Dalhousie Law Journal

Volume 5 | Issue 2 Article 3

5-1-1979

The Problem of Similar Fact Evidence

C. R. Williams

C. R. Williams*

The Problem of Similar Fact Evidence

Similar fact evidence raises in a particularly acute form the conflict between two competing principles in the law of evidence. On the one hand, the principle that evidence of high probative value ought to be admitted. On the other, the principle that in criminal trials evidence possessing a significant potential for prejudice ought, in the interests of fairness, to be excluded.

The expression "similar fact evidence" is here used broadly to refer to all evidence which shows that on some other occasion the accused acted in a way more or less similar to the way in which the prosecution alleges he acted on the occasion which is the subject of the present charge. Such evidence is, clearly, frequently of great probative value. Equally, such evidence constitutes the example *par excellence* of evidence possessing a potential for prejudice.

The purpose of the present article is to re-examine the English and Commonwealth case law dealing with the admissibility of similar fact evidence, with a view to showing the manner in which these two competing principles interact.

I. *The Rule in Makin* v. *Attorney-General for New South Wales*

The starting point for any discussion of the subject of similar fact evidence must be the decision of the Privy Council in *Makin* v. *Attorney-General for New South Wales*.[1]

The accused, a husband and wife, were charged with the murder of a baby. Its body was found buried in their garden, and they were proved to have agreed to adopt it in return for payment of a small sum by its parents. The defence of the accused was that the child had died through natural causes, and that their sole crime was to have buried it irregularly. The prosecution's case was that the child had been killed by the Makins pursuant to a scheme by which they took charge of infants in return for payments to be used for the infants care; then killed the infants and retained the sums paid. In support of this case the prosecution led evidence that the bodies of

*B. Juris., LL.B. (Hons.) (Monash), B.C.L. (Oxon.), Barrister-at-Law (Vic.), Senior Lecturer in Law, Monash University, Formerly Visiting Professor, Osgoode Hall Law School.

1. [1894] A.C. 57

twelve other infants had been discovered in the grounds of premises occupied at various times by the Makins, and that several of these infants had been placed in the care of the Makins in return for payment of a small sum. The accused were convicted and appealed unsuccessfully to the Privy Council. The Privy Council held that the evidence had been properly admitted to establish that the baby's death was the result not of natural causes, but of the conduct of the Makins.

Delivering the judgment of their Lordships, Lord Herschell L.C. stated:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the 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. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.[2]

This statement has been repeated in most of the subsequent cases on the subject, and its authority never doubted. In the most recent decision of the House of Lords dealing with similar fact evidence[3] Lord Morris stated that Lord Herschell's words "have always been accepted as expressing cardinal principles"[4], and Lord Hailsham said "I do not know that the matter can be better stated than it was by Lord Herschell."[5] Lord Salmon expressed himself even more strongly stating:

> The principles upon which such evidence should be admitted or excluded are stated with crystal clarity in the celebrated passage from the judgment delivered by Lord Herschell L.C. in *Makin* v. *Attorney-General for New South Wales* [1894] A.C. 57, 65. I doubt whether the learned analyses and explanations of that passage to which it has been subjected so often in the last 80 years add very much to it.[6]

---

2. *Id.* at 65
3. *D.P.P.* v. *Boardman*, [1975] A.C. 421; [1974] 3 All E.R. 887
4. *Id.* at 438 [1974] 3 All E.R. at 892
5. *Id.* at 453 [1974] 3 All E.R. at 905
6. *Id.* at 461 [1974] 3 All E.R. at 912

However, if Lord Herschell's formulation is examined it will be seen to contain an internal logical contradiction which would appear to render it unworkable.[7] The first sentence states a rule of exculsion. The second sentence states a rule of inclusion, but a rule of such width as to render the rule of exclusion of no effect. It is not possible to say that evidence of a particular class is inadmissible, and then to say that such evidence is admissible "if it be relevant to an issue before the jury". To be admissible any item of evidence must be relevant to an issue before the jury. If evidence relevant to an issue before the jury is to be admissible notwithstanding the exclusionary rule, then the exclusionary rule is of no effect.

Broadly, three approaches have been adopted to the problem of giving a workable meaning to Lord Herschell's formulation.

1. *A Rule of Exclusion With Exceptions*

The first approach is to state that there is a general rule requiring the exclusion of similar fact evidence. This rule is stated in the first sentence of Lord Herschell's formulation. To this rule of exclusion however, there are a number of exceptions. It is to the class of exceptions that the second sentence of Lord Herschell's formulation refers. The two exceptions mentioned (cases where the evidence bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, and cases where the evidence rebuts a defence which would otherwise be open to the accused) were not intended to be exhaustive of the classes of case where relevant similar fact evidence may be admitted. It is now recognised that there are other classes of case where such evidence may be admissible, and further classes may be developed.[8] The most commonly listed classes of exception are 1) To Prove Identity, 2) To Prove Knowledge or Intent, 3) To Rebut a Defence of Mistake or Involuntary Conduct, 4) To Establish System, 5) To Rebut a Defence of Innocent Association.

Such an understanding of Lord Herschell's formulation has often

---

7. The two sentences of Lord Herschell's formulation constitute an example of what Professor Julius Stone has termed "Legal Categories of Competing Reference." *Legal System and Lawyers' Reasoning* (Sydney: Maitland Publications Pty. Ltd., 1964) at 248 - 52

8. *Thompson* v. *The King*, [1918] A.C. 221, at 237 (H.L.); *Harris* v. *D.P.P.*, [1952] A.C. 694, at 705 (H.L.); *MacDonald* v. *Canada Kelp Co. Ltd.* (1973), 39 D.L.R. (3d) 617 at 625 (B.C.C.A.); *R.* v. *Schell and Paquette* (1977), 33 C.C.C. (2d) 422 at 426-7 (Ont. C.A.).

been adopted by the courts,[9] and it is the approach taken in many of the textbooks on evidence.[10] The difficulty with this approach is that it tends to encourage an overly simplistic view of the question of the admissibility of similar fact evidence. When faced with a particular case its adherents often simply ask whether the case fits neatly within one of the established categories. If it does the evidence will usually be admitted; if it does not the evidence will usually be rejected. It is submitted that if such a procedure is adopted, the true factors which ought to determine whether an item of similar fact evidence is to be admitted or rejected are being largely ignored.

2. *Relevance Via Propensity and Relevance Other than Via Propensity*

This second approach treats as crucial the distinction between evidence which is relevant only as establishing a propensity or disposition on the part of the accused to commit acts similar in nature to those acts constituting the subject matter of the crime charged, and evidence which possesses a relevance other than by establishing such a propensity or disposition. The words "propensity" and "disposition" are here treated as equivalents. If the evidence is relevant only via propensity it is excluded by the first sentence of Lord Herschell's formulation. If the evidence possesses

---

9. *E.* g. *R.* v. *Bond*, [1906] 2 K.B. 389 at 398, 414 (C.A.); *Harris* v. *D.P.P.*, [1952] A.C. 694 (H.L.); *R.* v. *Horwood*, [1969] 3 All E.R. 1156, at 1158.

10. *Phipson on Evidence* (12th ed. London: Sweet and Maxwell, 1976) Ch. 11; P.K. McWilliams, *Canadian Criminal Evidence* (Canada Law Book Limited, 1974) Ch.11; *McCormick on Evidence* (2nd. ed. St. Paul: West Publishing Co., 1972) at 447-54; J. A. Gobbo, *Cross on Evidence* (Australian ed. Sydney: Butterworths, 1970) at 369-411; Rupert Cross, *Evidence* (3rd ed. London: Butterworths, 1967) at 292-324. In the fourth edition of his book Professor Cross has altered the emphasis of his approach, see *infra*, note 21.

This was in substance the approach taken by the Canadian Law Reform Commission in drafting the proposed federal Evidence Code. Section 17(1) provides:

> In criminal proceedings, evidence tendered by the prosecution of a trait of character of the accused that is relevant solely to the disposition of the accused to act or fail to act in a particular manner is inadmissible . . . . .

Section 18 provides:

> Nothing in section 17 prohibits the admission of evidence that a person committed a crime, civil wrong or other act when relevant to prove some fact other than his disposition to commit such act, such as evidence to prove absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

a relevance other than via propensity it is admissible as falling within the second sentence of Lord Herschell's formulation.[11]

If the evidence possesses a relevance other than via propensity it is admissible notwithstanding the fact that it also possesses a relevance via propensity. Indeed, by definition similar fact evidence will always possess some relevance via propensity. In this context what Wigmore termed the doctrine of "multiple admissibility" is applicable. He wrote:

> *. . . when an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not indadmissible because it does not satisfy the rules applicable to it in some other capacity and because the jury might improperly consider it in the latter capacity.*[12]

It is only if the evidence possesses no substantial relevance other than via propensity that it is inadmissible as falling within the first limb of Lord Herschell's formulation.

The expressions "relevance via propensity" and "relevance other than via propensity" require explanation. Assume that the accused is charged with burglary. Evidence that the accused on some previous occasion broke into another house is, without more, inadmissible. It is inadmissible because it shows no more than that the accused has a propensity for dishonesty, or, at most, a propensity for burglary. Assume however that at the scene of the second burglary an article left by the burglar is found. Assume further, that it is established that this article was taken from the first house which was burgled. When the facts are changed in this way, evidence that the accused committed the first burglary becomes relevant in a quite different way to show he committed the second burglary. The evidence now possesses a relevance other than via propensity. The evidence is relevant in the same sort of way as evidence that a wallet honestly acquired and belonging to the accused was discovered at the scene of the second burglary.

The evidence does, of course, still possess a relevance via propensity; it tends to show that the accused has a propensity for burglary. This latter relevance may constitute a reason for its exclusion by the trial judge in the exercise of his discretion. Because

---

11. This distinction forms the basis of many academic accounts of the similar fact rule. See in particular Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England* (1933), 46 Harv. L.R. 954; *Wigmore on Evidence* (3rd. ed. Boston: Little Brown and Co., 1940) Volume 1 at 710-22

12. *Wigmore on Evidence, id.* at 300

of the risk that prejudicial evidence may be admissible as possessing some slight relevance other than via propensity, proponents of this interpretation of Lord Herschell's formulation place considerable emphasis on the discretion which, in English law at least, the trial judge has to reject legally admissible evidence.[13]

The difficulty with an approach based upon the distinction between relevance via propensity and other relevance, is that in many cases undoubtedly admissible similar fact evidence derives its only relevance from an argument via propensity. A particularly clear illustration is the case of *R.* v. *Straffen.*[14] The accused was charged with the murder by manual strangulation of two little girls at Bath. He was found unfit to plead by reason of insanity, and committed to Broadmoor Institution. A year later the accused escaped, and was at liberty for a period of approximately four hours. During the period the accused was at large a small girl, Linda Bowyer, was murdered by strangulation. The accused was seen near the place where the body was found, but there were other passers-by who might have committed the crime. When questioned by the police the accused admitted killing the two girls at Bath, but denied he was responsible for the murder of Linda Bowyer.

The accused was tried for the murder of Linda Bowyer. The trial judge admitted evidence of the statements made by the accused to the police, and also evidence of the circumstances surrounding the killing of the little girls at Bath. The following points of similarity existed between the two earlier killings and the killing of Linda Bowyer: 1) in each case the victim was a young girl, 2) each of the children was killed by manual stangulation, 3) in no case was there any attempt at sexual interference or any apparent motive for the crime, 4) in none of the cases was there any evidence of a struggle, and 5) in no case was any attempt made to conceal the body although that could easily have been done.

The accused was convicted, and appealed to the Court of Criminal Appeal. The Court dismissed the appeal, holding that the similar fact evidence had been properly admitted. Delivering the judgment of the Court Slade J. stated:

> In the opinion of the court that evidence was rightly admitted, not for the purpose of showing . . . that the appellant was "a professional strangler", but to show that he strangled Linda Bowyer; in other words, for the purpose of identifying the

13. See discussion p. 286 *infra*
14. [1952] 2 Q.B. 911; [1952] 2 All E.R. 657

murderer of Linda Bowyer as being the same individual as the person who had murdered the other two little girls in precisely the same way.[15]

Clearly the decision of the Court was correct. The evidence was of the highest possible probative value, and it would have been absurd to have held it inadmissible. The sole relevance of the evidence was, however, via propensity. The similar fact evidence established that the accused possessed a propensity of the most unusual kind; he was a strangler of small girls, in peculiar circumstances, and for no apparent motive. The unusual nature of the propensity gave the evidence its great probative value and rendered it admissible.

R. v. *Straffen* is in no way highly unusual in this regard. In many cases the only relevance of undoubtedly admissible similar fact evidence is by virtue of an argument via propensity.[16]

A modified form of the present approach recognises that there are many cases where evidence relevant solely via propensity is admissible, but nonetheless insists on the importance of the distinction. Those adopting this approach maintain that evidence relevant solely via propensity is *prima facie* inadmissible, but may be admissible if it is of exceptional probative value. This argument was elaborated in an influential essay in Cowen and Carter's, *Essays on the Law of Evidence*.[17] The authors summarised the position regarding the admissibility of similar fact evidence as follows:

Rule 1. Evidence of similar facts which is relevant primarily via propensity is inadmissible unless it is exceptional.

Rule 2. Such evidence is exceptional and therefore admissible provided:

(i) it has very great real probative value upon any issue upon which the jury is likely to use it; and

---

15. *Id.* at 916 [1952] 2 All E.R. at 662

16. Other leading cases in which the similar fact evidence was relevant solely via propensity include *R.* v. *Ball*, [1911] A.C. 47 (H.L.); *Thompson* v. *The King*, [1918] A.C. 221 (H.L.); *O'Leary* v. *The King* (1946), 73 C.L.R. 402 (H.C., Aust.); *R.* v. *Drysdale*, [1969] 2 C.C.C. 141, 66 W.W.R. 664 (Man. C.A.); *R.* v. *Morris* (1969), 54 Cr.App.Rep. 69 (C.C.A.); *R.* v. *Bird*, [1970] 3 C.C.C. 340, 71 W.W.R. 256 (B.C.C.A.); *R.* v. *McDonald* (1974), 20 C.C.C. (2d) 144 (O.C.A.); *D.P.P.* v. *Boardman*, [1975] A.C. 421. [1974] 3 All E.R. 887. All these cases are discussed in detail, *Infra*

17. "The Admissibility of Evidence of Similar Facts: A Re-Examination" in Zelman Cowen and P.B. Carter, *Essays on the Law of Evidence* (Oxford: Clarendon Press, 1956) at 106

(ii) its admission is not unnecessary (*i. e.* the issue upon which it is tendered can reasonably be regarded as a real one in the circumstances of the case).

Rule 3. Evidence of similar facts which has substantial relevance otherwise than via propensity (even if as well as via propensity) is admissible provided it is sufficiently relevant.

Rule 4. In criminal cases the judge has a discretion to exclude evidence admissible under any of the foregoing rules if their strict application would operate unfairly against the accused.

N.B. It should be remembered that:

(a) Evidence which is relevant via propensity is a much wider category than has often been supposed.

(b) Rule 2 means (obviously) that *not all* evidence the primary relevance of which is via propensity is excluded.

(c) The nature of the issue to which the evidence is relevant (*e.g.* that it is to show system, to prove intent,) does not control its admissibility. The nature of the issue *may,* however, affect the strength of the probative value of the similar fact evidence and thus indirectly influence its admissibility.[18]

The approach taken by Cowen and Carter is certainly more satisfactory than others considered thus far. However, having accepted probative value or weight as a vital factor, it is difficult to see why the authors nonetheless insist upon the primary significance of the distinction between relevance via propensity and relevance other than via propensity.

3. *An Approach Based Upon a Comparison of Probative Value and Risk of Prejudice*

The third approach, and the one argued for in the present article, treats the balance between probative value and the risk of prejudice as the key to determining the admissibility of similar fact evidence. It is submitted that the question of whether the evidence derives its relevance from an argument via propensity or from an argument other than via propensity ought properly to be regarded as largely incidental.

This approach involves treating Lord Herschell's formulation not as containing two conflicting rules, one of exclusion and one of inclusion, but rather as referring to two competing principles.[19] The

18. *Id.* at 160

19. This is the view taken by P. Brett, *Abnormal Propensity Or Plain Bad Character?* (1954), 6 Res Judicata 471. On the distinction between rules and

first sentence refers to the principle that evidence which shows the accused to be of bad character or disposition is not admissible to establish his guilt of the crime charged. The second sentence refers to the principle that relevant evidence which does not fall within a recognised rule of exculsion ought to be admitted.

The rationale behind the principle of exclusion embodied in the first sentence of Lord Herschell's formulation is the risk of prejudice inherent in evidence of this sort. The term "prejudice" is here used in the sense adopted by Wigmore, *i.e.*

> (1) The over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) the tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offences; both of these represent the principle of Undue Prejudice.[20]

What Lord Herschell's formulation requires is that these two competing factors, the probative value of the evidence and the risk of prejudice, he weighed one against the other. If the risk of prejudice is great, and the probative value small by comparison, the evidence should be rejected. If the probative value is great, and the risk of prejudice slight by comparison, the evidence should be admitted.[21]

The problem of estimating the probative value of evidence is one which has received surprisingly little attention.[22] Relevance and

---

principles, see R. M. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), chs. 2 and 3

20. *Wigmore on Evidence, supra,* note 11 at 650. Wigmore also lists as a reason for excluding evidence of the accused's bad character: "(3) The injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated; this represents the principle of Unfair Surprise." This danger could, of course, be guarded against by the adoption of adequate notice procedure. It is suggested that the risk of surprise is, at most, a subsidiary justification for the principle of exclusion in relation to similar fact evidence.

21. The most influential proponent of this approach to understanding similar fact evidence is L. H. Hoffman. See *South African Law of Evidence* (2nd. ed. Durban: Butterworths, 1970), ch.3; *Similar Facts After Boardman* (1975), 91 L.Q.R. 193. A similar approach is adopted by Ronald B. Sklar, *Similar Fact Evidence — Catchwords and Cartwheels* (1977), 23 McGill Law Journal 60. In the most recent edition of his book *Evidence* Professor Cross has moved significantly towards the approach taken by Hoffman. Rupert Cross, *Evidence* (4th.ed. London: Butterworths, 1974) at 309, 317-8. See also Richard Eggleston, *Evidence, Proof and Probability* (London: Weidenfeld and Nicholson, 1978), ch. 7. And see, J.C. Smith, *Comment on R.* v. *Hurren* [1962] Crim. L.R. 770

22. This largely neglected problem is the subject of an important recent publication. Richard Eggleston, *Evidence, Proof and Probability,* note 21. See also

weight are generally treated as matters of common sense or experience both by judges and by academic commentators. In this way, the difficulties associated with what is in fact the key concept in the law of evidence are largely glossed over. It is, of course, impossible to ever estimate the probative value of evidence with any degree of exactitude. The degree of relevance possessed by an item of evidence is obviously dependent upon an almost infinite number of variables. In the present context the key variables appear to be the nature of the similar fact evidence itself, the issues in contest in the case and the other evidence presented in the case.

Equally it is extremely difficult to assess, even in a very approximate fashion, the extent of the risk of an item of evidence being misused by a jury so as to result in prejudice to the accused. However, the risk of prejudice is quite clearly the rationale for the exclusionary aspect of the similar fact rule. This being so, the difficulty in estimating potential for prejudice in no way removes the necessity for attempting some such estimate when determining whether a given item of similar fact evidence ought to be admitted.

The present approach does not involve complete rejection of the process of categorization which is the essence of the first approach discussed. The traditional categories in fact group together types of situation in which similar fact evidence is likely to possess a high degree of probative value. They do so, however, in an imprecise and haphazard way, and they have been accorded far greater significance than they ought to possess. In the present article use will be made of a set of categories of relevance. However, it is stressed that these categories are used solely for purposes of convenience.

The intent of this article is to re-examine the body of case law dealing with similar fact evidence, from the point of view of showing the clash of the competing principles of probative force and risk of prejudice. It is hoped to show that the frank recognition of these factors as the keys to what is in fact happening in the field of similar fact evidence would lead to more acceptable results than simplistic attempts to apply rules to a type of problem not truly amenable to solution by the application of rules.

II. *The Requirement of Relevance*

It is a truism that to be admissible evidence must be relevant to a fact in issue. It might therefore appear unnecessary to accord this

requirement separate treatment in relation to similar fact evidence. However, similar fact evidence is in a special category because of its inherent prejudicial nature. Thus similar fact evidence not sufficiently relevant to be admissible on ordinary principles (leaving aside completely the exclusionary limb of Lord Herschell's formulation in *Makin*) may sometimes be admitted. This is because the shadow of suspicion it casts over the accused results in insufficient attention being paid to the question of whether the evidence possesses any real probative value.

The case of *Maxwell* v. *Director of Public Prosecutions*[23] is illustrative. The accused was charged with the manslaughter of a woman who was alleged to have died as the result of an unlawful abortion performed on her by the accused. At his trial the accused was cross examined about another woman patient of his who had died. In respect of this earlier death the accused had been tried and acquitted of manslaughter. On this occasion the accused was convicted. He appealed to the House of Lords where his conviction was quashed. The House of Lords held that the cross examination as to the earlier charge was improper. Delivering the judgment of their Lordships, Viscount Sankey L.C. stated:

> The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is, therefore, irrelevant; it neither goes to show that the prisoner did the acts for which he is actually being tried nor does it go to his credibility as a witness. Such questions must, therefore, be excluded on the principle which is fundamental in the law of evidence as conceived in this country, especially in criminal cases, because, if allowed, they are likely to lead the minds of the jury astray into false issues; not merely do they tend to introduce suspicion as if it were evidence, but they tend to distract the jury from the true issue — namely, whether the prisoner in fact committed the offence on which he is actually standing his trial.[24]

In *R.* v. *Bain*[25] the accused was charged with indecent assault upon a twelve year old girl. The assault was said to consist of

---

G. James, *Relevance, Probability and the Law* (1941), 29 California Law Review 689; R. M. Eggleston, "The Relationship Between Relevance and Admissibility in the Law of Evidence", in H. H. Glass ed., *Seminars on Evidence* (Sydney: Law Book Company, 1970) at 53

23. [1935] A.C. 309; [1934] All E.R. 168.

24. *Id.* at 320 [1934] All E.R. 173. See also *Koufis* v. *The King*, [1941] S.C.R. 481; [1941] 3 D.L.R. 657; *R.* v. *Tilley*, [1953] O.R. 609; 106 C.C.C. 42 (C.A.). Cf. *R.* v. *Spreckley and Cootes* (1958), 31 W.W.R. 187; 123 C.C.C. 344 (B.C.C.A.)

25. [1970] 2 C.C.C. 49

improper fondling in the course of purporting to take photographs. The Crown sought to lead evidence of a subsequent incident of picture taking. On this occasion also a young girl was involved, but there was no evidence of indecent fondling. The magistrate before whom the case was heard ruled evidence of this incident inadmissible, and the Crown appealed unsuccessfully to the Nova Scotia Supreme Court. Delivering the judgment of the Court, Cooper J.A. stated:

> The offence charged is indecent assault. Any similar act to be admissible must, in my view, contain in itself the element of indecency to be material. I do not find such element in her evidence. The nearest approach to anything that could be said to be indecent was that the accused in the course of taking the [later pictures] . . . put [the girl's] hand on her stomach. Even if this action could be said to supply an element of indecency, it is "tenuous to a degree" and its prejudicial value would far exceed its probative value.[26]

Sometimes insufficiently relevant evidence may be unobjectionable until counsel seeks to place an unwarranted complexion upon it. It is submitted that this is what occurred in *R* v. *Truscott*.[27] The accused, a fourteen and a half year old youth, was charged with the murder of a girl, Lynne Harper, who had been raped and strangled to death. The accused was convicted and his appeal to the Court of Appeal of Ontario dismissed. Application for leave to appeal to the Supreme Court of Canada was refused. Seven years after the original conviction, as the result of a special reference of the Governor-General in Council, the Supreme Court of Canada was asked to consider:

> Had an Appeal by Steven Murray Truscott been made to the Supreme Court of Canada, as is now permitted by [legislation not in force at the time of the original application] . . . what disposition would the Court have made of such an appeal . . .?

The case involved a number of issues,[28] only one of which is

---

26. *Id.* at 54. See also *R.* v. *Weid* (1949), 95 C.C.C. 108 (B.C.C.A.); *R.* v. *Doughty*, [1965] 1 All E.R. 560; *R.* v. *Hartridge* (1967), 57 D.L.R. (2d) 332; [1967] 1 C.C.C. 346 (Sask. C.A.); *R.* v. *Tripp* (1971), 5 C.C.C. (2d) 297; 16 C.R.N.S. 164 (C.A.).

27. *R.* v. *Truscott* (1960), 126 C.C.C. 109; 32 C.R. 150 (Ont. C.A.); *Reference re R.* v. *Truscott*, [1967] S.C.R. 309; [1967] 2 C.C.C. 285.

28. All aspects of the case are dealt with in detail in M. L. Friedland, *Cases and Materials On Criminal Law and Procedure* (4th.ed. Toronto: University of Toronto Press, 1974), ch. 17. See also Isobel Le Bourdais, *The Trial of Steven Truscott* (London: Gollancz, 1966).

relevant in the present context. The accused and the deceased girl had been classmates. The accused had taken the deceased on the cross-bar of his bicycle to an area known as Lawson's bush. The prosecution's case was that he had there raped and murdered her. The accused's defence was that at her request he had taken her to an intersection in the area, had left her there and had never seen her again.

The prosecution led evidence of one Jocelyne Godette, also a classmate of the accused, that an arrangement had been made between her and the accused to see some new born calves at a spot near where the accused subsequently rode with the murdered girl. On the evening in question Jocelyne Godette was unable to go with the accused when he called as she was just beginning supper with her family. She testified that he had asked her to keep the arrangement secret, and great emphasis was placed on this in questions put to the witness both by the prosecutor and by the trial judge. In his summation to the jury the prosecutor stated:

> Well then, there was a tentative date for six o'clock on the Tuesday night. And that he, Steven, came to the house and called for her. He called there at ten minutes to six but she was having her supper, *and I suggest to you, Gentlemen, that if they were late having their supper, it was a God's blessing to that girl.*
>
> . . . . . .
>
> Here is the relevancy of that, Gentlemen. He missed his first prospect and what more logical and likely person to accept his proposal to go with him on short notice than a girl he knows is fond of him, soft on him, whatever you will, and likely to take up his invitation?[29]

It would seem, however, that the evidence of Jocelyne Godette was of practically no relevance. Nothing could be more natural than for a youth to make an arrangement to go on an expedition of such a nature with a girl, or to ask her to keep the matter secret. The making of the arrangement in no way went to show that later in the evening the accused raped and murdered another girl. It is only if one first assumes the accused is guilty of the murder of the second girl that the arrangement with the first takes on a sinister aspect. The evidence of Jocelyne Godette would have been unobjectionable had it been led merely to establish the accused's movements earlier in the evening. However, the complexion the prosecution sought to place upon it gave it a spurious appearance of relevance of a quite

29. [1967] S.C.R. 309 at 387; [1967] 2.C.C.C. 285 at 364.

different nature.

By a majority of eight to one the Supreme Court of Canada held that the accused's appeal would have been dismissed.[30] The majority stated:

> We do not think that any of this conversation between Truscott and Jocelyne Godette was any reflection on Truscott's character. To put it at its worst for Truscott, it means no more than this: that he had a tentative date arranged with Jocelyne Godette. He wanted a date with a girl that night and he took Lynn Harper when Jocelyne Godette was not available. We have already mentioned that this has some bearing on the submission of the prosecution that his story of the ride, the sole purpose of which was to take her to the intersection, may not have been true. It does not amount to trying to prove bad character or a disposition to murder and rape.[31]

A powerful dissent was delivered by Hall J. His Honour stated:

> The evidence has no probative value to prove Truscott murdered Lynne Harper and should have been rejected when tendered by the rule which excludes evidence of similar acts which Viscount Sankey said in *Maxwell* v. *Director of Public Prosecutions*, [1935] A.C. 309 at p.317, was "one of the most deeply rooted and jealously guarded principles of our criminal law."[32]

Commenting on the majority opinion, His Honour quoted the passage set out above, and stated:

> This appears to ignore the reality of the situation when considered in the actual setting as it was being developed at the trial by Crown counsel and entirely repugnant to what Crown counsel said in the extracts from his summation to the jury quoted above when he said, referring to Truscott having called for Jocelyne Godette "*and I suggest to you, Gentlemen, that if they were late having their supper, it was a God's blessing to that girl*" and when he followed that with his reference to Lynne Harper and said that Truscott gave Lynne the new-born calf invitation and "*that she went with him to the bush and to her doom*".
>
> . . . . . .
>
> Crown counsel was pursuing a planned course of action that included the subtle perverting of the jury to the idea that Truscott was sex hungry that Tuesday evening and determined to have a girl in Lawson's bush to satisfy his desires, if not Jocelyne, then Lynne.[33]

30. Taschereau, C.J.C., Cartwright, Fauteaux, Abbott, Martland, Judson, Ritchie and Spence JJ.; Hall J. dissenting.
31. [1967] S.C.R. 309 at 369; [1967] 2 C.C.C. 285 at 348.
32. *Id.* at 387 [1967] 2 C.C.C. at 364
33. *Id.* at 388-9 [1967] 2 C.C.C. at 366

It is respectfully submitted that the judgment of Hall J. is more persuasive than that of the majority in *Truscott's* case, and that the method in which the prosecution invited the jury to misuse the evidence of Jocelyne Godette should have resulted in Truscott's appeal being allowed.

III. *Cases Where Similar Fact Evidence is Properly Admitted*

1. *Where the Evidence Establishes Knowledge*

Where the accused is shown to have committed the acts said to constitute the offence charged, similar fact evidence may be admissible to show that at the time of committing those acts the accused possessed a certain knowledge or awareness in relation to facts or circumstances connected with those acts. The similar fact evidence may tend to establish such knowledge or awareness in one of two ways.

The evidence may consist of an experience which imparted to the accused knowledge of a certain nature, which knowledge the accused retained at the time of the incident the subject of the crime charged. In *R.* v. *Petryshen and Saiko*[34] the accused were charged with possession of materials to be used for counterfeiting. A witness for the accused Saiko testified that Saiko had no knowledge of the nature of the materials or the use to which they were capable of being put. It was held by the British Columbia Court of Appeal that the trial judge correctly allowed cross examination of the witness as to a previous conviction of Saiko and the witness for counterfeiting, in order to establish Saiko had knowledge of the potential use of the materials found in his possession.

Alternatively, the evidence may derive its relevance from the improbability that an act of a certain class would be likely to be repeated on a series of occasions without the accused possessing awareness of certain accompanying facts.

In *R.* v. *Francis*[35] the accused was charged with attempting to obtain money from a pawnbroker upon a ring by the false pretence that it was a diamond ring. Evidence was admitted that two days previously he had obtained money from another pawnbroker upon a chain which he falsely represented to be a gold chain, and that he had attempted to obtain from other pawnbrokers money upon a ring which he also represented to be a diamond ring. The accused was

34. (1956), 115 C.C.C. 217; 18 W.W.R. 662
35. (1874), L.R. 2 C.C.R. 128

convicted, and his conviction affirmed by the Court for Crown Cases Reserved. Delivering the judgment of the Court, Lord Coleridge C.J. stated:

> It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to shew that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often, than once, and every circumstance which shews he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last, and this is amply borne out by authority.[36]

2. *Where the Evidence Forms Part of the Transaction Under Investigation*

Such evidence may consist of an earlier attempt to commit the crime charged. Evidence that the accused previously attempted to commit the very crime he is alleged to have committed does, of course, possess a relevance far beyond showing a general propensity to commit crimes of the type charged. In *Paradis* v. *The King*[37] the accused was charged with conspiracy to commit arson of a furniture factory. The Supreme Court of Canada held that evidence that the accused previously offered another man money to burn the same factory was admissible.

Evidence of a similar fact nature which shows that at a point of time proximate to the commission of the crime charged, the accused possessed a propensity for the commission of the crime charged may be admissible. The sole relevance of such evidence is, of course, via propensity. The factor which gives evidence of this

---

36. *Id.* at 131-2; quoted with approval in *R.* v. *Rhodes*, [1899] 1 Q.B. 77 at 82. See also *R.* v. *Foster* (1855), 1 Dears. 456; 169 E.R. 803; *R.* v. *Weeks* (1816), 8 Cox C.C. 451; *R.* v. *Ollis*, [1900] 2 Q.B. 758; *R.* v. *Mason* [1914], 10 Cr.App.Rep. 169; *R.* v. *Labrie* (1919), 60 D.L.R. 582; 34 C.C.C. 407 (Que. K.B.); *R.* v. *Hamilton*, [1931] 3 D.L.R. 121; 55 C.C.C. 85 (C.A.); *R.* v. *Porter* (1935), 25 Cr.App.Rep.59; *R.* v. *Gregg* (1965), 49 W.W.R. 732; [1965] 3 C.C.C. 203 (Sask. C.A.). Cf. *R.* v. *Oddy* (1851), 2 Den.C.C. 264; 169 E.R. 499; *R.* v. *Holt* (1860), Bell C.C. 280; 169 E.R. 1261

37. [1934] S.C.R. 165; [1934] 2 D.L.R. 88. See also *R.* v. *Gibson* (1913), 13 D.L.R. 393; 21 C.C.C. 393 (Ont. C.A.); *R.* v. *Doughty* (1921), 64 D.L.R. 423; 38 C.C.C. 83 (Ont. C.A.)

nature its great weight is that it shows not merely that the accused possesses a certain sort of propensity, but that he exhibited this propensity and was prepared to act upon it at a point of time closely proximate to the commission of the crime charged.[38]

Illustrative is the Australian case of *O'Leary* v. *The King*.[39] The accused and the deceased were both employees at an isolated timber camp in South Australia. They, together with other fellow employees, took part in a drunken orgy which commenced on Saturday morning and continued until late on Saturday night. At about midnight the deceased retired to his cubicle which was a short distance from that of the accused. In the early hours of Sunday morning the deceased was found in his cubicle in a dying condition. He had been struck on the head eight or nine times with a bottle, after which kerosine had been poured over him and set alight.

The prosecution led evidence that at various times during the course of the orgy the accused (a) punched one Hollywood about the head, knocked him down and continued to punch him while he was on the floor; (b) grabbed one O'Toole by the throat and threatened "to do" him; (c) knocked one Kimber down, and kicked him in the body and in the head; (d) abused and threatened to assault and shoot three other people.

The High Court of Australia held this evidence to be admissible.[40] It did not merely show that the accused was of a violent disposition. Its significance was that if showed the accused was of a violent disposition, and was prepared to act on that disposition, on the evening in question. Dixon J. stated:

> In my opinion the evidence objected to was admissible, because, from the time on Saturday 6th July when the prisoner and the party with him came under the influence of drink right up to the conclusion of the scene in the early hours of the following

---

38. In some cases, where the contemporaneity is very close, the doctrine of *res gestae* may be applicable. In the cases to be discussed however, it would seem that the similar facts were not sufficiently closely connected in point of time to be regarded as part of the *res gestae*, even accepting that the scope of that doctrine has been somewhat widened as a result of the decision of the Privy Council in *Ratten* v. *The Queen*, [1972] A.C. 378; [1971] 3 All E.R. 801.

39. (1946), 73 C.L.R. 566. See also *R.* v. *Voke* (1823), Russ. and Ry. 531; 168 E.R. 934; *R.* v. *Cobden* (1862), 3 F. & F. 833; 176 E.R. 381; *R.* v. *Rearden* (1864), 4 F & F. 76; 176 E.R. 473; *R.* v. *Bahrey*, [1934] 1 W.W.R. 376 (Sask.C.A.); *R.* v. *Evans*, [1950] 1 All E.R. 610; *R.* v. *O'Regan*, [1961] Qd.R. 78. Cf. *R.* v. *Bodnarchuk*, [1949] 3 D.L.R. 565; (1949), 94 C.C.C. 279; *R.* v. *Fitzpatrick*, [1962] 3 All E.R. 840

40. Latham C.J., Rich, Starke, Dixon and Williams JJ.; McTiernan J. dissenting

> Sunday morning in the presence of the deceased's body lying in front of the huts, a connected series of events occurred which should be considered as one transaction. The part which the prisoner took in the drunken orgy which, as the facts suggest, culminated in the fatal attack upon the deceased man would appear to me to be relevant to the question whether the prisoner was the assailant and, if so, whether he was at the time capable of forming, and did form, the intention which would make his crime murder.
>
> The evidence disclosed that, under the influence of the beer and wine he had drunk and continued to drink, he engaged in repeated acts of violence which might be regarded as amounting to a connected course of conduct. Without evidence of what, during that time, was done by those men who took any significant part in the matter and especially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event.[41]

The evidence was given even greater probative value by the fact that the killing took place at an isolated timber camp. Thus there were a strictly limited number of persons who could have committed the crime.[42] That earlier in the evening one of these men had been on a drunken rampage was obviously of tremendous probative value. Had the killing taken place in a town where any of a large number of persons may have committed the crime, the evidence would have been of much less weight. Quite clearly the probative value of any particular item of evidence will vary having regard to all the surrounding circumstances of the particular case.

The English case of *R.* v. *Mortimer*[43] provides a further neat illustration of similar fact evidence deriving great relevance from its close temporal proximity with the crime charged. The accused was charged with murder, the allegation of the prosecution being that he had knocked down a woman cyclist by deliberately driving a motor car at her. Evidence was admitted to the effect that on the previous evening he had knocked down two other women cyclists in a similar way and had stopped his car and assaulted them, and that shortly after the incident which was the subject of the murder charge, he had knocked down a further woman cyclist and had stolen her bag. Here the evidence showed not merely that the accused had a

41. (1946), 73 C.L.R. 566 at 577
42. See in particular the judgment of Williams J. on this point, *id.* at 582.
43. (1936), 25 Cr.App.Rep. 150

propensity for knocking down women cyclists, although such a propensity would of itself have been sufficiently unusual to render the evidence admissible,[44] but also that the accused was subject to that propensity, and was prepared repeatedly to act upon it, on a particular evening and throughout the following day.

3. *Where the Offence is of a Continuing Nature*

In some cases the definition of the crime charged involves an element of continuity which can only be established by evidence of a similar fact nature. In such situations the evidence is rendered admissible by the very definition of the offence charged. Examples of such crimes are permitting a house to be used as a brothel,[45] persistent importuning in a public place[46] and contributing to the delinquency of a juvenile.[47]

4. *Where the Evidence Confirms Testimony Collateral to the Main Issue*

Where the testimony of the accused and that of a prosecution witness are in conflict, evidence of a similar fact nature which confirms the testimony of the witness as to a matter collateral to the main issue may be admissible. The relevance of the evidence is that if the account given by the witness is corroborated as to the collateral matter, it is more probable that the witness is also telling the truth in relation to the main issue in dispute. Thus in this context similar fact evidence is admissible as going to support the credit of a prosecution witness.

In *R.* v. *Lovegrove*[48] the accused was charged with the manslaughter of a woman who died as the result of an unlawful abortion. The husband of the deceased gave evidence that, having obtained the accused's name and address from another woman, he went to the accused's house and arranged with her for his wife to go there in order that the accused might perform an abortion on her. The husband testified that he subsequently accompanied his wife to the accused's house, where an abortion was performed as a result of which she died. The other woman was called by the prosecution,

44. *Infra*. p. 299
45. *Ex parte Burnby*, [1901] 2 Q.B. 458; *R.* v. *Brady*, *R.* v. *Ram*, [1964] 3 All E.R. 616
46. *Dale* v. *Smith*, [1967] 2 All E.R. 1134
47. *R.* v. *Christakos*, [1947] 2 D.L.R. 151; (1946), 87 C.C.C. 40
48. [1920] 3 K.B. 643

and gave evidence that the accused had performed an abortion on her some months previously. The accused's defence was that the only time she had seen the husband was when he called to inquire about accommodation, and that she had never met the deceased. The accused was convicted and appealed unsuccessfully to the Court of Criminal Appeal. The Court held that the evidence of the other woman as to the abortion performed upon her was properly admitted, as it tended to corroborate the husband's evidence.

In *R.* v. *Chitson*[49] the accused was charged with carnal knowledge of a girl aged fourteen. The prosecutrix gave evidence that on the day after connection had taken place, the accused told her that he had previously had similar relations with another young girl. It was held by the Court of Criminal Appeal that the accused was properly cross examined about his relations with the other girl. Delivering the judgment of the Court A. T. Lawrence J. stated the cross examination was admissible, as it

> . . . tended to shew that he was guilty of the offence with which he was charged, for if he had made that statement to the prosecutrix at the time alleged by her, that fact would strongly corroborate her evidence that the prisoner was the person who had had connection with her.[50]

The admissibility of the similar fact evidence in cases such as *R.* v. *Lovegrove* and *R.* v. *Chitson* is dependent upon the accused giving evidence. It may also depend upon the nature of the evidence given by the accused. If in *R.* v. *Lovegrove* the accused had admitted the deceased's husband had come to her house and attempted to arrange an abortion, but had denied that she performed the abortion, evidence of the other woman as to the abortion performed on her by the accused would not have been admissible. In such event the evidence would not have acted as corroboration upon any point in dispute between the testimony of the deceased's husband and the accused.

It is submitted that cases such as *R.* v. *Lovegrove* and *R.* v. *Chitson* should be regarded as right on the borderline of admissibility of similar fact evidence. To admit evidence with such a high degree of potential for prejudice in order to do no more than support the credit of a prosecution witness involves considerable risk of injustice.

---

49. [1909] 2 K.B. 945
50. *Id.* at 947. See also *R.* v. *Kennaway*, [1917] 1 K.B. 25

5. Where the Circumstances Surrounding the Similar Fact Evidence are Relevant Independently of the Similar Facts

Where the fact that the accused has committed another offence is largely incidental to that which it is proposed to prove by similar fact evidence, such evidence will normally be admissible. For example, the accused is charged with murder and denies being anywhere near the scene of the killing. Evidence that shortly before the killing the accused had committed another crime in the same vicinity would, of course, be admissible.[51] It would be admissible since its character as similar fact evidence would be wholly incidental to its relevance.

In *Perkins* v. *Jeffrey*[52] the accused was charged with indecently exposing himself to a certain Miss T. Miss T gave evidence for the prosecution, identifying the accused as the person who had exposed himself to her. The prosecution put to him in cross examination questions suggesting that he had exposed himself to Miss T on an earlier occasion, and to rebut his denials sought to recall Miss T to prove that the accused had been guilty of the same conduct to her at the same time and place approximately two months earlier. The prosecution also desired to call other witnesses to show that the accused had been guilty of a systematic course of conduct by indecently exposing himself with intent to insult other females on various occasions at the same place and at about the same hour. The justices before whom the case was heard ruled that the questions as to the accused's earlier conduct in relation to Miss T ought not to have been put, and refused to hear further evidence from Miss T or from the other witnesses. The accused was discharged by the justices, and the prosecution appealed the Divisional Court.

The Court held that the questions put to the accused in cross examination suggesting that he had earlier indecently exposed himself to Miss T was permissible, and that evidence of Miss T to rebut his denials ought to have been received. Such evidence was relevant for the purpose of showing that Miss T was not mistaken in her identification of the accused. So far as Miss T was concerned the evidence possessed a relevance entirely independent of its character as similar fact evidence. It was relevant as showing that

51. *R.* v. *Ducsharm*, [1956] 1 D.L.R. (2d) 732; (1955), 113 C.C.C. 1. On the facts of *R.* v. *Ducsharm* it is submitted that the dissenting judgment of Laidlaw J.A. is to be preferred to that of the majority. See also *R.* v. *O'Meally*, [1953] V.L.R. 30

52. [1915] 2 K.B. 702

Miss T had previously seen the accused, and was therefore less likely to be mistaken in her identification of him as the person exposing himself to her on the occasion the subject of the charge.

The evidence of the witnesses other than Miss T raised a number of separate issues, and this aspect of *Perkins* v. *Jeffrey* will be considered presently.[53]

6. *Where the Evidence Bears on the Relationship Between the Accused and the Victim*

Evidence which shows no more than that the accused possesses a general provensity towards a certain class of criminal activity is, of course, inadmissible. However, if the propensity can be rendered more specific by virtue of the fact that the crime charged and the similar fact evidence each have as their object the same individual, the evidence may be admitted. Evidence of a propensity directed specifically towards another person, whether taking the form of sexual passion or violent antipathy, is often sufficiently probative to be admissible notwithstanding its extreme potential for prejudice.

(a) *Sexual Passion*

The leading case is the decision of the House of Lords in *R.* v. *Ball*.[54] The two accused, who were brother and sister, were indicted under the *Punishment of Incest Act* 1908 (U.K.) for having had carnal knowledge of each other during stated periods in 1910. Evidence was given on behalf of the prosecution to the effect that, at the times specified in the indictment, the accused were living together in the same house, that the house contained only one furnished bedroom, and that there was in the bedroom a double bed which bore signs of two persons having occupied it. The prosecution then tendered evidence of prior sexual relations between the two accused. The evidence was to the effect that the male accused in November 1907 took a house to which he brought the female accused as his wife, that they lived there as husband and wife for about sixteen months, that at the end of March 1908 the female accused gave birth to a child, and that she registered the birth, describing herself as the mother and the male accused as the father. These events took place prior to the enactment of the *Punishment of Incest Act* 1908 (U.K.), at a time when incest

53. *Infra*. p. 302
54. [1911] A.C. 47

between a brother and sister was not unlawful.

The accused were convicted and appealed to the Court of Criminal Appeal where the convictions were quashed. The prosecution then appealed to the House of Lords, which reversed the order of the Court of Criminal Appeal. Delivering the judgment of the House of Lords, Lord Loreburn L.C. stated:

> My Lords, the law on this subject is stated in the judgment of Lord Chancellor Herschell in *Makin* v. *Attorney-General for New South Wales;* it is well known and I need not repeat it — the question is only of applying it. In accordance with the law laid down in that case, and which is daily applied in the Divorce Court, I consider that this evidence was clearly admissible on the issue that this crime was committed — not to prove the *mens rea,* as Darling J. [delivering the judgment of the Court of Criminal Appeal] considered, but to establish the guilty relations between the parties and the existence of a sexual passion between them as elements in proving that they had illicit connection in fact on or between the dates charged. Their passion for each other was as much evidence as was their presence together in bed of the fact that when there they had guilty relations with each other.[55]

The sole relevance of the evidence was, of course, via propensity. However the degree of relevance possessed by the evidence was sufficient to justify admissibility. If an accused is charged with incest with sister A, evidence that on some other occasion he committed incest with sister B would not be of sufficient probative value to be admissible.[56] In such event the similar fact evidence would establish no more than a propensity to commit incest. However, where the similar fact evidence establishes a propensity directed exclusively towards the individual the subject of the instant charge, the probative value of the evidence is increased to such an extent that admissibility may be justified. This is so notwithstanding that the evidence clearly involves a very great risk of prejudice.

The weight of the similar fact evidence in *R.* v. *Ball* was also affected by the other evidence presented in the case. The fact that while living together they occupied the same bed, when taken together with the similar fact evidence, made the likelihood of sexual intercourse having taken place very high. If, for example, no more had been shown than that they lived together in the same house, the similar fact evidence would have been of less probative

55. *Id.* at 71

56. *R.* v. *O'Regan,* [1961] Qd.R. 78; *R.* v. *Flack,* [1969] 2 All E.R. 784.

force. This, when coupled with its extreme potential for prejudice, would probably have resulted in its exclusion.

The decision of the House of Lords in *R.* v. *Ball* has been followed many times in Canada. It has been applied not only to cases of incest,[57] but also to rape,[58] indecent assault,[59] and unlawful carnal knowledge.[60]

(b) *Antipathy*

In *R.* v. *Drysdale*[61] the accused was charged with the murder of the three year old daughter of his *de facto* wife. The child's mother and a brother gave evidence that the accused beat the girl into unconsciousness, inflicting injuries upon her as a result of which she quickly died. Evidence was admitted that the accused had assaulted the girl on previous occasions. Evidence was also admitted of a number of vicious assaults by the accused upon other children of the family and upon the houshold pet. The accused was convicted and appealed successfully to the Manitoba Court of Appeal.

The Court held that while evidence of the earlier assaults upon the deceased little girl were admissible as showing a specific antipathy towards her, evidence of assaults upon the other children and upon the family pet were inadmissible. Delivering the judgment of the Court, Freedman J.A. stated:

> Dealing first with the evidence of earlier assaults upon Angela [the deceased child], I would admit that evidence on the ground of relevance, particularly on the issue of intent. That evidence could provide a *nexus* or link with the alleged murder and could show the existence of a continuing *animus* or malice on the part of the accused towards the child.

---

57. *R.* v. *Pegelo*, [1934] 2 D.L.R. 798; (1934), 62 C.C.C. 78 (B.C.C.A.); *R.* v. *Beddoes* (1952), 103 C.C.C. 131; 6 W.W.R. (N.S.) 62 (Sask. C.A.); *R.* v. *Thompson* (1954), 110 C.C.C. 95; 14 W.W.R. (N.S.) 575 (B.C.C.A); *R.* v. *Williams* (1973), 12 C.C.C. (2d) 453 (Ont. C.A.). See also the New Zealand case, *Wilkinson* v. *The Queen*, [1947] N.Z.L.R. 412

58. *R.* v. *Stelmasczuk* (1948), 93 C.C.C. 124; 8 C.R. 430 (N.S.S.C.)

59. *R.* v. *Collerman*, [1964] 3 C.C.C. 195; 46 W.W.R. 300 (B.C.C.A.)

60. *R.* v. *Bristol*, [1926] 4 D.L.R. 753; (1926), 46 C.C.C. 156. See also *R*: v. *Shellaker*, [1914] 1 K.B. 414; *R.* v. *Marsh* (1949), 33 Cr.App.Rep. 185

61. [1969] 2 C.C.C. 141; 66 W.W.R. 664. See also *Theal* v. *The Queen* (1882), 7 S.C.R. 397; *R.* v. *Sunfield* (1907), 13 C.C.C. 1; 15 O.L.R. 252 (C.A.); *R.* v. *Le Forte* (1961), 29 D.L.R. (2d) 459; 130 C.C.C. 318 (B.C.C.A.); *R.* v. *Wilson* (1970), 44 A.L.J.R. 221; *R.* v. *Iuliano*, [1971] V.R. 412; *R.* v. *McDonald* (1974), 20 C.C.C. (2d) 144 (Ont.C.A.); *R.* v. *Schell and Paquette* (1977), 33 C.C.C. (2d) 422 (Ont. C.A.). See *R.* v. *Demyen (No. 2)* (1976), 31 C.C.C. 383 (Sask. C.A.)

> Concerning the evidence of prior acts relating to others than Angela, I am decidedly of the view that these were irrelevant and inadmissible.[62]

It is not, of course, the case that similar fact evidence showing prior antipathy towards the victim will necessarily be admissible. The key is always the degree of probative value possessed by the evidence.

In *R.* v. *Barbour*[63] the accused was charged with the murder of his girl friend. The prosecution's case was that the accused had killed the woman in a fit of jealous passion aroused by her conduct with another man. Evidence of several previous quarrels and assaults by the accused upon the deceased was admitted. The latest in point of time was about a week before the fatal incident. Following each of these quarrels the accused and the deceased had resumed amicable relations.

The accused was convicted and appealed successfully to the New Brunswick Supreme Court. An appeal by the prosecution to the Supreme Court of Canada was dismissed by a majority of three to two.[64] The view of the majority was that the evidence failed to show anything in the nature of consistent jealously of, or antipathy towards, the victim on the part of the accused. The evidence was therefore not sufficiently relevant to be admissible. Sir Lyman P. Duff C.J.C. stated:

> If you have acts seriously tending, when reasonably viewed, to establish motive for the commission of a crime, then there can be no doubt that such evidence is admissible, not merely to prove intent, but to prove the fact as well. But I think, with the greatest possible respect, it is rather important that the Courts should not slip into a habit of admitting evidence which reasonably viewed cannot tend to prove motive or to explain the acts charged merely because it discloses some incident in the history of the relations of the parties.[65]

Similar fact evidence showing prior antipathy was also held inadmissible in *R.* v. *Robertson.*[66] The accused, a sixteen year old youth, was charged with the murder of the nine year old sister of a

---

62. [1969] 2 C.C.C. 141 at 145-6; 66 W.W.R. 664 at 668-70
63. [1038] S.C.R. 465; (1938), 71 C.C.C. 1. See also *R.* v. *Wied,* [1950] 1 D.L.R. 143; (1949), 95 C.C.C. 108; *R.* v. *Tsingopoulos,* [1964] V.R. 676
64. Sir Lyman P. Duff, C.J.C.; Rinfret and Davis JJ. concurring. Kerwin and Hudson JJ. dissented
65. [1938] S.C.R. 465 at 469; (1938), 71 C.C.C. 1 at 19-20
66. (1975), 21 C.C.C. (2d) 385

friend. The girl was murdered at her home when she returned there from school during the lunch hour. The accused's connection with the crime was established largely by circumstantial evidence. His defence was a complete denial. The prosecution led evidence of two prior incidents involving the accused and the girl. The first, which took place some ten or fourteen days before the killing, involved a threat made by the accused to the deceased. The accused, with others, was at the victim's home, and the accused was being noisy. The victim came out of the bedroom and asked if the others would "quiet [the accused] down". The accused replied: "You get ---- back in the bedroom or I'll kick you in the ---". The second incident took place later the same evening. The accused was alleged to have made a remark that he was going to do something "similar to shooting at a police officer" or do "something better than [shooting at a police officer]".

The accused was convicted of murder and appealed to the Ontario Court of Appeal. The Court allowed the appeal and ordered a new trial. The Court held that evidence of the two prior incidents ought not to have been admitted.

With respect to the first incident, Martin J.A., with whom the other members of the Court agreed,[67] stated that evidence that an accused entertained feelings of hatred or hostility towards the deceased was relevant to prove the accused killed the deceased. Further, that evidence of prior threats were admissible to prove the existence of feelings of such hostility. However, His Honour held that on the facts of the instant case the evidence was not of sufficient probative value to justify admissibility. His Honour stated:

> The utterance of the accused in the circumstances cannot be regarded other than as an unseemly venting of feelings of temporary annoyance and on any reasonable view is not evidence of feelings of ill will or enmity constituting a motive for the murder of the deceased. The evidence with respect to such utterance was accordingly inadmissible.[68]

With respect to the second incident, His Honour stated:

> A threat may be generic in character, and accordingly a threat to shoot at the police would be admissible on a charge of murdering a policeman although the threat was not directed towards the particular policeman who was killed. As a general rule, however, a threat by an accused to kill A would not be admissible on a

67. Gale C.J.O., Dubin J.A. Dubin J.A. dissented in part as to different matters.
68. (1975), 21 C.C.C. (2d) 385 at 411

> charge of murdering B . . . [Even if the statement made by the accused is capable of being construed as a threat referable to the deceased] its admissibility is so tenuous, having regard to the context in which the words were uttered, and of such slight probative value in relation to its prejudicial effect, that the trial Judge, in the exercise of his discretion, would be justified in excluding it.[69]

7. *Where the Propensity Established by the Evidence is Particularly Uncommon*

In some exceptional cases the disposition or propensity exhibited in the commission of the crime charged is of sufficiently uncommon a nature to render admissible similar fact evidence establishing such a propensity in the accused. Perhaps the clearest example of such an exceptional propensity is provided by the case of *R.* v. *Straffen,* which has already been discussed in detail.[70]

R. v. *Morris*[71] was a similar case. The accused was charged with the murder in August 1968 of a girl D aged eight (count 1). The little girl had been enticed into a car by the killer, driven to a secluded spot and there sexually assaulted in a brutal fashion and killed by suffocation. The accused was also charged with the attempted abduction in November 1968 of a girl A aged ten (count 2), and with indecent assault in August 1968 on a girl Y aged five (count 3). The trial judge refused an application to sever the indictment and try the offences separately, holding that the evidence on the other charges was admissible against the accused on the murder charge. The accused pleaded guilty on count 3. He was convicted on counts 1 and 2, and appealed unsuccessfully to the Court of Appeal.

The similarities in the offences were as follows. All three cases involved little girls. Each of the offences were alleged to have been committed in the same geographical locality. The murdered girl had been enticed into a motor car driven by the killer, and count 2 likewise involved a similar, in this case unsuccessful, attempt to entice the little girl into a motor car driven by the accused. The Court held that this element of similarity rendered the evidence on count 2 of sufficient probative value to be admissible in relation to count 1.

---

69. *Id.* at 412
70. *Supra,* p. 307
71. (1970), 54 Cr.App.Rep. 69

The major focus of the Court's attention concerned count 3. The little girl the subject of this count was a relative of the accused's wife and had come to visit with them. Whilst she was staying in the house, the accused took a series of grossly indecent photographs of her. In relation to poses, arrangement of clothes, and other details, the photographs bore a close similarity to the position and attitude of the dead body of the little girl the subject of count 1.

The evidence of the photographs was obviously of the most extreme prejudice, and the Court of Appeal properly considered the issue before it as being whether the evidence was of such exceptional probative value as to justify admissibility. Delivering the judgment of the Court Widgery L.J. stated:

> In this case to render the evidence of the photographs admissible, it is not enough for the Crown to show that they indicate a tendency on the part of the applicant to sexual deviation. The Crown in order to make the evidence admissible must go further and show that there is a sufficient similarity between the applicant's conduct when the photographs were taken, and the conduct of the murderer, to give a real and positive indication that they were one and the same man. It is not necessary to show that the circumstances are so similar that the same man *must* have been concerned in each case. The admissibility of the evidence depends on whether the similarities are sufficient to show that the applicant and the murder have common characteristics which are so unusual that it is likely that they are one and the same man.[72]

After a careful review of the evidence, His Lordship concluded it was properly admitted. His Lordship stated:

> Looking at the similarities of the matter, the most important one, in our judgment, is the one which strikes anyone opening these two albums of photographs [the photographs of the deceased, and the photographs taken by the accused of the girl Y]. Words of mine would be insufficient to convey the really quite remarkable impression which a comparison of these photographs makes, and I shall not attempt to describe the detail, sordid as it is, further than that. The situation of the clothing is common, the attitude of the body is common, the child is lying on her back, and so on . . . .
>
> When one looks at those similarities, it becomes clear that the murderer and the applicant had this common characteristic of lustful design on little girls and a similarity in the method in which they gratified that lust, and the number of men similarly afflicted is happily not such as to make them other than

72. *Id.* at 80

> exceptional in any community. The evidence therefore (when one realises that these two incidents were geographically close together and that the applicant himself lives in what is part of the same relatively small community) does point to the fact that both offences were committed by one and the same man.[73]

Clearly the most important case in recent years on the subject of similar fact evidence is the decision of the House of Lords in *Director of Public Prosecutions* v. *Boardman*.[74] The accused was convicted on one count of buggery with S, aged 16, and one count of buggery with H, aged 17. Both boys were pupils at a language school at which the accused was headmaster. Each of the boys gave evidence that the accused came to his dormitory late at night, and asked him to come with him for the purpose of homosexual intercourse. In each case the boy said the accused invited him to take the active role while he, the accused, assumed the passive. In each case the particular occasion to which the charge related was not the only incident affecting that boy.

At the trial the judge directed the jury that the evidence of S on the count concerning him was admissible as corrobative evidence in relation to the count concerning H, and vice versa. The decision of the House of Lords two years earlier in *Director of Public Prosecutions* v. *Kilbourne*[75] had established that, where similar fact evidence is admissible, it may constitute corroboration.

The accused appealed unsuccessfully first to the Court of Appeal and then to the House of Lords.

Director of Public Prosecutions v. *Boardman* is of particular significance for a number of reasons. Prior to this case there was a considerable body of authority in support of the view that cases involving homosexuality stood in a special category, and that in such cases similar fact evidence was always admissible. Their Lordships squarely rejected such a view. This aspect of the case will be returned to presently.[76]

---

73. *Id.* at 82-3. See *R.* v. *Willett* (1972), 10 C.C. (2d) 36

74. [1975] A.C. 421: [1974] 3 All E.R. 887. For helpful discussions of *D.P.P.* v. *Boardman*, see Rupert Cross, *Fourth Time Lucky — Similar Fact Evidence in the House of Lords*, [1975] Crim.L.R. 62; L.H. Hoffman, *Similar Facts After Boardman* (1975), 91 L.Q.R. 193; Richard Eggleston, *Evidence, Proof and Probability, at* 80-2. *D.P.P.* v. *Boardman* has been considered in a number of subsequent English cases. See *R.* v. *Rance* (1975), 62 Cr.App.Rep. 118; *R.* v. *Scarrott*, [1977] 3 W.L.R. 629; *R.* v. *Mansfield*, [1978] 1 All E.R. 134

75. [1973] A.C. 729; [1973] 1 All E.R. 440

76. *Infra*. p. 309

Although their Lordships continued to insist that the rule to be followed is expressed adequately in the formulation of Lord Herschell in *Makin,*[77] the decision in *Director of Public Prosecutions* v. *Boardman* marks a significant change in judicial approach to the admissibility of similar fact evidence. Their Lordships declined to treat the issue as turning on whether the evidence fell within a recognised category of admissibility. Likewise, the majority of their Lordships declined to give significance to the question of whether the evidence was relevant solely via propensity or whether it possessed some relevance other than via propensity. Instead, perhaps more clearly than in any previous case, their Lordships treated the admissibility of similar fact evidence as turning solely upon a balancing of the probative value of the evidence against its potential for prejudice.

Lord Wilberforce stated:

> Whether in the field of sexual conduct or otherwise, there is no general or automatic answer to be given to the question whether evidence of facts similar to those the subject of a particular charge ought to be admitted. In each case it is necessary to estimate (i) whether, and if so how strongly, the evidence as to other facts tends to support, *i.e.,* to make more credible, the evidence given as to the fact in question, (ii) whether such evidence, if given, is likely to be prejudicial to the accused. Both these elements involve questions of degree.[78]

Lord Cross stated:

> The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in face of it. In the end — although the admissibility of such evidence is a question of law, not of discretion — the question as I see it must be one of degree.[79]

Only Lord Hailsham laid stress upon the distinction between relevance via propensity and other relevance. His Lordship stated:

> It is perhaps helpful to remind oneself that what is *not* to be admitted is a chain of reasoning and not necessarily a state of facts. If the inadmissible chain of reasoning is the *only* purpose for which the evidence is adduced as a matter of law, the

---

77. *Supra.* p. 310
78. [1975] A.C. 421 at 442; [1974] 3 All E.R. 887 at 896
79. *Id.* at 457 [1974] 3 All E.R. at 909

> evidence itself is not admissible. If there is some other relevant, probative purpose than for the forbidden type of reasoning, the evidence is admitted, but should be made subject to a warning from the judge that the jury must eschew the forbidden reasoning.[80]

It is difficult to see how Lord Hailsham was, in the context of *Director of Public Prosecutions* v. *Boardman,* able to insist upon the importance of this distinction. In *Director of Public Prosecutions* v. *Boardman* the similar fact evidence had no major relevance other than via propensity; the propensity to catamite homosexuality.

The House of Lords held that because of the striking similarity in the accounts given by the boys S and H, the evidence of each boy was admissible in respect of the count relating to the other. Their Lordships did, however, have some reservations as to the sufficiency of the probative value of the evidence of the two boys. Lord Wilberforce stated: "I confess to some fear that the case, if regarded as an example, may be setting the standard of 'striking similarity' too low".[81] Similarly, Lord Cross remarked: "I must say that I regard this as very much a border-line case".[82]

The trial judge had taken the view that the fact that an adult had induced an adolescent boy to play the active, while he played the passive, part in the acts of buggery was itself a sufficiently unusual feature to justify the admission of the evidence. The majority of their Lordships declined to accept this view.[83] Lord Salmon stated:

> Whenever these unnatural practices are indulged in, someone *ex hypothesi* is in the active and someone in the passive role. It may be that it is most unusual for the older man to be in the passive role. If it is so, then there is a striking similarity between the two cases. For all I know, however, the one may be as ususal as the other, in which case there is not the striking similarity between the case of S. and that of H upon which the learned trial judge relied.[84]

---

80. *Id.* at 453 [1974] 3 All E.R. at 905-6
81. *Id.* at 445 [1974] 3 All E.R. at 898
82. *Id.* at 461 [1974] 3 All E.R. at 912
83. Lord Morris, *id.* at 442 [1974] 3 All E.R. at 895; Lord Hailsham *id.* at 447 and 455[1974] 3 All E.R. at 900 and 907 Lord Cross, *id.* at 461 [1974] 3 All E.R. at 912 and Lord Salmon, *id.* at 467 [1974] 3 All E.R. at 914. Lord Wilberforce, while expressing doubts on the point, accepted the view taken by the trial judge. *Id.* at 445; [1974] 3 All E.R. at 898.
84. *Id.* at 463 [1974] 3 All E.R. at 914. Note also Lord Cross, *id.* at 460; [1974] 3 All E.R. at 912.

The majority held, however, that when the other similarities in the stories of the two boys, in particular the accused's nocturnal visits to the dormitories, was added to the peculiar nature of the accused's homosexuality, the evidence was sufficiently probative to be admissible.[85]

The peculiar nature of the propensity exhibited by the accused rendered similar fact evidence admissible in the recent Canadian case of *R.* v. *Simpson*.[86] The accused was charged on two counts of attempted murder. The victim in both cases was a woman. Both cases involved a similar form of attack and both had a sexual connotation. The first victim was attacked after leaving a tavern frequented by the accused. The assailant seized her around the neck from behind, and stabbed her. He then attempted to rape her. The victim testified that her attacker had a body odour. The victim identified the accused as her attacker. The second victim met the accused at the same tavern a month later. They then went to the accused's apartment where intercourse took place. The victim became aware that the accused had a body odour. After intercourse the victim left the accused's apartment. As she was leaving the building she was seized around the neck from behind and stabbed. Her attacker said, "You will never talk". The victim testified that it was the accused who stabbed her as there was no one else present in the vicinity.

The trial judge permitted the two counts to be tried together, and declined to direct the jury to disregard the evidence on one count in considering the other. The accused was convicted and appealed to the Ontario Court of Appeal. The Court held that the peculiar form of murderous propensity exhibited by the accused, when taken together with the similarities in the circumstances surrounding the two attacks and the fact that both victims testified to their attacker having a body odour, rendered the evidence in each count of sufficient probative value in respect of the other count to justify its admissibility.[87]

8. *Where the Evidence Confirms an Identification*

(a) *The Principle of Thompson* v. *The King*

85. Lord Morris, *id.* at 442 [1974] 3 All E.R. at 895; Lord Hailsham, *id.* at 455 [1974] 3 All E.R. at 907; Lord Cross, *id.* at 461 [1974], 3 All E.R. at 912; and Lord Salmon, *id.* at 463; [1974] 3 All E.R. at 914

86. (1977), 35 C.C.C. (2d) 337

87. The accused's appeal was allowed and a new trial ordered on other grounds.

In *Thompson* v. *The King*[88] the accused was charged with committing acts of gross indency with two boys. The acts in respect of which the charges were brought were alleged to have occurred on March 16, and the person who committed them was alleged to have made a further appointment with the boys for March 19. The police were informed in the meantime, and they kept watch with the boys at the rendezvous — a public lavatory. At the appointed time the accused arrived at the rendezvous, and was identified by the boys as the man who had committed the offences on the 16th. The accused's defence was one of mistaken identity. At his trial the prosecution tendered evidence that when arrested on the 19th the accused was carrying powder puffs, and that he had indecent photographs of boys in his room. The accused was convicted and apppealed unsuccessfully first to the Court of Criminal Appeal and then to the House of Lords.

The significance of the powder puffs and the indecent photographs was that they showed the accused to be a homosexual.[89] The House of Lords held that, in the very special circumstances of the case, evidence showing the accused to be a homosexual was admissible to support the identification of him by the two boys. Lord Finlay L.C. stated:

> The whole question is as to the identity of the person who came to the spot on the 19th with the person who committed the acts on the 16th. What was done on the 16th shows that the person who did it was a person with abnormal propensities of this kind. The possession of the articles tends to show that the person who came on the 19th, the prisoner, had abnormal propensities of the same kind. The criminal of the 16th and the prisoner had this feature in common, and it appears to me that the evidence which is objected to afforded some evidence tending to show the probability of the truth of the boys' story as to identity.[90]

The other members of the House of Lords adopted similar reasoning to that of Lord Finlay.[91]

The reasoning adopted by their Lordships was essentially as follows. The person who committed the offences and who made an

---

88. [1918] A.C. 221

89. While no doubt unusual, it is in fact highly doubtful if the carrying of powder puffs does possess any real probative value in suggesting that a man is a homosexual. See *Hales* v. *Kerr*, [1908] 2 K.B. 601

90. [1918] A.C. 221 at 225-6

91. Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor

appointment to be at point A at time B possessed a certain unusual propensity, he was a homosexual. The accused was present at point A at time B. The similar fact evidence established that the accused possessed the same unusual propensity. Thus, in the absence of a remarkable coincidence, the accused and the individual who committed the offences were the same person. Having regard to all the circumstances of the case, in particular the identification of the accused by the two boys, the similar fact evidence thus possessed sufficient probative value to justify its admission.

It is submitted that the reasoning of their Lordships was based upon two untested premises. First, it appears to have been an unstated assumption throughout the case that homosexuality is a very rare condition indeed. This was, of course, an understandable assumption in 1918. It is now estimated that at least 4% of adult males are exclusively homosexual throughout their lives.[92] It would seem then that the coincidence required for the accused to have been innocent was of considerably less magnitude than was believed to be the case by their Lordships. Secondly, nothing appears from the report of the case as to the nature of the area in which the offences occurred and the accused was arrested. If the locality was one regularly frequented by homosexuals, then the fact that at the appointed time the accused who was a homosexual was in the vicinity was of quite limited probative value.

If *Thompson* v. *The King* were to occur again on its precise facts, it is submitted that the similar fact evidence ought not to be admitted.[93] Homosexuality is now recognised as sufficiently common to render the evidence of insufficient probative value to justify admissibility in view of its great potential for prejudice. The facts would, however, only need to be changed slightly to render the evidence of much greater probative value and therefore to justify admissibility. If, for example, the person who committed the

92. This is the estimate made in the *Kinsey Report*. Alfred C. Kinsey, Wardell B. Pomeroy, Clyde E. Martin, *Sexual Behavior in the Human Male* (Philadelphia and London: W.B. Saunders Company, 1948) at 651. The figure of 4% relates to males who are exclusively homosexual. The authors estimated that 37% of the total male population has at least some overt homosexual experience to the point of orgasm between adolescence and old age. *Id.* at 650. More recent studies would suggest that the actual percentages are, if anything, higher than those estimated by the authors of the *Kinsey Report*. See generally the references listed in M. Foster and K. Murray, *A Not So Gay World* (Toronto: McClelland and Stewart Ltd., 1972) at 237-240

93. Note *R.* v. *Morris* (1969), 54 Cr.App.Rep. 69 at 79. Contra R. Cross, *Evidence* (4th ed.) at 334

offences arranged to meet the victims again on a deserted hillside, or in a graveyard at midnight, evidence that the person who kept the appointment possessed the same propensity would be admissible.

(b) *Unwarranted Extensions of Thompson's Case*

As has been shown, the point involved in *Thompson* v. *The King* was quite narrow indeed. That decision has, however, often been mis-interpreted and treated as authority for the proposition that cases involving sexual deviance, and in particular cases involving homosexuality, constitute a special category in relation to which similar fact evidence is always admissible. Largely responsible for this misinterpretation of *Thompson* v. *The King* is an *obiter dictum* in the judgment of Lord Sumner. In a remarkable passage His Lordship stated:

> The evidence tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognized as properly bearing that name. Experience tends to show that these offences against nature connote an inversion of normal characteristics which, while demanding punishment as offending against social morality, also partake of the nature of an abnormal physical property. A thief, a cheat, a coiner, or a house-breaker is only a particular specimen of the genus rogue, and, though no doubt each tends to keep to his own line of business, they all alike possess the by no means extraordinary mental characteristic that they propose somehow to get their livings dishonestly. So common a characteristic is not a recognizable mark of the individual. Persons, however, who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity.[94]

The tendency to regard cases involving homosexuality as standing in a special category has by no means been universal,[95] and in England such a view has now been squarely rejected by the

---

94. [1918] A.C. 221 at 235

95. For cases in which such evidence has been properly rejected by the Courts in the application of ordinary principles, see *R.* v. *Cole* (1810), noted [1946] K.B. 541; *R.* v. *Bailey*, [1924] 2 K.B. 300; *R.* v. *Southern* (1930), 22 Cr.App.Rep. 6; *R.* v. *Boynton*, [1935] 1 D.L.R. 687; (1934), 63 C.C.C. 95 (Ont. C.A.); *R.* v. *Cole* (1941), 165 L.T. 125; *R.* v. *Hughes* (1949), 33 Cr.App.Rep. 59; *R.* v. *Carter*, [1956] Crim.L.R. 722; *R.* v. *Chandor*, [1959] 1 Q.B. 133; *R.* v. *Horwood*, [1970] 1 Q.B. 133

House of Lords in *Director of Public Prosecutions* v. *Boardman*.[96] It will, therefore, be sufficient to focus upon three illustrative cases; two English and one Canadian.[97]

In *R.* v. *Sims*[98] the accused was convicted on three counts of buggery with three different men. The evidence of each man was that the accused had invited him to his house, and had there committed the acts charged. On appeal to the Court of Criminal Appeal it was argued that in respect of each count evidence concerning the other two counts ought to have been held to be inadmissible. This argument was rejected by the Court. Delivering the judgment of the Court, Lord Goddard C.J. stated:

> The evidence of each man was that the accused invited him into the house and there committed the acts charged. The acts they describe bear a striking similarity. That is a special feature sufficient in itself to justify the admissibility of the evidence.[99]

The logic of the argument here being put is unexceptionable. If there had been some feature strikingly peculiar about the three incidents, then the similar fact evidence would have been admissible upon ordinary principles. However, there is nothing in the report of the case to suggest that anything other than acts of buggery of the ordinary kind occurred.

Immediately following the passage quoted above, His Lordship went on to place the Court's decision upon a wider basis. His Lordship stated:

> . . . we think [the admissibility of the evidence] should be put on a broader basis. Sodomy is a crime in a special category because, as Lord Sumner said [His Lordship then quoted from the judgment of Lord Sumner in *Thompson* v. *The King*] . . . . On this account, in regard to this crime we think that the repetition of the acts is itself a specific feature connecting the accused with the crime and that evidence of this kind is admissible to show the nature of the act done by the accused.[100]

In *R.* v. *Hall*[101] the accused was charged on an indictment

96. *Infra*. p. 316

97. For other cases in which it is submitted such evidence has been wrongly admitted, see *R.* v. *Twiss*, [1918] 2 K.B. 853; *R.* v. *Ailes* (1918), 13 Cr.App.Rep. 173; *R.* v. *Berg* (1927), 20 Cr.App.Rep. 38; *R.* v. *Gillingham* (1939), 27 Cr.App.Rep. 143; *R.* v. *Lyons*, [1944] 4 D.L.R. 206; (1944), 81 C.C.C. 280 (B.C.C.A.); *R.* v. *Jeffries* (1946), 47 S.R. (N.S.W.) 284; *R.* v. *Cambell*, [1956] 2 Q.B. 438; *R.* v. *King*, [1967] 2 Q.B. 338; *R.* v. *Twomey*, [1971] Crim.L.R. 277

98. [1946] 1 K.B. 531

99. *Id.* at 539-40

100. *Id.* at 540

101. [1952] 1 K.B. 302

containing eight counts alleging gross indecency with three different young men. The accused's defence to the charges in the case of two of the young men (C and B) was that the acts complained of were done in the course of medical treatment. The accused and these young men had met at a medical institution at which the accused worked. In the case of the third man (R) the accused's defence was that he had never met him. At the trial application was made for each case to be tried separately. The trial judge refused the application, giving as his reason that all the evidence to be called on all the counts could have been called on any one of them. The accused was convicted on all counts, and appealed unsuccessfully to the Court of Criminal Appeal.

The judgment of the Court was delivered by Lord Goddard C.J. In relation to C and B his Lordship correctly held that the similarities between the two sets of incidents were sufficient to justify the admissibility of the evidence to rebut the accused's defence of lack of criminal intent.[102] In relation to R, however, His Lordship again returned to the view he had put forward in *R.* v. *Sims* that homosexuality is itself a sufficiently unusual characteristic to justify the admission of similar fact evidence. In relation to R, His Lordship stated:

> The only case which caused the court momentary difficulty was the case of R., because in that case the appellant's defence was that he had never seen R. in his life before, and he did not say that he was giving R. medical treatment. But the evidence of the other men became material on the very ground on which the House of Lords upheld the admission of evidence in *Thompson* v. *The King,* namely, that it went to identity. The meaning of that expression is that the evidence goes to show that the witness for the prosecution is speaking the truth when he says that the appellant was the man who did the indecent things to him, because it shows that the appellant is a man addicted to unnatural practices. That was what justified the evidence in this case with regard to R. It was for the jury to say whether R. was a liar or a witness of truth, and in deciding that question they were entitled to take into account the evidence given by C. and B.[103]

Clearly the view adopted by Lord Goddard C.J. in *R.* v. *Sims* and *R.* v. *Hall* is in principle wrong. Where the accused is charged with a homosexual offence, evidence that he is in fact a homosexual obviously has tremendous potential for prejudice. On the other hand

---

102. See generally, *infra.* p. 317
103. [1952] 1 K.B. 302 at 308

it is, without more, of quite limited value. It shows no more than that the accused belongs to a class of person, a class comprising 4% or more of the population, members of which class possess a propensity for acts of the kind charged.

It is submitted that similar fact evidence of insufficient probative value was improperly admitted in *R.* v. *Glynn.*[104] The accused was charged with murder. Traces of semen were found in the anus of the deceased. The trial judge admitted in evidence proof that the accused had engaged in homosexual acts on previous occasions. The accused was convicted and appealed. The Ontario Court of Appeal, relying on *Thompson* v. *The King*, upheld the decision of the trial judge. Gale C.J.O. stated:

> . . . in a case where it was proved death could have been caused only by a left-handed person, evidence that the accused had the characteristic of being left-handed would clearly be admissible on the question of identity, so in this case where the death may well have been caused by a homosexual with certain characteristics it was proper to show that the accused was a homosexual with those characteristics.[105]

It is, with great respect, suggested that this analogy is fallacious. The distinction between the two cases is that left-handedness does not, but homosexuality does, carry with it the risk of prejudice. It is this danger which necessitates the requirement of greater relevance before admissibility can be justified in the case of homosexuality. If the accused were charged with murder committed in the course of a rape, there can be no doubt that evidence that he had previously raped someone else would, without more, be inadmissible. There can be no justification for treating a propensity towards homosexuality differently.

The decision of the House of Lords in *Director of Public Prosecutions* v. *Boardman* has already been discussed in detail.[106] In that case the House of lords held that no special rules are applicable in cases involving homosexuality.[107] Lord Hailsham stated:

> There is not a separate category of homosexual cases. The rules of logic and common sense must be the same for all trials where

104. (1972), 5 C.C.C. (2d) 364
105. *Id.* at 365-6
106. *Supra*, p. 318. See also *D.P.P.* v. *Kilbourne*, [1973] A.C. 729; [1973] 1 All E.R. 440.
107. [1975] A.C. 421 at 441, 443, 455, 458, 461; [1974] 3 All E.R. 887 at 895, 896-7, 907, 909-10, 912

> "similar fact" or other analogous evidence is sought to be introduced.[108]

Lord Cross described the words of Lord Sumner in *Thompson* v. *The King* as sounding "nowadays like a voice from another world".[109] The decision in *R.* v. *Sims* was accepted by their Lordships as authority only for the proposition that such similar fact evidence is admissible where there is in fact a "striking similarity" between the various incidents.[110]

The approach adopted in *Director of Public Prosecutions* v. *Boardman,* that in all cases, including those involving homosexuality, the key to the admissibility of similar fact evidence is probative value, was applied by the Court of Appeal in the recent case of *R.* v. *Scarrott.*[111] The accused was charged on 13 counts of homosexual offences, involving eight young boys and covering a period of four and a half years. The trial judge refused counsel's application for separate trials in respect of each boy. During the course of the trial the judge ruled that the evidence given by each boy relating to the count or counts concerning him was admissible on the other counts. The accused was convicted and appealed unsuccessfully to the Court of Appeal.

Delivering the judgment of the Court, Scarman L.J. stated:

> Positive probative value is what the law requires, if similar fact evidence is to be admissible. Such probative value is not provided by the mere repetition of similar facts; there has to be some feature or features in the evidence sought to be adduced which provides a link — an underlying link as it has been called in some of the cases. The existence of such a link is not to be inferred from mere similarity of facts which are themselves so common place that they can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration.[112]

The Court carefully reviewed the evidence, and held that the similarities in the accounts given of the various incidents by the boys were such as to render the evidence of sufficient probative value for it to be admissible.

---

108. *Id.* at 455-456 [1974] 3 All E.R. at 907
109. *Id.* at 458 [1974] 3 All E.R. at 909
110. *Id.* at 439-440, 444, 450, 456, 458, 461 [1974] 3 All E.R. at 893, 897, 902-3, 908, 909-10 and 912
111. [1977] 3 W.L.R. 629
112. *Id.* at 634

9. *Where the Propensity Renders a Lack of Criminal Intent Particularly Unlikely*

Where it is established that the accused committed the *actus reus* of the crime charged, evidence of a similar fact nature may often be of sufficient relevance to be admissible to show that he possessed the appropriate *mens rea*. The present category is a further illustration of the point that the probative value of a particular item of evidence may depend upon all the other evidence in the case. Evidence which shows the accused previously committed a crime similar to that presently charged may render extremely improbable any defence that in the instant case the accused lacked the relevant *mens rea*.

(a) *Unlawful Abortion*

Where an accused is charged with performing an unlawful abortion the fact that he has performed such abortions in the past is, without more, not sufficiently relevant to be admissible.[113] Where, however, it is established that a miscarriage was procured, and the accused's defence is that the operation was lawful, evidence of prior unlawful abortions may become admissible.

In *R.* v. *Bond*[114] the accused, a doctor, was charged with feloniously using instruments upon a woman with intent to procure her miscarriage. The patient was at the time pregnant by the accused. The accused admitted using instruments upon the woman, but denied that he had done so with the intention of procuring an abortion. The prosecution called another woman to give evidence that 9 months previously, at a time when she also was pregnant by the accused, he had used similar instruments upon her with the avowed intention of bringing about her miscarriage. This witness further testified that on that occasion he told her "he had put dozens of girls right".

The Court for Crown Cases Reserved held by a majority of five to two that this evidence was properly admitted.[115] The court held that the evidence was admissible both as establishing a systematic course of conduct on the part of the accused, and also as rendering

---

113. *Brunet* v. *The King*, [1928] 3 D.L.R. 822; (1928), 50 C.C.C.1. (S.C.C.); *R.* v. *Campbell*, [1947] 1 D.L.R. 904; (1946), 86 C.C.C. 410 (B.C.C.A.); *R.* v. *Hrechuk*, [1950] 2 W.W.R. 318; (1950), 98 C.C.C. 44 (Man. C.A.)

114. [1906] 2 K.B. 389

115. Kennedy, Darling, Jelf, Bray and A. T. Lawrence JJ.; Lord Alverstone C.J. and Ridley J. dissenting

extremely improbable the accused's defence that he acted without criminal intent. A. T. Lawrence J. stated:

> If the act charged is manifestly an intentional act, but the defence is that it was honestly or properly done, such evidence is admissible to rebut this defence by shewing knowledge of some fact essential to guilty knowledge or by shewing that in other cases similar acts have been committed by the prisoner by the like means under the like circumstances. The number of cases and the peculiarity of the circumstances tend to shew the improbability of the innocent intention.[116]

The decision in *R.* v. *Bond* was followed by the Supreme Court of Canada in *Brunet* v. *The King*.[117]

(b) *Other Cases*

In many different types of case similar fact evidence may be admissible as rendering highly improbable any defence of lack of criminal intent. It will be sufficient to give a few illustrations.[118]

The facts of *R.* v. *Mortimer*[119] have already been stated. The accused was charged with murder, the allegation of the prosecution being that he had knocked down a woman cyclist by deliberately driving a motor car at her. Evidence was led to the effect that during the course of that day and the previous evening the accused had knocked down three other women cyclists in a similar way. This evidence was of great probative value via a number of different, but related, chains of reasoning. First, it established that the accused possessed a propensity of a highly unusual and specialised nature. Secondly, it established not only that the accused possessed such a propensity, but that he possessed and was prepared to act on the propensity at a point of time very proximate to the incident the subject of the charge. Thirdly, it rendered extremely improbable

---

116. [1906] 2 K.B. 389 At 421. See also *R.* v. *Palm* (1910), 4 Cr.App.Rep. 253; *R.* v. *Thompson* [1912], 7 Cr.App.Rep. 276; *R.* v. *Starkie*, [1922] 2 K.B. 275

117. [1918], 42 D.L.R. 405; 30 C.C.C. 16. See also *R.* v. *Anderson*, [1935] 4 D.L.R. 32; (1935), 64 C.C.C. 205 (B.C.C.A.) Cf. *R.* v. *Pollard* (1909), 15 C.C.C. 74 (Ont. C.A.)

118. *R.* v. *Hough* (1806), Russ. & Ry. 120; 168 E.R. 714; *R.* v. *Balls* (1836), 1 Moo. C.C. 470; 168 E.R. 1348; *R.* v. *Wilson* (1911), 21 C.C.C. 105 (Alb. C.A.); *R.* v. *Boyle and Merchant*, [1914] 3 K.B. 339; *R.* v. *Cline* (1956), 4 D.L.R. (2d) 480; 115 C.C.C. 18 (Ont. C.A.); *R.* v. *Chandler*, [1956] S.R. (N.S.W.) 335; *R.* v. *Davis*, [1963] Crim.L.R. 40; *R.* v. *Marshall*, [1966] 4 C.C.C. 206 (B.C.C.A.); *DeBlois* v. *The Queen* (1964), 44 C.R. 399 (Que.C.A.); *LeBlanc* v. *The Queen* (1975), 29 C.C.C. (2d) 97; *R.* v. *Doubrough* (1977), 35 C.C.C. (2d) 46

119. (1936), 25 Cr.App.Rep. 150

any defence the accused might raise that he did not intend to hit the woman he was charged with having killed.

Delivering the judgment of the Court of Criminal Appeal Lord Hewart L.C.J. stated:

> It appears to us that it was of crucial importance to show that what was done in relation to [the deceased woman] was deliberately and intentionally done . . . . In our opinion, this evidence . . . was plainly necessary to prove something which was really in issue, namely, the intent with which the prisoner did the act, if he was the person who did it.[120]

It is not uncommon for a single item of evidence to possess more than one type of relevance. Where a given item of evidence possesses relevance via two or more chains of reasoning that may, in certain cases, give the evidence greater overall probative value and constitute additional justification for its admission.

In *Perkins* v. *Jeffrey*[121] the accused was charged with exposing himself with intent to insult to a certain Miss T. The prosecution desired to call other witnesses to testify that the accused had previously exposed himself with intent to insult other females on various occasions at the same place and about the same hour. The Divisional Court held that such evidence would be admissible if, but only if, the accused put forward the defence that he had not exposed himself wilfully or with intent to insult. In such event the evidence would possess great probative value in rendering such a defence highly improbable.

In *R.* v. *Harrison-Owen*[122] the accused was charged with burglary. He was found in a house, where a party was in progress, at 1 a.m. He had taken a handbag from a car parked outside, and found in it a key with which he had let himself in. The accused's defence was that he had no recollection of entering the house, and that he must have done so in a state of automatism. It was held by the Court of Criminal Appeal that in these circumstances evidence of the accused's prior convictions for burglary were not admissible. It is submitted that the view taken by the Court in *R.* v. *Harrison-Owen* was unduly favourable to the accused. The similar fact evidence possessed very great probative value, rendering extremely improbable the accused's defence of lack of *mens rea*. *R.*

---

120. *Id.* at 157.
121. [1915] 2 K.B. 702. See *R.* v. *Coombes* (1960), 45 Cr.App.Rep. 36
122. [1951] 2 All E.R. 726

v. *Harrison-Owen* has been criticised,[123] and it is likely that it will not be followed in England.

In *Boulet* v. *The Queen*[124] the accused was charged with first degree murder for the premeditated killing of the deceased. The prosecution case was that the accused and three other men had planned and carried out the execution by shooting of the victim. The accused had taken the police to the scene of the killing, and pointed out the grave in which the deceased's body, decomposed by a caustic substance, was found. The accused's defence was that the deceased had tried to kill one of his companions, and that the companion had then killed the deceased in self-defence. To rebut this defence the trial judge admitted evidence of the accused showing the police another nearby grave, in which the body of a person known to the accused had been buried. This person had also been shot to death, and the body was in a state of decomposition as the result of a caustic substance.

The accused was convicted, and appealed unsuccessfully to the Supreme Court of Canada. Delivering the judgment of the Court, Beetz J. stated:

> The prosecution had to prove premeditation, and a systematic course of action has a clear tendency to establish premeditation. On the other hand, the prosecution was confronted by a defence which had several aspects. One of these was that the appellant found himself caught up by accident in an unforeseeable misadventure, and that as a result his intent was innocent, since he in no way willed the victim's death. Evidence of a similar act showing a systematic course of action, premeditation and guilty intent is admissible to rebut such a defence.[125]

10. *Where the Evidence Establishes a System*

Similar fact evidence may often be admissible to show that the crime charged constitutes merely one incident forming part of a systematic course of conduct engaged in by the accused. Such similar fact evidence may possess a relevance in either of two ways.

On the one hand, where the instant crime has been committed in a peculiar or unusual manner, similar fact evidence may be admissible to show that on other occasions the accused has committed similar crimes in the same unusual manner. The

123. Per Lord Denning in *Bratty* v. *A. G. for Northern Ireland*, [1963] A.C. 386 at 410. Note also R. Cross. *Reflections on Bratty's Case* (1962), 78 L.Q.R. 238
124. (1977), 34 C.C.C. (2d) 397
125. *Id.* at 411

significance of the similar fact evidence in such cases is that it establishes a certain *modus operandi*. This type of evidence of system is often spoken of as "the hallmark doctrine".

On the other hand, the evidence may fall short of establishing that on other occasions the accused in fact committed any criminal acts. Here the relevance of the evidence is of a different nature. The evidence establishes that a series of like transactions has occurred. The accused was connected with each of these transactions, and in respect of each he may or may not have committed a crime. As the number of transactions multiplies however, it becomes clear that either the accused has committed a crime in respect of each transaction or an increasingly remarkable coincidence has occurred.

A useful and simple illustration of this type of relevance is provided by the analogy of tossing a coin.[126] The chances of the coin landing heads on one toss are, of course, even. If the coin is tossed twice the chances of its landing heads on both occasions are 4 to 1 against. If the coin is tossed 10 times the chances of its landing heads on each occasion are 1,024 to 1 against. At this stage the transaction is susceptible of two possible interpretations. Either a remarkable coincidence has occurred, or the coin is not true. With each toss, the likelihood that the coin is not true increases. Similar fact evidence possessing a relevance of this nature is often spoken of as going to rebut a defence of accident or involuntary conduct.

(a) *Cases Involving a Similar Modus Operandi*

The case of *R.* v. *Bird*[127] is a particularly vivid example of an accused utilising an unusual *modus operandi*. The accused was charged with obtaining sexual intercourse from a woman by the use of threats, accusations or menaces.[128] The victim, a Mrs. Salmon, testified that a telephone call was made to her house, and that she mistook the caller for a family friend, one Ian MacDonald. The caller was able to ascertain that Mrs. Salmon's husband had been out drinking with Ian McDonald the night before. He then told her that in the course of the evening the husband had committed an indecent act with another woman, that someone had taken pictures, and that the woman had the pictures and threatened to circulate them

126. See Richard Eggleston, *Evidence, Proof and Probability, supra,* note 21, ch. 2

127. [1970] 3 C.C.C. 340. See also the Australian case *Griffith* v. *The King* (1937), 58 C.L.R. 185.

128. *Criminal Code* s.291.

unless the victim would do the same thing with him, Ian McDonald. The caller again telephoned later in the morning. Still impersonating Ian MacDonald he stated that he could not take part in the act, but that the other woman had a friend who would visit Mrs. Salmon shortly for that purpose. Shortly after a man identified by Mrs. Salmon as the accused arrived impersonating the friend of the other woman. Sexual intercourse then took place between him and Mrs. Salmon. The accused then left. Some time later Mrs. Salmon realised she had been duped. She telephoned Ian MacDonald and ascertained that he had had no part in the proceedings, and that in reality nothing had happened the night before.

The prosecution was permitted to lead evidence of two similar incidents involving a Mrs. Hutchinson and a Miss Thorburn. Mrs. Hutchinson testified to receiving a telephone call. She believed the caller to be a friend. He told her that the night before a woman had enticed him to her home. She had given him marijuana and the two of them went to bed. He said that the woman's brother had come and taken some pictures of the scene. He asked her if she would have intercourse with the woman's brother, in which event the brother would return the pictures to him. Subsequently there was another call from a person who identified himself as the brother. The caller stated he was coming over. Shortly after the accused, purporting to be the brother, arrived and sexual intercourse took place.

Miss Thorburn, an 18 year old schoolgirl, gave evidence that someone called her purporting to be a Dr. Archer. He told her that her mother had a venereal disease, and was concerned that she might communicate it to the daughter. He wanted to come over and see her in about half an hour. She agreed. Subsequently the accused, purporting to be Dr. Archer, arrived. He told her he wished to take scrapings from her vagina. She refused however, and he left.

The accused was convicted and appealed to the British Columbia Court of Appeal. The Court held that the similar fact evidence was admissible to support Mrs. Salmon's identification of the accused as the person who had duped her into having sexual intercourse. Delivering the judgment of the Court Branca J.A. stated:

> The person who committed the crime on Mrs. Salmon was one who adopted a uniquely similar *modus operandi* with Mrs. Hutchinson and Miss Thorburn. The conduct was extraordinary. The telephone conversations, in all three cases, were singularly patterned. The man in each case was one who was seeking sexual

> gratification from a woman who was previously unknown to him, in her own home, in the middle of the day . . . . It was this hallmark which made his conduct in the Hutchinson and in the Thorburn cases admissible evidence in reference to his identification by Mrs. Salmon as the man who had had sexual intercourse with her.[129]

It may be doubted whether the incident concerning Miss Thorburn was sufficiently similar to justify admissibility. The only points of similarity were that a call was made to a complete stranger, and that sexual gratification was sought by the device of impersonation. In relation to Mrs. Hutchinson however, the *modus operandi* was so unusual and so strikingly similar to that used in the case of Mrs. Salmon that the evidence was clearly of the highest possible probative value.

To be admissible the similar fact evidence need not be of such an unusual or striking nature as to make it virtually certain that the crimes were committed by the same man. In *R.* v. *Lawson*[130] the accused was convicted on three counts in an indictment charging that (i) he did forcibly seize E.K., (ii) he did rape P.K., and (iii) he did unlawfully assault H. W. All three crimes were committed in a suburb of Calgary over a period of 55 days, with two of the complainants being attacked at the same intersection. In two of the cases the assailant threatened the girls with a knife, and in the third case he threatened her with a gun. In each case the assailant flung his arm around the neck of the girl. In two of the cases (counts (ii) and (iii)) the girls were approached by the assailant and asked for directions. In two of the cases (counts (i) and (ii)) they were forced into the assailant's car, and required to sit astraddle the console of the car.

It was held by the Alberta Supreme Court that the similarity between the crimes was such that evidence in respect of each count was admissible on the other two counts. Delivering the judgment of the Court McDermid J.A. stated:

> Although the charges are different there can be no doubt that the purpose of the assailant in each case was to abduct the girl so he could rape her. Is there a sufficient similarity between the crimes, so that it is probable that they were committed by the same man?

---

129. [1970] 3 C.C.C. 340 at 345.

130. (1971), 3 C.C.C. (2d) 372. See also *R.* v. *Robinson* (1953), 37 Cr.App.Rep. 95; *R.* v. *Pickard,* [1960] Crim.L.R. 125; *R.* v. *Murphy* (1971), 56 Cr.App.Rep. 249 Cf. *R.* v. *Blackledge,* [1965] V.R. 397; *R.* v. *Wilson* (1973), 58 Cr. App. Rep. 169

> If so, the evidence on each count does not have to be considered separately. I do not think the Crown need go so far as to show that the evidence of similarity is such that it demonstrates beyond a reasonable doubt that the crimes were committed by the same man. It is sufficient if it is shown by a preponderance of evidence that they were probably so committed.[131]

Confidence tricksters often persistently utilize a similar *modus operandi*. Provided the *modus operandi* is of a reasonably specialised kind, similar fact evidence will often be of sufficient probative value to be admissible. In *R.* v. *Gregg*[132] for example, the accused was charged on six counts of obtaining grain by deceit.[133] The accused entered into agreements with farmers by which he obtained barley on his undertaking to pay for the barley once the precise quantity was ascertained. The accused sold the barley, but made no payments to the farmers. Similar fact evidence was admitted that the accused, both on an earlier and on a subsequent occasion, had entered into similar arrangements with other farmers. In these cases also the accused had obtained produce but had made no payments in return. It was held by the Saskatchewan Court of Appeal that in respect of each count the similar fact evidence, including the evidence on the other five counts, was admissible to rebut any defence of innocent intent. The evidence established not merely that the accused was a confidence trickster, but that he was a confidence trickster who habitually obtained similar property by employing the same fraudulent device.

(b) *Cases Where the Repetition of Similar Events Renders an Innocent Explanation of those Events Improbable*

Makin v. *Attorney-General for New South Wales*[134] is itself an

---

131. *Id.* at 378

132. [1965] 3 C.C.C. 203. See also *R.* v. *Cooper* (1849), 3 Cox C.C. 547; *R.* v. *Rhodes*, [1899] 1 Q.B. 77; *R.* v. *Ollis*, [1900] 2 Q.B. 758; *R.* v. *Wyatt*, [1904] 1 K.B. 188; *R.* v. *Boyle and Merchant*, [1914] 3 K.B. 339; *R.* v. *Baker* (1925), 45 C.C.C. 19 (S.C.C.); *Bruck* v. *The King* (1942), 80 C.C.C. 52 (Que. C.A.); *R.* v. *Melynk*, [1948] 2 D.L.R. 274; (1947), 90 C.C.C. 257 (B.C.C.A.); *R.* v. *Giovannone* (1960), 45 Cr.App.Rep. 31; *R.* v. *Salerno*, [1973] V.R. 59; *Alward and Mooney* v. *The Queen* (1977), 35 C.C.C. (2d) 392 (S.C.C.). Cf. *R.* v. *Fisher*, [1910] 1 K.B. 149; *R.* v. *Ellis*, [1910] 2 K.B. 746; *R.* v. *Baird* (1915), 11 Cr.App.Rep. 186; *R.* v. *Boothby* (1933), 24 Cr.App.Rep. 112; *R.* v. *Slender* (1938), 26 Cr.App.Rep. 155; *R.* v. *Hamilton*, [1939] 1 All E.R. 469; *R.* v. *Brown, Smith, Woods and Flanagan* (1963), 47 Cr.App.Rep. 205

133. *Criminal Code* s.323(1)

134. *Supra*, note 1

example of evidence possessing this sort of relevance. It was not established that the Makins had murdered any of the thirteen infants whose bodies were found buried in the grounds of premises occupied by them at various times. However, when the similar fact evidence and the evidence in the instant case were considered overall, one of two conclusions was necessary. Either the Makins had been remarkably unfortunate, and that thirteen infants left in their care had died of natural causes. Alternatively, the Makins were engaged in systematically taking in infants in return for payment, and then killing the infants in order to avoid the cost of maintaining them. Since coincidences of the order required for the first possible hypothesis to be correct are extremely rare, it followed that the similar fact evidence was of very high probative value. Being of such high probative value it was, in spite of its great potential for prejudice, properly admitted.

Another example is provided by the famous "brides in the bath case", *R.* v. *Smith.*[135] The accused was charged with the murder of a woman, Bessie Mundy, with whom he had gone through a bigamous marriage ceremony. The accused had abandoned the lady shortly after the marriage ceremony, but some eighteen months later they met again and were reunited. Shortly afterwards the lady executed a will in favour of the accused. He then had a bath installed in the house, and some three days later the lady was found drowned in it. The prosecution was permitted to tender evidence of two other incidents in which "wives" of the accused had drowned. Some eighteen months after the death of Bessie Mundy the accused had gone through a form of marriage with another woman. An insurance policy was taken out on her life, and she made a will in

---

135. (1915) 11 Cr.App.Rep. 229. A more complete account of the facts of this case is contained in Eric R. Watson (ed.), *The Trial of George Joseph Smith* (London: 1922).

For other examples of evidence possessing this form of relevance, see generally *R.* v. *Richardson* (1860), 2 F. & F. 343; 175 E.R. 1088; *R.* v. *Gray* (1866), 4 F. & F. 1102; 176 E.R. 924; *R.* v. *Roden* (1874), 12 Cox C.C. 630; *R.* v. *Colclough* (1882), 15 Cox C.C. 92; *R.* v. *Hamilton,* [1931] 3 D.L.R. 121; (1931), 55 C.C.C. 85 (Ont. C.A.); *R.* v. *Pinsk,* [1935] 1 D.L.R. 307; (1934), 63 C.C.C. 201 (Sask.C.A.); *R.* v. *Mortimer* (1936), 25 Cr.App.Rep. 150; *Martin* v. *Osborne* (1936), 55 C.L.R. 367; *R.* v. *Sommers* (1958), 122 C.C.C. 6 (B.C.S.C.); *R.* v. *MacPherson,* [1964] 2 O.R. 101; [1964] 3 C.C.C. 170 (C.A.); *R.* v. *Mansfield,* [1978] 1 All E.R. 134. See also the poisoning cases, *R.* v. *Geering* (1849), 18 L.J.M.C. 215; *R.* v. *Garner* (1864), 3 F. & F. 681; 176 E.R. 313; *R.* v. *Cotton* (1873), 12 Cox C.C. 400; *R.* v. *Heeson* (1878), 14 Cox C.C. 40; *R.* v. *Flannagan* (1884), 15 Cox C.C. 403; *R.* v. *Grills* (1954), 73 W.N. (N.S.W.) 303.

the accused's favour. Shortly after she too was found drowned in a bath. Yet a year later another of the accused's "wives" was found drowned in her bath, this time the night after their "marriage". This lady also had insured her life shortly before the tragedy, and on the day of her death she had made a will in the accused's favour.

The accused was convicted, and appealed unsuccessfully to the Court of Criminal Appeal. The Court held the similar fact evidence to have been properly admitted. There were only two possible explanations of the succession of events which had occurred. Either the accused was an extremely unfortunate individual in that three times over a period of less than three years a "wife" of his had died in a precisely similar and highly unusual accident. Alternatively, the accused was engaged in the business of marrying and then murdering unfortunate women for financial gain. The high order of coincidence required for the first hypothesis to be true justified the admissibility of the similar fact evidence.

In *R.* v. *Stawycznyj*[136] the accused was charged with the murder of the newly born child of his *de facto* wife. The mother gave evidence that immediately following the birth of the child he grabbed it by the neck. She told him to let it alone. He replied he would be ashamed to let people know and continued to hold it by the neck for ten minutes or more, choking it. He then put the child's body in a box and buried it in the garden. The mother gave further evidence that intimacy between her and the accused resumed, and that a year later she gave birth to a boy, and the following year to twin boys. She testified that the accused also strangled these babies a few minutes after their birth. He also put their bodies in boxes which he buried in places in the garden. The bodies of four babies were found buried in the garden.

The accused was convicted and appealed to the Manitoba Court of Appeal. By a majority of four to one the Court held that the similar fact evidence had been properly admitted and dismissed the appeal.[137]

It was suggested by the majority however, that while the fact of the deaths was admissible, the testimony of the mother that it was the accused who killed the three subsequently born children was not admissible. Prendergast C.J.M. stated:

---

136. [1933] 4 D.L.R. 725; (1933), 60 C.C.C. 153

137. Prendergast C.J.M., Dennistoun, Trueman and Richards JJ.A.; Robson J.A. dissenting

> In the present case, what the Crown sought to establish was not that the accused murdered those three children . . . . The Crown's object in this case was to show that these children all died within a few minutes after their birth, which was for the purpose of suggesting to the jury that it is not in the course of nature or of usual events that they should have all died of accident or disease in such brief time, or in other words, that the cause of their death was designed and that a crime was thus committed whoever may have been responsible for it.
>
> If that had been all the woman's evidence and it had not gone farther, surely it would be admissible . . . .[138]

His Honour held, however, that the testimony of the mother that the accused killed the three later born children was properly received because of the difficulty which would have been involved in trying to elicit testimony as to the deaths of the children without receiving testimony as to the part played by the accused in those deaths.

It is, with respect, suggested that the distinction which His Honour attempted to draw was in fact misconceived. The relevance, and the only possible relevance, of the similar fact evidence was that it tended to show that the accused murdered all four children. If that was the purpose for which the evidence was adduced, there could be no objection to direct testimony as to that fact.

In *Noor Mohamed* v. *The King*[139] the accused was charged with the murder of his *de facto* wife, Ayesha. The case arose in the Supreme Court of British Guiana. Ayesha had died as a result of taking potassium cyanide. The accused was a goldsmith, lawfully in possession of potassium cyanide for the purpose of his business. The accused was shown to have been on bad terms with Ayesha, and the prosecution case was that he had either tricked or forced her into taking the poison. The prosecution was permitted to lead evidence that two years and four months earlier the accused's wife, Gooriah, with whom he had also been on bad terms, had also died as a result of taking potassium cyanide.

The accused was convicted of murder, and appealed to the Privy Council where the conviction was quashed. Delivering the judgment of the Privy Council Lord Du Parcq stated:

> There can be little doubt that the manner of Ayesha's death, even without the evidence as to the death of Gooriah, would arouse suspicion against the appellant in the mind of a reasonable man.

---

138. [1933] 4 D.L.R. 725 at 730; (1933), 60 C.C.C. 153 at 158
139. [1949] A.C. 182

> The facts proved as to the death of Gooriah would certainly tend to deepen that suspicion, and might well tilt the balance against the accused in the estimation of a jury. It by no means follows that this evidence ought to be admitted. If an examination of it shows that it is impressive just because it appears to demonstrate, in the words of Lord Herschell in *Makin's* case "that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried", and if it is otherwise of no real substance, then it was certainly wrongly admitted. After fully considering all the facts which, if accepted, it revealed, their Lordships are not satisfied that its admission can be justified.[140]

It is submitted that the Privy Council was correct in this decision, and that the similar fact evidence was not of sufficient weight to justify its admission.[141] There were two likely explanations as to the deaths of the two women. Either they had taken potassium cyanide by mistake or as a means of suicide, or the accused had murdered them.[142] In this instance however, the coincidence required for the first hypothesis to be true was not of a sufficiently high order to render the evidence admissible. Only two incidents were involved, and the circumstances of death were not of great peculiarity.

A case perhaps right on the borderline is *Harris* v. *Director of Public Prosecutions*.[143] The accused, a policeman, was charged on eight counts of larcency from the premises of a company of fruit and vegetable merchants in the Bradford market. In every case the money stolen was only a part of the amount that the thief might have taken; in every case the theft occurred in a period during part of which the accused was on duty in uniform in the course of patrolling the market, and apparently at an hour when most of the gates to the market were closed to the general public. On the first seven of these occasions there was no further evidence to associate the accused specifically with the thefts. On the eighth occasion, however, a trap had been laid. A burglar alarm had been placed on the premises without the knowledge of the accused, and marked money had been placed in the cash register. Immediately after the alarm sounded detectives, who had been lying in wait, ran to the market and saw

---

140. *Id.* at 192-3

141. See Rupert Cross, *Evidence* (4th ed.) *supra*, note 21 at 312-313. Note also the remarks of Viscount Simon in *Harris* v. *D.P.P.*, [1952] A.C. 694 at 708, and of Owen J. in *R.* v. *Fletcher*, [1953] S.R. (N.S.W.) 70 at 79.

142. A third possible hypothesis could have been that the accused killed one woman but not the other.

143. [1952] A.C. 694

the accused standing near the premises. He did not approach them immediately although they were persons with whom he was acquainted, but he did so after disappearing from sight for a short period during which he could have placed the marked money in a bin where it was subsequently found.

The jury acquitted on counts 1 to 7, and convicted on count 8. The accused appealed unsuccessfully to the Court of Appeal on the ground that the trial judge had incorrectly directed the jury that they could take account of the evidence relating to the first seven counts in considering the eighth count. He then appealed to the House of Lords, where by a majority of four to one the appeal was allowed and the accused's conviction quashed.[144] The main judgment in the House of Lords was delivered by Viscount Simon, who stated:

> The eighth count raised two issues: (1) Was the money stolen on July 22? (2) Is it proved that it was the appellant who stole it? Previous events could not confirm (1), which indeed was proved beyond dispute. As for (2), the accused denied that he was the thief and the fact that someone perpetrated the earlier thefts when the accused may have been somewhere in the market does not provide material confirmation of his identity as the thief on the last occasion. The case against him on July 22 depended on the facts of that date.[145]

It is, with respect, submitted that the evidence regarding the first seven counts in fact possessed considerably more probative value in relation to the eighth count than the majority of their Lordships were prepared to accord it.[146] The series of eight thefts were identical in locality and nature. It was a highly probable, through not a necessary, inference that they were all committed by the same person. All eight thefts were carried out on evenings when the accused was on duty in the market. Two hypotheses could be adduced to explain this set of facts. Either on eight evenings during

144. Viscount Simon, Lord Porter, Lord Morton of Henryton and Lord Tucker; Lord Oaksey dissenting

145. [1952] A.C. 694 at 711

146. The decision in *Harris* v. *D.P.P.* has generally been approved by commentators. See Rupert Cross, *Evidence* (4th ed.) *supra,* note 21 at 312; Zelman Cowen and P.B. Carter, "The Admissibility of Evidence of Similar Facts: A Re-Examination" in *Essays on the Law of Evidence supra,* note 17 at 123-126; P. Brett, *Abnormal Propensity Or Plain Bad Character? supra* note 19 at 478-9. Cf. R. M. Eggleston, "The Relationship Between Relevance and Admissibility in the Law of Evidence" in H. H. Glass (ed.), *Seminars on Evidence, supra,* note 22 at 68-9; Richard Eggleston, *Evidence, Proof and Probability supra,* note 21 at 69-71. The decision *in Harris,* v. *D.P.P.* was construed narrowly by the Court of Appeal in the recent case of *R.* v. *Mansfield,* [1978] 1 All E.R. 134 at 141-143.

which the accused was on duty in the market a theft had been carried out by an unknown person who was seen by no one including the accused. Alternatively, the accused committed each of the thefts. When to this is added the fact that the other evidence against the accused in respect of the eighth count was quite strong, it would seem that the first hypothesis was a fairly improbable one. It would appear then that the evidence relating to the first seven counts was of considerable probative value in respect of the eighth count, and that the House of Lords may have been unduly favourable to the accused in holding that it was not admissible for this purpose.

11. *Where the Accused is Found in Possession of Incriminating Material*

If the accused is charged with an offence, evidence that he was in possession of materials of a type often used in the commission of such an offence is, without more, not sufficiently relevant to be admissible. Such evidence shows not more than that the accused has a general propensity to commit offences of the type charged. If, however, the materials may well have been used in the commission of the actual crime charged, then the fact that the accused was in possession of these materials may be of far greater relevance and therefore admissible.

Illustrative is the Australian case of *Thompson* v. *The Queen*.[147] The two accused were charged with having taken money from two safes which had been blown open by the use of explosives. The prosecution was permitted to lead evidence that the accused had in their possession a collection of tools and implements for the opening of safes by blowing, by drilling or by picking the locks. The accused were convicted, and appealed to the High Court where their convictions were quashed.

The Court held that evidence that the accused had been in possession of implements which may have been used in the commission of the crimes charged was properly admitted. In a joint judgment Barwick C. J. and Menzies J. stated:

We do not think that evidence of the possession of tools for the

147. (1968), 42 A.L.J.R. 16. See also *R.* v. *Ventricini* (1910), 17 C.C.C. 183 (Ont.C.A.); *Prosko* v. *The King* (1922), 63 S.C.R. 226; 37 C.C.C. 199; *R.* v. *Manning* (1923), 17 Cr. App.Rep. 85; *R.* v. *Taylor* (1923), 17 Cr.App.Rep. 109; *R.* v. *Wurch* (1932), 58 C.C.C. 204 (Man. C.A.); *Picken* v. *The King*, [1938] S.C.R. 457; (1938), 69 C.C.C. 321; *Driscoll* v. *The Queen* (1977), 51 A.L.J.R. 731. Cf. *R.* v. *Reading* (1965), 50 Cr.App.Rep. 98

> commission of crime is admissible only when it appears that tools of that nature were used in carrying out the alleged crime; it is sufficient if such tools might have been so used. . . .[148]

However, evidence that they had been in possession of other tools for the opening of safes, which tools clearly had not been used in the commission of the crimes charged, went beyond what was permissible. Such evidence "did not more than tend to show that the prisoners were well-equipped safebreakers".[149]

The fact that the accused had possession of material similar in nature to that which may have been used in the commission of the crime charged is not always of high probative value. It is submitted that too much significance was placed upon this fact in *R.* v. *Armstrong*.[150] The accused, a solicitor, was charged with the murder of his wife by administering arsenic to her. It was admitted that the wife died of arsenic poisoning. The accused's defence was that he had not administered poison to her, but that she had committed suicide. The accused had purchased a quantity of arsenic and made it up into a number of small packets, each containing what would be a fatal dose. His explanation was that he had purchased it for use as a weed-killer in his garden.

To rebut this defence, the prosecution was permitted to lead evidence of an incident occurring eight months after the death of the wife. The accused was acting for the vendor in a contract for the sale of land. The purchaser's solicitor had warned him that unless the contract was concluded by a certain date, the purchaser would reclaim his deposit. Thereupon the two solicitors met at the accused's house for tea. The accused handed the other solicitor a buttered scone, saying "Excuse my fingers." The purchaser's solicitor became ill shortly afterwards, vomiting copiously. A sample of his urine revealed arsenic poisoning.

The accused was convicted, and appealed unsuccessfully to the Court of Criminal Appeal. Delivering the judgment of the Court Lord Hewart C.J. stated:

> [Prior to the death of his wife] the appellant purchased a quarter of a pound of white arsenic and took it home. With what design did he make that purchase and provide himself at that particular time with that poison? Was it for the innocent purpose of destroying weeds or for the felonious purpose of poisoning his

148. (1968), 42 A.L.J.R. 16 at 17
149. *Id*
150. [1922] 2 K.B. 555

> wife? The fact that he was subsequently found not merely in possession of but actually using for a similar deadly purpose the very kind of poison that caused the death of his wife was evidence from which the jury might infer that that poison was not in his possession at the earlier date for an innocent purpose.[151]

The evidence of the attempted poisoning of the solicitor showed no more than that the accused had a propensity for murder by poisoning. Such a propensity is not sufficiently unusual to render the evidence admissible. The fact that prior to the death of his wife the accused purchased arsenic does not appear to add significantly to the probative value of the similar fact evidence. It is suggested, therefore, that the similar fact evidence in *R.* v. *Armstrong* ought to have been inadmissible.

12. *Where the Evidence is Rendered Admissible by Statute*

Statutory provisions render evidence of a similar fact nature admissible in cases of possession of property obtained by the commission of a crime.[152] Sections 317 and 318 of the *Criminal Code* contain these exceptional provisions.[153] The purpose of these sections is to make it easier for the prosecution to prove guilty knowledge in a class of case where such knowledge is often particularly difficult to establish.

Similar fact evidence is only rendered admissible by virtue of these provisions where notice is given to the accused that the evidence is to be tendered.[154] The evidence is admissible only for the purpose of establishing knowledge on the part of the accused.

IV. *The Conduct of the Case*

The probative value of an item of similar fact evidence, and therefore its admissibility, will often depend upon the defence raised by the accused. In relation to some possible defences the evidence may be of great probative value and therefore admissible. In relation to other defences the evidence may be of quite limited probative value and therefore inadmissible.

The prejudicial potential of similar fact evidence makes it important that admissibility be confined to cases where the evidence

151. *Id* at 566
152. *Criminal Code* ss.312, 314 (1) (b)
153. Note *R.* v. *Boutilier* (1968), 4 C.R.N.S. 90 (N.S.Co.Ct.); *R.* v. *Bowins*, (1973), 24 C.R.N.S. 279 (Ont.Co.Ct.)
154. Ss.317(2), 318(2). Note *R.* v. *Long*, [1959] 3 All E.R. 559

is of high probative value having regard to the issues actually in dispute between the parties. In *Thompson* v. *The King* Lord Sumner stated:

> Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice.[155]

It will be sufficient to give several illustrations of this point. In *Perkins* v. *Jeffrey*[156] the accused was charged with indecently exposing himself to a certain Miss T. The prosecution wished to call other women to testify that on previous occasions the accused had exposed himself to them. The Divisional Court held that the relevance of this evidence, and therefore its admissibility, depended upon the defence raised by the accused. If the accused's defence was that he had not exposed himself wilfully or with intent to insult Miss T, the evidence would be admissible as rendering such a defence highly improbable. If, however, the accused's defence was one of mistaken identity by Miss T, the evidence would not be of sufficient probative value to justify admissibility.

In *R.* v. *Rodley*[157] the accused was charged with breaking and entering with intent to rape. The evidence for the prosecution was to the effect that the accused broke into the house between midnight and 1 a.m., that the prosecutrix, hearing a noise, came downstairs, when the accused seized her and pulled up her clothes. At this point the woman's father came downstairs, and the accused fled. The accused's defence was that he had gone to the house for the purpose of courting the prosecutrix with her consent, that he did not break into the house and did not intend or attempt to rape her. The prosecution tendered evidence that at about 2 a.m. on the same morning the accused went to the house of another woman, about

155. [1918] A.C. 221 at 232 This view was contradicted by Lord Goddard C.J. in *R.* v. *Sims*, [1946] K.B. 531 at 539, but affirmed by the Privy Council in *Noor Mohamed* v. *The King*, [1949] A.C. 182 at 191-192, and by the House of Lords in *Harris* v. *Director of Public Prosecutions*, [1952] A.C. 694 at 706-707. Note also *R.* v. *Hall*, [1952] 1 K.B. 302 and 307

156. [1915] 2 K.B. 702. Note also *R.* v. *Williams* (1977), 25 C.C.C. 103 (Ont.G.S.)

157. [1913] 3 K.B. 468

three miles from the prosecutrix's house. He gained access to her bedroom down the chimney and, with her consent, they had sexual intercourse.

The accused was convicted and appealed to the Court of Criminal Appeal. The Court held that the similar fact evidence ought not to have been admitted.

Had the accused's defence been a complete denial of the incident, the similar fact evidence would have been admissible in order to show that at the time in question he was in a lustful state and prepared to break into dwelling places in order to satisfy that lust. However, the accused's defence was that he had entered the first house not with intent to commit rape, but with intent to have voluntary intercourse. Evidence that shortly afterwards he entered another house where he succeeded in his aim was of little if any relevance in order to rebut this defence.

In *R.* v. *Campbell*[158] the accused was charged with performing an unlawful abortion. His defence was a denial that he had performed any operation on the woman. Evidence that the accused had performed abortions upon other women was admitted by the trial judge, and the accused was convicted. On appeal to the Court of Appeal for British Columbia the accused's conviction was quashed by a majority of three to two.[159] The majority took the view that had the accused admitted operating upon the woman, but denied that the operation performed was an unlawful abortion, the similar fact evidence would have been admissible. The evidence would have been relevant as rendering a defence of lack of intent highly improbable. However, in the context of a defence that the accused was not the person who had performed the abortion, the similar fact evidence was not of sufficient probative value to justify admissibility.

The prosecution is not obliged to wait until the accused makes his defence known before leading similar fact evidence. The prosecution may conduct its case on the basis that the accused is going to take all defences reasonably open. Where, however, in cross examination of a prosecution witness or in some other way, it

158. [1947] 1 D.L.R. 904; (1946), 86 C.C.C. 410. See also *R.* v. *Anderson*, [1935] 4 D.L.R. 32; (1935), 64 C.C.C. 205 (B.C.C.A.); *R.* v. *Hrechuk* (1950), 98 C.C.C. 44 (Man.C.A.); *R.* v. *Ross* (1958), 121 C.C.C. 284 (B.C.C.A.). Note also the recent case of *R.* v. *Doubrough* (1977), 35 C.C.C. 46 (Ont. C.C.), where the defence raised by the accused rendered damaging similar fact evidence admissible.

159. Sloan C.J., Robertson and Sidney Smith JJ.A.; O'Halloran and Bird JJ.A. dissenting

becomes clear that certain defences are not being taken by the accused, the prosecution ought not be permitted to lead similar fact evidence admissible only to rebut those defences. In *Harris* v. *Director of Public Prosecutions* Viscount Simon stated:

> The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge. I do not understand Lord Herschell's words [in *Makin* v. *Attorney-General for New South Wales*] to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal. Where, for instance, *mens rea* is an essential element in guilt, and the facts of the occurrence which is the subject of the charge, standing by themselves, would be consistent with mere accident, there would be nothing wrong in the prosecution seeking to establish the true situation by offering, as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged and was thus acting criminally . . . . What Lord Sumner meant when he denied the right of the prosecution to "credit the accused with fancy defences" (in *Thompson* v. *The King)* was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause.[160]

In some jurisdictions the sensible rule has been adopted that, in cases of doubt, the trial judge should ask the accused or his counsel, in the absence of the jury, to indicate whether he proposes to take the defence which the similar fact evidence will be admissible to rebut.[161]

It is submitted that the above principles were misapplied by the Supreme Court of Canada in *Leblanc* v. *The Queen*.[162] The accused was charged with criminal negligence causing death.[163] He was a bush pilot, and was to pick up the deceased and his companion. The accused, in order to frighten the men on the ground as a joke, intended to make a "pass" at them; that is, to fly very low over them. He miscalculated, flew too low and the plane hit and killed

160. [1952] A.C. 694 at 706-7. See also *R.* v. *Rogans* (1916), 35 N.Z.L.R. 265 at 304; *R.* v. *Anderson*, [1935] 4 D.L.R. 32; (1935), 64 C.C.C. 205 (B.C.C.A.); *Noor Mohamed* v. *The King*, [1949] A.C. 182 at 191-2; *R.* v. *Miller*, [1951] V.L.R. 346 at 353; *R.* v. *Thompson* (1954), 107 C.C.C. 373 (Ont.H.C.); *R.* v. *Cline* (1956), 115 C.C.C. 18 (Ont.C.A.); *Leblanc* v. *The Queen* (1975), 29 C.C.C. 97 at 103-5 (S.C.C.)

161. *R.* v. *Yuille*, [1948] V.L.R. 41 at 46. See also *R.* v. *Horry*, [1949] N.Z.L.R. 791 at 798-9

162. (1975), 29 C.C.C. 97

163. *Criminal Code* s.203

the deceased. The weather conditions were ideal at the time and the mechanical fitness of the airplane was established. The accused testified and admitted that he was making a "pass".

The prosecution as part of its case was allowed to prove that in the several weeks preceding the fatal "pass" the accused had made three other low "passes", twice over persons standing on the ground and once over persons sitting in a boat. The accused was convicted and appealed unsuccessfully to the Court of Appeal of Quebec. He then appealed to the Supreme Court of Canada.

By a majority of six to three the Supreme Court held the evidence was properly admitted and dismissed the accused's appeal.[164] The majority held the similar fact evidence was admissible to establish guilty intent, i.e. to preclude any possible defence that mechanical failure or some other factor beyond the control of the accused caused the aircraft's sudden descent.

The main judgment of the minority was delivered by Dickson J. His Honour stated:

> Evidence of other offences is admissible to negative a defence of innocent intent or accident only if such a defence is raised by an accused or it can be said from the facts of the case that such a defence was rationally open to the accused.[165]

His Honour further stated:

> I do not think the evidence of similar acts introduced in this case was admissible on the ground suggested or on any other ground. The accused did not intend to kill [the deceased] or to cause him bodily harm, otherwise he would have faced a murder charge. He *intended* to make a "pass" with the aircraft; his real intent, his identity and the *actus reus* were never in doubt or an issue. There was nothing in the evidence . . . to suggest mechanical failure or aircraft defect which might support a defence of accident. The aircraft was inspected two days later and found to be in good flying condition. In these circumstances, I incline to the view, with great respect, that the Judge should have awaited some intimation that accident was going to be raised as a ground of defence before admitting similar fact evidence to rebut a possible but improbable defence of accident.[166]

It is submitted that the view of the minority in *Leblanc* v. *The Queen* is preferable to that of the majority. It is, with respect, suggested that the case constitutes an example of "credit[ing] the

164. de Grandpré, Martland, Judson, Ritchie, Spence and Pigeon JJ.; Dickson J., Laskin C.J. and Breetz J. dissenting
165. (1975), 29 C.C.C. 97 at 103
166. *Id.* at 104-5.

accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice''.[167]

It is submitted that none of the above is in any way affected by s.582 of the *Criminal Code* and the decision of the Supreme Court of Canada in *Castellani* v. *The Queen*.[168] The accused was charged with the murder of his wife. It was established that her death was caused by arsenical poisoning, and that she had ingested quantities of arsenic throughout a period of several months prior to her death. The prosecution's case was that the accused had murdered his wife in order to be free to marry a woman with whom he was having an adulterous relationship. The first day of the trial, after the evidence of one prosecution witness had been heard, counsel for the accused tendered a formal written admission of facts and asked that this be received pursuant to s.582 of the *Criminal Code*. That section provides:

> Where an accused is on trial for an indictable offence he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

The prosecution objected to the inclusion of an admission by the accused of his adulterous relationship. The trial judge decided not to permit the admission of this fact. The prosecution was thus free to adduce evidence to prove the adulterous relationship. The accused was convicted and appealed. The Court of Appeal for British Columbia held that the trial judge should have permitted the admission, but that the error had caused no prejudice to the accused and that no substantial wrong or miscarriage of justice had occurred. The accused then appealed to the Supreme Court of Canada.

The Supreme Court upheld the decision of the trial judge, and dismissed the accused's appeal. The Court held that s.582 gives the accused no right to make admissions of fact. Delivering the judgment of the Court Cartwright C.J. stated:

> When recourse is proposed to be had to s.582 it is for the Crown, not for the defence, to state the fact or facts which it alleges against the accused and of which it seeks admission. The accused, of course, is under no obligation to admit the fact so alleged but his choice is to admit it or to decline to do so. He cannot frame the wording of the allegation to suit his own purposes and then insist on admitting it.''[169]

---

167. *Thompson* v. *The King*, *supra*, note 155
168. [1970] S.C.R. 310; [1970] 4 C.C.C. 287
169. *Id.* at 315 [1970] 4 C.C.C. at 290

Castellani v. *The Queen* was, of course, a case dealing with s.582 of the *Criminal Code*. Thus it cannot be treated as affecting the common law principle that the relevance, and therefore the admissibility, of evidence for the prosecution may be dependent upon the manner in which the defence is conducted. Further, the evidence it was sought to keep out by the making of the admission in *Castellani* v. *The Queen* was not similar fact evidence. It was circumstantial evidence directed to showing that the accused had a motive for the murder of his wife. The case therefore should not be regarded as involving any modification of the ordinary rules relating to the admissibility of similar fact evidence.

V. *The Discretion to Exclude*

In this article the argument has been put forward that in applying Lord Herschell's formulation in *Makin* v. *Attorney-General for New South Wales* the courts are in fact engaged in a process of balancing probative value against risk of prejudice. If this view were to be expressly adopted by the courts, then in the field of similar fact evidence there would be no real scope for the operation of a general judicial discretion to exclude legally admissible evidence. The considerations which govern the exercise of such a judicial discretion would be fully dealt with in the context of legal admissibility.

However, in determining whether similar fact evidence is admissible or not, the courts do not generally see themselves as balancing probative value against the risk of prejudice. Rather they see themselves as merely applying the rule laid down in *Makin* v. *Attorney-General for New South Wales,* and in general this means determining whether the evidence fits within a recognised category of admissibility. If the evidence can be treated as fitting within such a category it will generally, subject to the judicial discretion to exclude, he held admissible. So long as the courts continue to understand the principle of *Makin* v. *Attorney-General for New South Wales* in terms of a rule which needs merely to be applied to the facts of the instant case, it is highly important that a discretionary power to exclude similar fact evidence be retained and acted upon. If this is not done, a literal application of the rule may on occasion result in the admission of evidence of limited probative value but high prejudice.

The existence of a general judicial discretion to exclude similar

fact evidence legally admissible is well recognised in England. In *Noor Mohamed* v. *The King* Lord du Parcq stated:

> . . . in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.[170]

In *Harris* v. *Director of Public Prosecutions* Viscount Simon stated:

> This . . . proposition flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of "similar facts" affecting the accused, though admissible, should not be pressed because its probable effect 'would be out of proportion to its true evidential value' (*per* Lord Moulton in *Director of Public Prosecutions* v. *Christie*). Such an intimation rests entirely within the discretion of the judge.[171]

In Canada, any discussion of judicial discretion must now centre upon the decision of the Supreme Court of Canada in *R.* v. *Wray*.[172] The accused was charged with non-capital murder. He made a confession to the police which was clearly involuntary, and therefore inadmissible. The accused told the police that he had thrown the murder weapon into a swamp, and led them to a spot where the rifle which had killed the deceased was discovered. The trial judge refused to allow the prosecution to adduce evidence of the part played by the accused in the discovery of the murder weapon. The accused was acquitted, and the prosecution appealed. The Ontario Court of Appeal upheld the decision of the trial judge.

---

170. [1949] A.C. 182 at 192

171. [1952] A.C. 694 at 707. See also *R.* v. *Fitzpatrick*, [1962] 3 All E.R. 840; *R.* v. *Tait*, [1963] V.R. 520 at 524; *R.* v. *Doyle*, [1967] V.R. 698; *Selvey* v. *Director of Public Prosecutions*, [1970] A.C. 304 at 341-342, 358, 360. Cf. Bernard Livesey, *Judicial Discretion to Exclude Prejudicial Evidence* [1968] C.L.J. 291.

172. [1971] S.C.R. 272; (1970), 11 D.L.R. (3d) 673

The judgment of the Court was delivered by Aylesworth J.A., who stated:

> In our view, a trial Judge has a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute, the exercise of such discretion, of course, to depend upon the particular facts before him. Cases where to admit certain evidence would be calculated to bring the administration of justice into disrepute will be rare, but we think the discretion of a trial Judge extends to such cases.[173]

The prosecution when appealed to the Supreme Court of Canada. By a majority of six to three the Court allowed the appeal and directed a new trial.[174] Both the majority and the minority were of the view that, as a matter of law, the finding of the gun and the part played by the accused in its discovery were admissible. The case turned on the scope of the trial judge's discretion to disallow legally admissible evidence.

The leading judgment of the minority was delivered by Cartwright C.J.C. Adopting the reasoning of the Ontario Court of Appeal, His Honour stated:

> The confession of the accused was improperly obtained and was rightly excluded as being involuntary. In spite of this, evidence of the fact that the accused told the police where the murder weapon could be found was legally admissible under the rule in *R.* v. *St. Lawrence*, but because the manner in which he was induced to indicate the location of the weapon was as objectionable as that in which he was induced to make the confession, it was open to the learned trial Judge to hold that the admission of evidence of that fact would be so unjust and unfair to the accused and so calculated to bring the administration of justice into disrepute as to warrant his rejecting the evidence in the exercise of his discretion; and, finally, there being evidence on which it was open to the learned trial Judge to exercise his discretion in the way he did, the propriety of that exercise is not open to review on an appeal by the Crown.[175]

The leading judgment of the majority was delivered by Martland J. In what has become a celebrated passage, His Honour stated:

> The allowance of admissible evidence relevant to the issue before

---

173. [1970] 3 C.C.C. 122 at 123

174. The majority comprised Martland, Judson, Ritchie, Pigeon, Fauteaux and Abbott JJ.; Cartwright C.J., Spence and Hall JJ. dissented.

175. [1971] S.C.R. 272 at 286-7; (1970), 11 D.L.R. (3d) 673 at 684-5

> the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly.[176]

Referring to two cases in which the English Court of Appeal held that improperly obtained evidence ought to have been rejected by the trial judge,[177] His Honour stated:

> In cases such as *R.* v. *Court* and *R.* v. *Payne,* I think confusion has arisen between "unfairness" in the method of obtaining evidence, and 'unfairness' in the actual trial of the accused by reason of its admission . . . . The view which they express would replace the *Noor Mohamed* test, based on the duty of a trial Judge to ensure that the minds of the jury be not prejudiced by evidence of little probative value, but of great prejudicial effect, by the test as to whether evidence, the probative value of which is unimpeachable, was obtained by methods which the trial Judge, in his own discretion, considers to be unfair. Exclusion of evidence on this ground has nothing whatever to do with the duty of a trial Judge to secure a fair trial for the accused.[178]

His Honour concluded:

> In my opinion, the recognition of a discretion to exclude admissible evidence, beyond the limited scope recognized in the *Noor Mohamed* case, is not warranted by authority, and would be undesirable. The admission of relevant admissible evidence of probative value should not be prevented, except within the very limited sphere recognized in that case. My view is that the trial Judge's discretion does not extend beyond those limits, and, accordingly, I think, with respect, that the definition of that discretion by the Court of Appeal in this case was wrong in law.[179]

The decision in *R.* v. *Wray* has been the subject of a great deal of controversy.[180] It is not proposed in this article to enter into the debate over the conflicting philosophies expressed by the Ontario Court of Appeal and the Supreme Court of Canada. It is submitted, however, that the decision of the Supreme Court in no way affects

---

176. *Id.* at 293 (1970), 11 D.L.R. (3d) at 689-90
177. *R.* v. *Court,* [1962] Crim.L.R. 697; *R.* v. *Payne,* [1963] 1 W.L.R. 637
178. [1971] S.C.R. 272 at 295; (1970), 11 D.L.R. (3d) 673 at 691
179. *Id.* at 295-6 (1970), 11 D.L.R. (3d) at 691-2
180. Note in particular the criticisms in the Ontario Law Reform Commission's *Report on the Law of Evidence,* ch.5. Cf. M.S. Weinberg, *The Judicial Discretion to Exclude Relevant Evidence* (1975), 21 McGill Law Journal 1

the discretion of the trial judge to reject legally admissible similar fact evidence.

There is a clear distinction between the exercise of a discretion with respect to evidence which was obtained improperly before the trial, and the exercise of a discretion with respect to evidence which, although obtained in an entirely proper manner, would be extremely prejudicial to the accused if admitted during the course of the trial.[181] Indeed, this distinction formed a cornerstone of the reasoning of the majority in *R.* v. *Wray*. *R.* v. *Wray* is authority for the proposition that the trial judge is not entitled to reject evidence of the former class on the grounds that to admit it would "bring the administration of justice into disrepute".[182] Nothing in *R.* v. *Wray* curtails the discretion of the trial judge to reject prejudicial evidence where to do so is necessary in order to ensure that the accused receives a fair trial. It is submitted therefore, that when properly understood *R.* v. *Wray* leaves untouched the discretion of the trial judge to reject legally admissible similar fact evidence where the prejudicial potential of such evidence is out of proportion to its probative value.

In subsequent cases however, the view has been expressed that *R.* v. *Wray* involves a significant narrowing of the trial judge's discretion to reject similar fact evidence.

R. v. *Glynn* has already been discussed in detail.[183] The accused was charged with murder. There was evidence to suggest that the deceased may have been murdered by a homosexual. The trial judge admitted in evidence proof that the accused had engaged in homosexual acts in previous occasions. The Ontario Court of Appeal held that such evidence was properly admitted. On the question of discretion the Court simply quoted the key passage from the judgment of Martland J. in *R.* v. *Wray*,[184] and stated:

> It is perfectly apparent to us the admissibility of this evidence is not tenuous and the probative force of this evidence in relation to the main issue before the Court cannot by any stretch of the imagination he described as trifling.[185]

It has been shown that the evidence in *R.* v. *Glynn* was of quite limited probative value. On the other hand, it was undoubtedly

---

181. See Rupert Cross, *Evidence* (4th ed.) *supra*, note 21 at 27-30.
182. *Supra*, note 173
183. *Supra*, p. 345
184. *Supra*. note 176
185. (1971), 5 S.C.C. (2d) 364 at 366

evidence with a high potential for prejudice. It is submitted that as a matter of law, and certainly in the exercise of the trial judge's discretion, the evidence ought to have been rejected.

In *R.* v. *McDonald*[186] the accused was charged with the murder of his mistress. She had been found beaten to death. The accused's defence was that she had been killed by someone else. The victim's son gave evidence that during the time the accused had lived with him and his mother, the accused had fought with and severely beaten his mother over a hundred times, usually when one or both of them were intoxicated. The accused was convicted of manslaughter and appealed unsuccessfully to the Ontario Court of Appeal. The judgment of the Court was delivered by Arnup J.A., who stated:

> As I have indicated, counsel suggested that the evidence was so obviously prejudicial that the trial Judge had a discretion to exclude it. It is clear from the English cases that such discretion has a much wider ambit in England than it now has in Canada since the judgment of the Supreme Court of Canada in *Wray* v. *The Queen,* [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673, [1971] S.C.R. 272. The admissibility of this evidence was not "tenuous", nor was its probative value "slight" (both terms being those used by Martland, J., in *Wray).* Accordingly, the trial Judge was right in not exercising the discretion it is said that he had to exclude it.[187]

Clearly the evidence was admissible as bearing on the relationship between the accused and the victim.[188] Equally, since the evidence was of high probative value the trial judge was correct in not exercising his discretion to exclude it. It is unfortunate, however, that the Court saw fit to suggest that *R.* v. *Wray* has led to a narrowing of the trial judge's discretion to reject similar fact evidence. It is submitted that on the facts of *R.* v. *McDonald* an English Court would have reached the same result as did the Ontario Court of Appeal.

It is submitted that there is no warrant for the view that the discretion of the trial judge to reject similar fact evidence is narrower in Canada than in England. *R.* v. *Wray* is certainly no authority for such a proposition.

VI. *Conclusion*

The approach taken in this article to the admissibility of similar fact

186. (1974), 20 C.C.C. (2d) 144
187. *Id.* at 154
188. *Supra,* p. 346

evidence has been to focus upon the interaction of the two factors of probative value and risk of prejudice. Traditional accounts of the operation of the rule in *Makin* v. *Attorney-General of New South Wales* concentrate either upon questions of classification or upon the distinction between relevance via propensity and relevance other than via propensity. It has been argued that such approaches tend to place insufficient emphasis upon the factors which in reality determine the admissibility of similar fact evidence. Traditional categories certainly draw attention to areas in which similar fact evidence is often of sufficiently high probative value to justify admissibility. Likewise the distinction between relevance other than via propensity and relevance via propensity separates in a rough and ready fashion classes of case where similar fact evidence is often admissible from classes of case where it is often inadmissible. However, it is maintained that any satisfactory account of the law relating to the admissibility of similar fact evidence must treat the issues of probative value and risk of prejudice as the key issues, in comparison with which other factors are to be regarded as largely incidental.

The aim of the present article has been to provide such an account. A set of headings has been utilized, not as a key to admissibility, but merely to conveniently group together types of case in which the probative value of similar fact evidence is often sufficient to justify admissibility. It is a mistake to think that any set of categories or distinctions can give a clear indication of when similar fact evidence will be admissible.

It may be readily conceded that neither probative value nor risk of prejudice can be measured with any degree of exactitude. The potential for prejudice possessed by an item of evidence is often largely a matter of guesswork. The probative value of an item of evidence is often equally difficult to estimate, and is dependent upon a large number of variables. In the present context the key variables are the nature of the similar fact evidence itself, the issues in contest in the case, and the other evidence presented in the case. In many of the cases which have been considered, a slight variation in the facts would have led to a different result.

Precise predictability cannot, of course, be expected in an area in which basic policy considerations compete. It is submitted that similar fact evidence is such an area, and that it is a mistake to attempt to solve the question of admissibility by reliance upon any simple verbal formula or set of distinctions. What is needed is a

clear recognition of the competing policies, coupled with a willingness to attempt the difficult task of evaluating the probative value and the potential for prejudice possessed by the evidence.**

** I am grateful to Professor P.L. Waller of Monash University for reading this article, and for his comments and criticisms.

The Dalhousie Law Journal

The Dalhousie Law Journal is published by the Faculty of Law of Dalhousie University. Communications having to do with editorial matters should be addressed to The Editor, Dalhousie Law Journal, Faculty of Law, Dalhousie University, Halifax, Canada, B3H 3J5. The Editorial Committee welcomes the submission of material for possible publication and advises potential contributors that a style sheet is available from the Editor. Views expressed in a signed contribution are those of the writer, and neither Dalhousie University nor the Faculty of Law accepts responsibility for them.

The Journal is printed by Earl Whynot and Associates Graphics Limited, Trade Mart, Scotia Square, Halifax, Nova Scotia. All communications concerning subscriptions should be addressed to The Carswell Company Limited, 2330 Midland Avenue, Agincourt, Ontario, M1S 1P7. The price of an individual copy is $6.00.
"Indexed": Index to Canadian Legal Periodical Literature