must establish that the evidence is capable of demonstrating a propensity that is relevant to the question of whether the defendant committed the charged offence.⁷⁰⁷ However, the English courts consider that having regard to its nature, evidence of other child sexual assaults generally has the requisite capacity to gain admission.⁷⁰⁸

The US exclusionary rule lies at the other end of the spectrum. On its face, the US exclusion operates as an absolute prohibition on propensity reasoning.⁷⁰⁹ However, in practice the courts regularly allow evidence of other assaults on the (frequently artificial) basis that the evidence is relevant on a non-propensity basis.⁷¹⁰ A number of jurisdictions – including the federal courts – have, with greater transparency, created express statutory or common law exceptions to the absolute exclusion so that evidence of other child sexual assaults is admissible and available for propensity reasoning.⁷¹¹ US law is rather messy and does not provide a good model for law reform, but it does provide a demonstration of the tension and distortions that can be generated when evidence law seeks to exclude such valuable evidence of an under-enforced criminal offence.

In addition to the general exclusionary rule and admissibility tests, this report has considered several more specific principles that may apply to child sexual assault cases depending upon the form of the other-misconduct evidence. Often in child sexual assault cases, the evidence is in the form of the testimony of other alleged victims. Whereas the prosecution will rely upon the improbability of the various witnesses telling similar lies, the defendant often counters that the similarities are the result of joint concoction or unwitting influence between the alleged victims. A key legal issue is how the defence argument is treated. Generally, witness credibility is left as an issue for the jury; however, in New Zealand and Canada the credibility of other alleged victims is treated as an admissibility issue for the trial judge.⁷¹² In England under the CJA, the risk of contamination is not treated as an admissibility issue but may provide a basis for the trial judge to direct an acquittal or order a retrial.⁷¹³

In other cases, the prosecution may seek to prove the defendant's other sexual assaults by adducing evidence that the defendant has prior convictions. Evidence that the defendant is

⁷⁰⁴ §3.4.

⁷⁰⁵ §2.6.

⁷⁰⁶ §1.2.

⁷⁰⁷ Ibid.

⁷⁰⁸ Ibid.

⁷⁰⁹ §4.2.

⁷¹⁰ §4.3.

⁷¹¹ §§4.4 and 4.5.

⁷¹² §§2.7 and 3.5.

⁷¹³ §1.4.

a convicted paedophile (rather than just an alleged paedophile) may carry a greater risk of moral prejudice; however, to the extent that convictions avoid the complex credibility issues presented by allegation evidence, the risk of reasoning prejudice may be reduced. Of course, notwithstanding the convictions, the defendant may dispute having committed the other misconduct. However, the defendant's efforts may be stymied. Canada and England provide legislative procedures facilitating the proof of other misconduct through evidence of prior convictions.⁷¹⁴

What if the other alleged assaults were the subject of previous proceedings resulting in acquittals? In Canada, the prosecution is estopped from adducing evidence that would call into question the correctness of the acquittals.⁷¹⁵ In England and New Zealand, on the other hand, the estoppel doctrine has no application. Indeed in England, the allegations will be presumed to be true even if it appears they were not believed at the previous trial.⁷¹⁶ In New Zealand, while there is no estoppel, the courts may be reluctant to allow the prosecution to effectively retry the previous charges, particularly if there is no further evidence supporting the earlier allegations.⁷¹⁷ Of course, in many cases, the evidence of the other misconduct will be stronger than at the previous trial because it is supported by the present complainant's evidence that the defendant committed a similar assault against him or her.

Development of the law governing tendency and coincidence evidence should be informed by a proper understanding of the structure and logic of the relevant inferences. As mentioned, US courts frequently mischaracterise other-misconduct evidence as deriving relevance from non-propensity (or non-character) theories. To a significant extent this may be a result of the unviable absolute prohibition on propensity reasoning in the US system. However, other jurisdictions have displayed similar confusion. Courts have suggested that other-misconduct evidence may be admitted more readily or that it requires a less careful jury direction because it involves coincidence reasoning or merely provides background.⁷¹⁸ But their claim that propensity reasoning is absent is often poorly reasoned and unpersuasive. Another questionable line of English, Canadian and US authority requires that juries should be directed that they must be satisfied, to the criminal standard in some cases, that the defendant committed the other misconduct before using the other-misconduct evidence to infer the defendant's guilt of the charged offence.⁷¹⁹ As other courts and commentators have recognised, this is contrary to the cumulative logic of circumstantial evidence, particularly where the prosecution relies on coincidence reasoning to combine evidence that is 'individually inconclusive but collectively compelling'.⁷²⁰

Whether Australia reforms its laws governing tendency and coincidence evidence – and the direction those reforms may take – will be informed by policy choices. Drawing on the law of other comparable jurisdictions, this report provides a range of possible directions for

⁷¹⁴ §§1.3 and 2.9.

⁷¹⁵ §2.9.

⁷¹⁶ §1.6.

⁷¹⁷ §3.9.

⁷¹⁸ §§1.10, 2.8, 2.11, 3.8, 3.11, 4.3 and 4.4.

⁷¹⁹ §§1.10, 2.11 and 4.7.

⁷²⁰ Broun, 1040 fn39.

reform, together with assessments as to their workability and potential impact on child sexual assault prosecutions.

Sources

To gain a current overview of the law of the four foreign jurisdictions, I drew heavily on several leading evidence texts from each jurisdiction. I chose these sources because they had a recent publication date; offered good coverage of the issues around tendency and coincidence evidence; and were recognised as authoritative. Evidence texts for each jurisdiction are listed below, together with additional notes on how they were chosen.

England and Wales

I drew heavily on two monographs focusing on the English law governing evidence of character in the criminal trial – one fairly recent, the other published in 2015. Both authors are highly respected. Mike Redmayne, until his untimely death in 2015 was a professor at London School of Economics. JR Spencer is a professor at Cambridge University Faculty of Law. Spencer was involved in training judges to bring them up to speed with the new legislation (the CJA), which led to the development of this commentary. I also used the highly respected text on criminal evidence law by Professor Paul Roberts of Nottingham University Law School and Professor Adrian Zuckerman of Oxford University. These three texts were obvious choices because their narrow focus meant that they had more extensive treatments of the relevant law. I then chose Phipson as a more general text because it was extremely current and included extensive coverage of this area of law. The contributor of the ‘bad character’ chapter, Professor Peter Mirfield of Oxford University, editor of the *Law Quarterly Review*, kindly provided me with an advance copy of his latest supplement.

JR Spencer, *Evidence of Bad Character* (2nd ed, Hart Publishing, 2009)

Mike Redmayne, *Character in the Criminal Trial*, (OUP 2015)

Paul Roberts and Adrian Zuckerman, *Criminal Evidence*, (2nd ed, OUP, 2010)

Hodge Malek (Gen Ed), Peter Mirfield (Ed), *Phipson on Evidence* (Sweet and Maxwell, 18th ed, 2013, 2015 supplement)

Canada

S Lederman, A Bryant and M Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada* (4th Ed, LexisNexis, 2014)

D Paciocco and L Suesser, *The Law of Evidence* (7th ed, Irwin Law Inc, 2015)

R Delisle, D Stuart, D Tanovich and L Dufraimont, *Evidence: Principles and Problems* (10th ed, Carswell, 2012)

Paciocco *et al* and Lederman *et al* appear to be the most authoritative evidence texts. Both have been cited frequently by the SCC of Canada over the last 15 years (10 and nine times respectively). Delisle *et al* is more of a teaching text with case extracts and commentary, although it also has five SCC citations. It is prescribed by many leading Canadian law schools.

New Zealand

Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012)

Don Mathieson (ed), *Cross on Evidence* (9th Ed, LexisNexis, Wellington, 2013)

Bruce Robertson (ed), *Adams on Criminal Law – Evidence* (online looseleaf ed, Brookers, accessed September 2015)

Richard Mahoney, Elisabeth McDonald, Scott Optican and Yvette Tinsley, *The Evidence Act 2006 Act and Analysis* (3rd ed, Brookers, Wellington, 2014)

Because New Zealand is a fairly small jurisdiction it was not necessary to be selective in my choice of evidence law texts. I was able to consult all texts with recent editions. (I did not consider Chris Gallavin, *Evidence* (LexisNexis, Wellington, 2008) as it is out of date.)

United States

I used three leading evidence law texts. McCormick is currently the most widely cited, authoritative and influential evidence text. One of the contributing authors is Edward Imwinkelreid, probably the leading US commentator on ‘bad character’ evidence. Mueller and Kirkpatrick is the most widely cited text on the FRE, and also has the advantage of being available in an updated online version. Wigmore has historically been one of the most widely respected legal texts in the world in any area of law. While it is less widely cited these days, it has an extensive section dealing with ‘bad character’ evidence – authored by David Leonard, one of the leading commentators in this area – and is kept up to date online.

Kenneth S Broun (general ed), *McCormick on Evidence* (7th ed, Thomson West, St Paul, 2013)

Christopher B Mueller and Laird C Kirkpatrick, *Federal Evidence* (Westlaw database, updated June 2015)

David P Leonard, *The New Wigmore, A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* (Westlaw, current through the 2015 cumulative supplement)

