

## SIMILAR FACT REASONING IN *PHILLIPS*: ARTIFICIAL, DISJOINTED AND PERNICIOUS

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[I]t is not the law, nor precedent, nor policy, that will account for such rulings, but merely a rooted inclination to take the stricter view and a preference to err in favor of criminals and against innocent victims.

-- John Henry Wigmore<sup>1</sup>

### I INTRODUCTION

On 19 November 2001, MM, a 15 year-old girl, reported to the Innisfail police that the previous evening she had been threatened with a baseball bat and then raped by Daniel Phillips, a 17 year-old boy that she knew from school. Earlier that day Daniel had helped MM move out of her boyfriend's house. They then had a few drinks together at a vacant house on his mother's property, where the rape allegedly occurred. The police investigation into these allegations turned up four other teenage girls, BS, TK, ML and SW, each of whom said that, over the preceding 16 months, they had also been sexually assaulted by Daniel. Each girl said that they had joined Daniel at a social gathering at which he got them alone and forced them to have unwanted sexual contact with him.

Daniel was charged with multiple counts of rape and one count of indecent assault against the five complainants and was granted bail. On 12 May 2003, JD, an 18 year-old girl, reported to the Brisbane police that in the early hours of the previous day she had been sexually propositioned, threatened and assaulted by Daniel Phillips who was there awaiting trial on the other offences. They had first met at a hotel the previous week. He subsequently invited her to a party at his parents' property. She said that she went to the property, but it turned out there was no party, and instead, he assaulted her. His apparent intention was to have sex with her against her will, but the assault stopped when his mother appeared

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1 *Treatise on the System of Evidence in Trials at Common Law* (2<sup>nd</sup> ed, 1923) 616.

on the scene. Charges of assault with intent to rape relating to JD were added to those previously laid.

The defendant pleaded not guilty, claiming in some cases that the sexual contact was consensual or that he believed it to be consensual, and denying sexual contact in others. Over defence objections, the trial judge held that the charges should be heard together and that the complainants' evidence was cross-admissible as similar fact evidence. The credibility of each complainant's allegations could derive support from the fact that other complainants had made similar allegations, demonstrating that the defendant had a propensity for this type of sexual assault. The jury convicted the defendant in relation to five of the six complainants, on three counts of rape, alternative charges of unlawful carnal knowledge on two counts and one count of assault with intent to rape.

The defendant appealed, primarily on the similar fact and joinder issues. The Queensland Court of Appeal dismissed the defendant's appeal,<sup>2</sup> however, in *Phillips v The Queen*<sup>3</sup> the defendant's appeal was unanimously upheld by five judges of the High Court. The Court held that the evidence of other alleged victims was irrelevant to the issue of a complainant's non-consent and, on issues of commission and mistake as to consent, the evidence lacked sufficient probative value to satisfy the similar fact admissibility test laid down in *Pfennig v The Queen*.<sup>4</sup> The High Court ordered retrials of the counts that had resulted in convictions at the original trial. Without joinder, the counts relating to each of the five complainants were to be heard separately.

It appears that, of the five remaining complainants, only two were prepared to go through with the ordeal of another trial: JD and BS. At the first retrial, the jury was unable to reach agreement. However, at the second retrial on 14 March 2007, the defendant was convicted of rape. At this stage, Phillips was remanded in custody and sentencing was delayed, as fresh charges had been laid in the meantime. Phillips subsequently pleaded guilty to having twice raped a young woman on 21 May 2006, while on bail following the success of his High Court appeal. It could be suggested that Phillips' pattern of behaviour, noted at trial and on appeal to the Queensland Court of Appeal but doubted by the High Court, had continued. As Shanahan DCJ said to Phillips in sentencing him on his three rape convictions, '[t]he offences themselves are somewhat similar. They involve you in social situations approaching girls with requests for sexual favours, them rejecting those requests and you persisting and with the use of some force, in obtaining intercourse with them.'<sup>5</sup>

*Phillips* is a decision on the admissibility of similar fact evidence at common law as modified by Queensland legislation.<sup>6</sup> Its direct impact may be limited as most other jurisdictions have their own legislative tests.<sup>7</sup> Nevertheless, the

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2 *R v PS* [2004] QCA 347.

3 (2006) 225 CLR 303 ('*Phillips*').

4 (1995) 182 CLR 461 ('*Pfennig*').

5 *R v Phillips* (2006) (Sentencing Remarks, Unreported, Rockhampton District Court, 17 September 2007).

6 *Evidence Act 1977* (Qld) s 132A.

7 *Crimes Act 1958* (Vic) s 398A; *Evidence Act 1906* (WA) s 31A (2); see also Uniform Evidence Law s 101; *R v Ellis* (2003) 58 NSWLR 700 ('*Ellis*').

influence of *Phillips* may be considerable.<sup>8</sup> It is a decision by the highest Australian court on the assessment of the relevance and probative value of similar fact evidence. The details of the admissibility test vary from jurisdiction to jurisdiction, but relevance and probative value remain central concepts.

This article finds the High Court's factual and legal reasoning in *Phillips* extremely deficient.<sup>9</sup> The Court's determination that the testimony of one rape complainant is irrelevant to the issue of another rape complainant's non-consent is artificial and unpersuasive. With regard to similar fact evidence, the Court affirmed the admissibility test from *Pfennig* without giving proper consideration to the difficulties it has presented the lower courts. The High Court laid down guidelines to mitigate the apparent strictness of the admissibility test. However, the Court failed to follow these guidelines itself, making the law still more opaque. In application, the Court demanded a level of probative value that will rarely be reached. Both in its ruling that the evidence of other alleged victims is irrelevant to consent, and in its strict application of similar fact admissibility test, the High Court has set a precedent that will make sexual assault even more difficult to prosecute successfully.

## II ADMISSIBILITY OF SIMILAR FACT EVIDENCE

Courts have long recognised that similar fact evidence carries a number of dangers. Chief among these are dual risks of 'reasoning prejudice'<sup>10</sup> – the jury overestimating the probative value of evidence of the defendant's other misconduct – and 'moral prejudice'<sup>11</sup> – the jury, knowing of the defendant's other misdeeds, failing to give the defendant the benefit of a reasonable doubt. For these and other reasons<sup>12</sup> similar fact evidence has long been excluded.<sup>13</sup>

This exclusion has never been absolute. Courts have regularly been presented with cases in which excluding similar fact evidence would be an 'affront to common sense'.<sup>14</sup> At one point it was thought that admissibility depended upon types of reasoning. In particular, propensity reasoning was thought to be 'forbidden'.<sup>15</sup> Evidence of the defendant's other misdeeds should not be admitted for the purpose of persuading the jury that, because the defendant has done this kind of thing in the past, the defendant is more likely to have done it on the occasion in question. However, such evidence could be admitted if relevant to one or more items on a list of exceptions: identity, intention, knowledge and so on. But as Julius Stone pointed out some years ago, this distinction is

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8 LexisNexis Casebase indicates that Queensland decisions make up less than a third of those referring to *Phillips* – six of 20 (at 8 July 2007).

9 See also Jeremy Gans, 'Similar Facts after Phillips' (2006) 30 *Criminal Law Journal* 224, 227.

10 Andrew Palmer, 'The Scope of the Similar Fact Rule' (1994) 16 *Adelaide Law Review* 161, 169.

11 *Ibid* 171.

12 See David Hamer, 'The Structure and Strength of the Propensity Inference: Singularity, Linkage and the Other Evidence' (2003) 29 *Monash University Law Review* 137, 140-141.

13 See generally Julius Stone, 'The Rule of Exclusion of Similar Fact Evidence: England' (1933) 46 *Harvard Law Review* 954.

14 See, eg, *DPP v Boardman* [1975] AC 421, 456 (Lord Cross) ('*Boardman*').

15 *Ibid* 453 (Lord Hailsham); see also 438 (Lord Morris), 461 (Lord Salmon).

‘spurious’.<sup>16</sup> And, since the House of Lords decision in *DPP v Boardman*,<sup>17</sup> it has increasingly been accepted in England and Australia that admissibility is a question of degree, not kind.<sup>18</sup> In *DPP v P*,<sup>19</sup> the House of Lords made it clear that, in English common law, similar fact evidence is admissible, even for the purpose of propensity reasoning, provided it possesses sufficient probative value to outweigh the risk of prejudice.<sup>20</sup>

This balancing test is inherently flexible. In *R v H*<sup>21</sup> Lord Griffiths suggested that the risk of prejudice may be lessening. He indicated that a ‘less restrictive form’ of the exclusionary rule suits today’s ‘better educated and more literate juries’.<sup>22</sup> *DPP v P* and *R v H* were viewed as exhibiting a far more permissive attitude than the earlier decision in *Boardman*.<sup>23</sup> The British Parliament has since taken things a step further with the *Criminal Justice Act 2003* (UK), which abolishes the exclusionary rule. Such evidence need only be ‘relevant’.<sup>24</sup> There is provision for the court to keep out the evidence where it would ‘be unjust’<sup>25</sup> or have an ‘adverse effect on the fairness of the proceedings’;<sup>26</sup> however, courts have recognised that the legislative intention is ‘that evidence of bad character would be put before juries more frequently than in the past’<sup>27</sup> and have given effect to this intention.<sup>28</sup>

Whereas the House of Lords and the English Parliament have recently opened up the admissibility of similar fact evidence, Australian law has taken a very different path. In *Pfennig*<sup>29</sup> McHugh J favoured a balancing approach – ‘[t]he judge must compare the probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted’<sup>30</sup> – although at the same time he expressed concern about the two being ‘incommensurables [with] no standard of comparison’.<sup>31</sup> However, a majority of the High Court rejected the balancing approach on the grounds that it was too discretionary.<sup>32</sup> Instead, the Court fixed

16 Julius Stone, ‘The Rule of Exclusion of Similar Fact Evidence: America’ (1938) 51 *Harvard Law Review* 988, 1004.

17 [1975] AC 421 (‘*Boardman*’).

18 L H Hoffman, ‘Similar Facts After *Boardman*’ (1975) 91 *Law Quarterly Review* 193, 200; *Pfennig* (1995) 182 CLR 461, 480-81 (Mason CJ, Deane and Dawson JJ), 522-528 (McHugh J). The spurious rule continues to dominate US law: H Richard Uviller, ‘Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom’ (1981) 130 *University of Pennsylvania Law Review* 845, 877.

19 [1991] 2 AC 447.

20 *Ibid* 460.

21 [1995] 2 AC 596.

22 *Ibid* 613.

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

24 *Criminal Justice Act 2003* (UK) s 101(1)(d), 103(1)(a); John R Spencer, *Evidence of Bad Character* (2006) [4.20], [4.29].

25 *Criminal Justice Act 2003* (UK) s 103(3).

26 *Police and Criminal Evidence Act 1984* (UK) s 78; see also *Criminal Justice Act 2003* (UK) s 101(3).

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

28 See, eg, *R v Weir* [2006] 1 Cr App R 19.

29 *Pfennig* (1995) 182 CLR 461.

30 *Ibid* 529.

31 *Ibid* 528.

32 *Ibid* 528-29: McHugh J, although suggesting that probative value and prejudicial risk were ‘incommensurables’, still favoured the balancing approach.

the level of probative value which the similar fact evidence has to reach in order to gain admissibility. The Court required that there be no rational view of the challenged evidence consistent with innocence for it to be admitted.<sup>33</sup> This formulation comes from the *Hodge's*<sup>34</sup> direction sometimes given to juries in circumstantial evidence cases.<sup>35</sup> This direction in turn restates the criminal standard of proof beyond reasonable doubt – a rational view of the evidence consistent with innocence would provide reasonable doubt of guilt.<sup>36</sup> On first appearances then, it seems that the stringency of the *Pfennig* test resolves Justice McHugh's problem of incommensurability. It sets a high enough standard for similar fact evidence to overcome any possible prejudice. If the evidence is capable of proving guilt beyond reasonable doubt, there is no space left for prejudice to operate and the 'unfairness disappears'.<sup>37</sup>

However, the derivation of the *Pfennig* admissibility test from the criminal standard of proof raises questions about its operation. An initial concern is that the judge, in assessing whether the evidence proves guilt to the criminal standard, may be intruding too far into the territory of the jury.<sup>38</sup> This concern is difficult to dismiss absolutely, but the judge is exercising quite a different function at a different stage in the proceedings. The judge is deciding admissibility, a question of law, whereas the jury in drawing its verdict is determining the facts. An acquittal by the jury is reconcilable with the judge having admitted similar fact evidence, since the two decisions will have been based upon different bodies of information at different stages.<sup>39</sup> The jury will have had the entire body of evidence before it, whereas the judge will have made his or her determination very early in the trial or even prior to its commencement, on the basis of assumptions about the evidence from committal transcripts, other witness statements or prosecution submissions.<sup>40</sup>

A more practical concern with the *Pfennig* test is simply that it sets the threshold too high. There would be few cases where similar fact evidence, a particular kind of circumstantial evidence, would be strong enough by itself to secure a conviction.<sup>41</sup> As discussed in Part VII below, this concern is arguably

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33 Ibid 483-84 (Mason CJ, Deane and Dawson JJ). See also Justice John Dyson Heydon 'Similar Fact Evidence: The Provenance of and Justification for Modern Admissibility Tests' in Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (2006) 241.

34 *R v Hodge* (1838) 2 Lew CC 227 ('*Hodge's Case*' or '*Hodge's*'); *Grant v The Queen* (1975) 11 ALR 503, 505; *Knight v The Queen* (1992) 175 CLR 495, 502.

35 The connection between the *Hodge's* direction and the similar fact evidence test is drawn most clearly by Dawson J in *Sutton v The Queen* (1984) 152 CLR 528, 563-4.

36 David Hamer, 'Probabilistic Standards of Proof, Their Complements and the Errors that are Expected to Flow from Them' (2004) 1 *University of New England Law Journal* 71, 99-104.

37 Hoffman, above n 18, 194; *R v Handy* [2002] 59 SCR 908, 945.

38 *R v Handy* [2002] 59 SCR 908, 946.

39 Heydon, above n 33, 257.

40 Ibid 250.

41 *R v W* [1998] 2 Qd R 531, 537 (de Jersey J); see also ibid 533-34 (Pincus JA and Muir J); *R v Vinh Le* [2000] NSWCCA 49 (Hulme J); Tim H Smith and Oliver Paul Holdenson, 'Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions: Part II' (1999) 73 *Australian Law Journal* 432, 439; Geoffrey Flatman and Mirko Bagaric, 'Non-similar Fact Propensity Evidence: Admissibility, Dangers and Jury Directions' (2001) 75 *Australian Law Journal* 196.

based upon a misreading of the *Pfennig* test. The probative value of the similar fact evidence is to be assessed contextually – against the background of primary evidence. Nevertheless, a number of legislatures have adopted the balancing test, in some cases explicitly overriding the *Pfennig* formulation.<sup>42</sup>

But that is not the end of *Pfennig*'s troubles. The majority held that the admissibility of similar fact evidence should be determined by reference to a fixed threshold of probative value rather than by weighing probative value against prejudicial risk. But the majority's goals of precision and predictability have not been achieved. There are a number of reasons for this. First, the Court in *Pfennig* may have been pursuing the unattainable. Although *Pfennig* removed prejudicial risk from the equation, the assessment of probative value remained a non-trivial exercise. It is one that courts recognise as 'very much a matter of impressions ... no easy task ... an issue upon which reasonable minds may differ'.<sup>43</sup> But uncertainty about the application of *Pfennig* is not confined to the assessment of probative value in the individual case. As discussed in Parts V to VII below there are specific aspects of the admissibility test that *Pfennig* leaves unclear and which *Phillips* fails to clarify.<sup>44</sup>

Before considering the statement and application of the admissibility test in *Phillips*, I will examine the Court's preliminary finding as to the supposed irrelevance of the other complainants' sexual assault allegations on the consent issue.

### III RELEVANCE TO ISSUE OF CONSENT

As the High Court points out in *Phillips*:

It is essential at the outset to identify the issues at the trial on which the similar fact evidence is tendered. This is central to the identification of relevance, and to the assessment of probative force on which the admissibility of similar fact evidence depends.<sup>45</sup>

Issue definition can be central to the admissibility of similar fact evidence. In certain cases, this question can be difficult to resolve. However, in *Phillips*, it appears that the High Court is incorrect in determining that the evidence of other alleged victims as to their lack of consent is irrelevant to the issue of the complainant's non-consent.

A relatively straightforward illustration of the importance of identifying the facts in issue is seen in *R v Tweed*.<sup>46</sup> The defendant was convicted of rape. The complainant alleged that she had opened the door to the defendant, believing it to

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42 *Crimes Act 1958* (Vic) s 398A; *Evidence Act 1906* (WA) s 31A(2); see also *Evidence Act 1995* (Cth, NSW, Tas) s 101; *R v Ellis* (2003) 58 NSWLR 700.

43 *R v Hooper* [1999] 108 A Crim R 108 ('*Hooper*') [11] (De Jersey CJ); see also *R v Milton* [2004] NSWCCA 195 [33] (Tobias JA, Hidden and Greg James JJ in agreement). In *Hooper*, McMurdo P (in dissent) took a very different view from the majority.

44 See also Gans, above n 9, 237, 239.

45 *Phillips* (2006) 225 CLR 303, [26]; see also *Hoch v The Queen* (1988) 165 CLR 292, 301 (Brennan and Dawson JJ); *Handy* [2002] 59 SCR 908, [69].

46 *R v Tweed* [1992] NI 269 ('*Tweed*'); see also *R v Horry* (1949) 68 NZLR 791; *R v Rodley* [1913] 3 KB 468; Hamer, above n 12, 188-9.

be her boyfriend, and that he had forced his way in and raped her. The defendant admitted intercourse, but claimed that she had consented. The prosecution was allowed to call evidence from another woman, S. The defendant had visited S earlier that night and insistently invited her to have sex with him. However, he eventually accepted her unflagging refusals and left, saying 'I'll go, I'm not bloody wanted'.<sup>47</sup> The trial judge commented to the jury that the prosecution relied on this evidence to show 'this man was determined to have sex with somebody by whatever means on that night and they point to what happened in [S's] house as indicating just precisely what his state of mind was'.<sup>48</sup> But on appeal, the evidence was held to be irrelevant. The defendant's behaviour towards S was 'consistent with a desire on his part to have consensual sex but [did] not go to the length of showing an intent or inclination to commit the crime of rape'.<sup>49</sup> The trial judge was wrong in suggesting 'that a propensity to have intercourse by consent could indicate or tend to show a propensity to have intercourse without consent'.<sup>50</sup>

This is not to say that similar fact evidence of consensual sex could never be relevant or admissible in a sexual assault case. In *R v Butler*<sup>51</sup> identity was in issue and similar fact evidence was admitted on that point. The charges related to the defendant forcing the complainant to perform highly unusual sexual acts including fellating him while he was driving his car in particular locations. The similar fact evidence was to the effect that other women had, at his request, consensually performed the same acts. Relevance on identity is clear. It would be a remarkable coincidence for someone else to share the defendant's very unusual predilections. Clearly, however, if identity had been conceded and consent was the only live issue, this evidence would have been irrelevant and inadmissible as it was in *Tweed*. As Dawson J observed in *Harriman v The Queen*,<sup>52</sup> there are 'cases in which admissibility will be dependent upon the nature of the defence'.<sup>53</sup>

A more difficult illustration of this principle is provided by *R v Joiner*.<sup>54</sup> The defendant was convicted of the murder of his wife. The defendant admitted having struck his wife but said he had not intended to harm her, suggesting she died from the fall and a pre-existing neurological condition. The trial judge admitted similar fact evidence of the defendant's violence against three former partners. This was challenged on appeal. Justice of Appeal Hodgson considered the only issue to be whether the defendant had intended to cause grievous bodily

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47 *Tweed* [1992] NI 269 272.

48 *Ibid* 272.

49 *Ibid* 274.

50 *Ibid*. It could be argued that the restraint displayed by the defendant with S can, to some extent, be reconciled with the force used against the complainant on the basis that, on the earlier occasion, S's sister was also present. But this appears speculative.

51 (1986) 84 Cr App R 12.

52 (1989) 167 CLR 590.

53 *Ibid* 602.

54 (2002) 133 A Crim R 90 (*Joiner*). The majority and dissentient disagreed markedly on a similar issue in *R v Fletcher* (2005) 156 A Crim R 308 [61], [67] (Simpson J, McClellan CJ in agreement), [96]-[97], [124]-[126], [153]-[156] (Rothman J).

harm. Defence counsel argued that the defendant's earlier violence lacked probative value on this issue, since it had not involved that level of harm.<sup>55</sup>

However, Hodgson JA upheld the trial judge's decision:

Evidence of inability to control anger, and a tendency to respond to minor irritations with violence against women with whom the appellant was having a relationship, was powerful evidence to refute the version of events given by the appellant, and to support an inference that the injuries suffered by the deceased were caused by a violent assault.<sup>56</sup>

In *Tweed* it was possible to draw a sharp distinction between accepting and ignoring a refusal to have sex, and between consensual and non-consensual sex. In *Joiner*, however, the contrast was not so great, and the earlier incidents of violence, although less serious, were on the same spectrum as the charged offence. Seeking consensual sex does not demonstrate a propensity for rape, but the commission of lesser acts of violence may show a tendency towards greater acts of violence.

Having regard to *Tweed* and *Joiner*, it is difficult to understand the High Court's finding in *Phillips* that the other rape allegations against the defendant were irrelevant to the complainant's consent. In *Phillips*, unlike *Tweed* and *Joiner*, the claims of the other alleged victims matched that of the complainant. They all stated that they did not consent to the sexual acts perpetrated on them by the defendant. The High Court held that this

does not itself prove any disposition on the part of the accused: it proves only what mental state each of the other complainants had on a particular occasion affecting them, and that can say nothing about the mental state of the first complainant on a particular occasion affecting her.<sup>57</sup>

This reasoning may have superficial appeal, but in this context it is artificial and inapplicable.<sup>58</sup> Each complainant may be viewed as isolated from the others in respect of many of their attitudes and preferences. However, their attitudes to sexual contact with the defendant are closely connected. The common thread is provided by the defendant's behaviour. Asked how they came to have unwanted sexual contact with the defendant, each complainant referred to the defendant's use of threats and force. Their testimony was evidence of the defendant's disposition to use threats and force to have sexual contact with women without their consent, and such a disposition is clearly relevant to a particular complainant's non-consent. The line drawn by the Court between the complainants' mental states and the defendant's conduct is false. 'Consent' is something 'freely and voluntarily given'.<sup>59</sup> It is vitiated by 'force', 'threat or intimidation' and 'fear of bodily harm'.<sup>60</sup>

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55 *Joiner* (2002) 133 A Crim R 90 [33].

56 *Ibid* [36].

57 *Phillips* (2006) 225 CLR 303, [47].

58 See also Gans, above n 9, 229-231.

59 *Criminal Code 1899* (Qld) s 348 (1).

60 *Criminal Code 1899* (Qld) s 348 (2) (a)-(c). In a remarkably literal and non-purposive piece of statutory interpretation, the Queensland Court of Appeal held that this definition of consent applies to s 349 rape but not s 352 sexual assault: *R v BAS* [2005] QCA 97[51]-[52]. For further definitions of consent in terms of the perpetrator's behaviour, see *Crimes Act 1958* (Vic) s 36(a); *Sexual Offences Act 2003* (UK) s 75(2)(a).



The High Court sought support for its position in the fact that '[n]either the courts below nor counsel for the respondent cited any case in which similar fact evidence of complainants who said that they did not consent was led to show that another complainant had not consented'.<sup>61</sup> But there was good reason for such cases not having been cited. This argument was raised for the first time in oral argument in the High Court; it was raised by the Court rather than defence counsel, and prosecution counsel was given insufficient notice to adequately deal with it.<sup>62</sup> Of course, the High Court is entitled to raise arguments not advanced by counsel, and on occasions this may be necessary for the satisfactory determination of the case. However, this practice also carries the risk that the novel argument is not fully tested. And where the Court does adopt an argument raised in this way, it seems self-evidently fallacious to claim support from the fact that no contrary authority has been cited by counsel or the courts below.

In *Phillips*, given the irregular way in which the issue arose, the High Court remained ignorant of a pertinent body of authority.<sup>63</sup> The Victorian Court of Criminal Appeal has expressed views similar to the High Court: 'the issue is primarily one of whether ... intercourse was consensual or otherwise. The attitude of other women to his advances is not ... relevant ...'.<sup>64</sup> But, more recently, the Victorian Court of Criminal Appeal has expressed reservations about this approach,<sup>65</sup> and it has been rejected by criminal appeal courts in the United States,<sup>66</sup> Canada<sup>67</sup> and England. In *R v Wilmot*,<sup>68</sup> the English Court of

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61 *Phillips* (2006) 225 CLR 303, [47].

62 Transcript of Proceedings, *Phillips v The Queen* (High Court of Australia, Gleeson CJ, Kirby, Hayne, Heydon, Gummow JJ, 11 November 2005). In argument the 'bare question of relevance, as distinct from the issue [they had] been debating' (Gleeson CJ) was acknowledged by defence counsel, Mr AJ Glynn SC, to have been 'raised' by Hayne J during the High Court hearing. About half way through just under three hours of oral argument, shortly after the luncheon adjournment, Hayne J observed: 'In this case it may be that the issue becomes whether demonstrating that the accused man had intercourse with A without her consent says anything about whether B gave her consent to other transactions of a sexual kind occurring on a different occasion'. Mr Glynn appeared quite happy to adopt this line of argument, but a moment later returned his main argument, which was that 'there was no issue ... to which [the evidence] could properly go and have a high degree of probative value'. When Hayne J again questioned whether the evidence could have 'any' probative value, and suggested that 'this is a relevance case, not a similar fact case', Mr Glynn seemed not to understand. He responded '[t]he evidence is relevant. The question was, was it admissible?' Gummow and Hayne JJ asked 'Relevant to what?', 'What issue is it relevant to?' and Glynn admitted to having 'misunderstood'. Hayne J responded, 'It is not a matter ultimately for you, Mr Glynn, it will be for Ms Clare [prosecution counsel], but she should be on notice that one very early question will be, to what issue did the evidence go?' Notice, however, was hardly adequate. It was less than half an hour before Mrs Clare had to meet, as she put it, 'the challenge from his Honour Justice Hayne to address the issue of relevance'.

63 Hamer, above n 12, 189-90.

64 *R v Movis* [1994] 75 A Crim R 416, 424 (Southwell, Nathan and McDonald JJ in agreement). An identical view was expressed in *R v Holloway* [1980] 1 NZLR 315, 320.

65 *R v Rajakaruna* (2004) 8 VR 340 [10] (Chernov JA, in dissent), [174] (Smith AJA); compare [122]-[127] (Eames JA).

66 *Williams v State of Florida*, 621 So 2d 413 (Fla, 1993); *People v Oliphant*, 250 NW 2d 443 (Mich, 1976); *State v Hill*, 450 P 2d 696 (Ariz, 1969).

67 *R v McDonald* (2000) 148 CCC (3d) 273 (Ont CA) [37] rejecting the view that *R v Clermont* [1986] 2 SCR 131 is authority for such a rule; see also *R v Brooks* (1989) 7 WCB (2d) 170 (BCCA); *R v Handy* [2002] 2 SCR 908, a case which the High Court considered on other points.

68 *R v Wilmot* (1989) 89 Cr App R 341 ('*Wilmot*'), 345; see also *R v Ryder* [1994] 98 Cr App R 242 CA.

Appeal upheld the admissibility of other complainants' evidence on the issue of non-consent. This was followed in *R v Z*,<sup>69</sup> a case which ultimately reached the House of Lords. While the relevance issue was not the subject of argument on appeal, a majority of the House of Lords expressed approval of *Wilmot*. Lord Hutton, with whom Lords Hope, Browne-Wilkinson and Hobhouse agreed, praised the trial judge's 'careful judgment'.<sup>70</sup> Lord Hope indicated that the defendant had not challenged this aspect of the decision since 'the similar fact evidence of these complainants ... has a direct bearing on the allegation ... that the defendant's intercourse was without consent'.<sup>71</sup>

As a matter of principle, the High Court's views on the irrelevance of the defendant's other alleged sexual assaults to the complainant's lack of consent are factual rather than legal and should not be viewed as setting a binding precedent.<sup>72</sup> 'There is no limit to the ways in which particular human experience can be relevant, depending on the issues in the case',<sup>73</sup> and so findings on relevance 'afford most unsuitable materials for the construction of a body of case law'.<sup>74</sup> But there is a real risk that courts will either mistakenly feel bound by *Phillips*, or failing that, will be strongly influenced by it in their own factual determinations. There are already signs that *Phillips* is having this unfortunate effect.<sup>75</sup>

#### IV TENDENCY AND COINCIDENCE INFERENCES

As discussed, the High Court in *Phillips* held that the similar fact evidence was not even relevant to the consent issue. However, the Court went on to consider whether the evidence may have been admissible to other issues: whether the defendant committed the acts of assault and whether he was mistaken about consent.<sup>76</sup> Before examining the High Court's application of the admissibility test in *Phillips*, it will be helpful to take a closer look at the structure of similar fact reasoning.<sup>77</sup>

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69 [2000] 2 AC 483.

70 Ibid 488.

71 Ibid 487. Only Lord Millet reserved his view on this point, at 510.

72 See also *Smith v The Queen* (2001) 206 CLR 650; Gans, above n 9, 232.

73 Justice John Dyson Heydon (ed), *Cross on Evidence* (7<sup>th</sup> ed, 2004), 103.

74 George James, 'Relevancy, Probability and the Law' (1941) 29 *California Law Review* 689, 704; see also William Twining, *Theories of Evidence: Bentham and Wigmore* (1985) 154-155. It is the attempt to capture the multitudinous varieties of relevance by a limited number of strict rules that has created difficulties for some versions of rape-shield legislation: Neil Kibble, 'Judicial Discretion and the Admissibility of Prior Sexual History Evidence under Section 41 of the Youth Justice and Criminal Evidence Act: Sometimes Sticking to Your Guns Means Shooting Yourself in the Foot' [2005] *Criminal Law Review* 263. See also *People v Hackett*, 421 Mich 338 (1984); *R v Seaboyer* (1991) 66 CCC (3d) 321; *Grills v The Queen* (1996) 70 ALJR 905; *R v A* [2002] 1 AC 45.

75 *Phillips* has been cited as binding authority that evidence of other complainants in connection with consent 'is not probative and is irrelevant': *R v Hakeem* (2006) 163 A Crim R 549 [98]; see also *R v MAP* [2006] QCA 220 [43].

76 *Phillips* (2006) 225 CLR 303, [44], [55].

77 See generally Hamer, above n 12.

The inference from similar fact evidence has three basic elements. At its heart is a similarity, unity or *singularity* between the charged offence and the other acts. This suggests that the person who committed those other acts also committed the charged offence. The second component of the inference is the defendant's *connection* with the other events. If the defendant definitely committed the other acts, and those acts bear a high degree of singularity<sup>78</sup> with the charged offence, the similar fact evidence will be highly probative of guilt. Finally, the similar fact inference must be viewed in the context of the other evidence, ie the *primary evidence* implicating the defendant in the charged offence. These three elements need not be considered in any particular order, although, as discussed in Part III, in a given case, reference to the primary evidence may confine the issues in such a way as to render the similar fact evidence irrelevant.

The components of the similar fact inference can be put together differently so as to produce two variants – the tendency (or propensity) inference and the coincidence inference.<sup>79</sup> The tendency inference begins with the proposition that the defendant committed the other misconduct. From this it may be inferred that the defendant has a tendency to commit misconduct of that kind. And then, given that the other misconduct and the charged offence share a high degree of singularity, it may be inferred that the defendant also committed the charged offence. This inference is then added to the primary evidence to form the prosecution's overall case.

The coincidence inference is more holistic. It is based on the recognition that the defendant has some connection with both the other events *and* the charged offence. Given the singular features shared by the different events, it may be considered improbable that the defendant's connections to them are innocent, leading to an acceptance that the defendant was responsible for all. It should be noted that coincidence reasoning, like tendency reasoning, ascribes to the defendant a 'constancy or uniformity of action and, in that sense, necessarily involves reasoning from propensity'.<sup>80</sup>

The tendency inference may appear more natural where the defendant's commission of the other misconduct is clear-cut. In *R v Straffen*,<sup>81</sup> for example, the defendant was charged with the murder of a young girl by strangulation. The defendant admitted to having strangled two other young girls a year earlier.<sup>82</sup> The question is then whether these earlier strangulations demonstrate a tendency to strangle young girls, supporting the prosecution case that the defendant strangled the victim on this occasion. The coincidence inference, on the other hand, may appear more natural where the defendant denies responsibility for any of the

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78 One meaning of 'singular' is 'unique', and there are no degrees of uniqueness. I use the term in other senses – 'remarkable, extraordinary, unusual, uncommon': *Oxford English Dictionary* (2<sup>nd</sup> ed, 1989).

79 See also *Evidence Act 1995* (Cth) ss 97, 98.

80 Annalise Acorn, 'Similar Fact Evidence and the Principle of Inductive Reasoning: Makin Sense' (1991) 11 *Oxford Journal of Legal Studies* 63, 65.

81 [1952] 2 QB 911.

82 He was found unfit to plead to these offences by reason of insanity, and was committed to Broadmoor. He escaped for a short period, and the charged murder occurred in the area of Broadmoor while he was at large.

events. Indeed, the defendant may question whether there has been any misconduct. For example in *Perry v The Queen*,<sup>83</sup> the defendant claimed to have had nothing to do with the fact that her second husband, de facto husband and brother had all died from poisoning, and that her third husband had also been poisoned. But can this series of poisonings of people close to the defendant have happened without her involvement? The rejection of this possibility suggests that the defendant was responsible for all.

The two types of inference are sharply distinguished in their ideal forms, but in practice the distinction may be less clear and, in a given case, either variant may be open. Even where the other misconduct is the subject of a prior conviction, providing a firm basis for the tendency inference, the coincidence inference may be invoked instead. In *Pfennig*, for example, the prosecution relied upon the defendant's conviction for the kidnap and sexual assault of a young boy, H, in support of its circumstantial case that the defendant had kidnapped Michael Black for sexual gratification and then murdered him. The conduct leading to the conviction may be taken to have demonstrated the defendant's tendency towards such conduct and that this tendency led the defendant to commit the charged offence.<sup>84</sup> But the related coincidence inference is also open. As McHugh J noted, it would be a 'remarkable coincidence' if, as well as the defendant, there was another person present that day who had the means and the propensity to abduct and sexually assault young boys.<sup>85</sup>

*R v Makin*<sup>86</sup> illustrates the converse situation. Mr and Mrs Makin had been charged with the murder of an infant. The prosecution were permitted to lead evidence that this was just one of 12 infant bodies found buried in the backyards of properties that had been occupied by the Makins. The evidence was purely circumstantial, and the defendants denied knowledge of how the bodies got there. Given that the defendants' connection with the deaths was in issue, coincidence reasoning may appear more applicable as 'no one could believe that it was by mere coincidence that a person took three houses in the back yards of which former tenants had secretly buried babies'.<sup>87</sup> Alternatively, a fact-finder could use the evidence of the discovery of the other babies' bodies to conclude that the defendants' 'disposition was murderous',<sup>88</sup> and then infer from this that the defendants committed the charged murder.

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83 (1982) 150 CLR 580; see also *R v Geering* (1849)18 LJMC 215.

84 The H abduction occurred a year later, but there was admission evidence that the defendant had been thinking of 'it' for 12 months: *Pfennig* (1995) 182 CLR 461, 487. The better view is that similar fact evidence of later misconduct will not necessarily be any less probative than that of earlier misconduct: Hamer, above n 12, 153.

85 *Pfennig* (1995) 182 CLR 461, 542; see also 508 (Toohey J); Colin Tapper, 'Dissimilar Views of Similar Facts' (1995) 111 *Law Quarterly Review* 381, 383.

86 (1893) 14 LR (NSW) 1; *Makin v AG of NSW* [1894] AC 57.

87 *R v Makin* (1893) 14 LR (NSW) 1, 22.

88 Colin Tapper, *Cross and Tapper on Evidence* (9<sup>th</sup> ed, 1999) 243.

## V CONNECTION AND CREDIBILITY

Having outlined the tripartite structure of the similar fact inference, and its coincidence and tendency variants, I will now apply this structural analysis to *Phillips*. The similar fact evidence consisted of six complainants making similar sexual assault allegations against the defendant. As discussed above in Part III, through questionable reasoning and without reference to the contrary views expressed in other jurisdictions, the Court considered the evidence of other alleged victims irrelevant to the issue of a complainant's consent. However, the Court noted that, contrary to the approach of the trial judge, consent was not in issue on all counts, and where it was in issue, it was not the sole issue. In respect of a number of counts, the issue was whether the appellant had done the acts alleged, and on other counts, if lack of consent was proven the question would arise whether the defendant had made an honest and reasonable mistake about consent.<sup>89</sup> The Court indicated that the evidence could have relevance on those other issues and went on to consider whether its probative value was sufficient to gain admissibility under the *Pfennig* test.

As previously outlined, in a given case, issue definition can be crucial to assessments of relevance and probative value. However, *Phillips* is not such a case. The defendant's propensity to have sexual contact with women regardless of their consent was relevant to all counts. It was relevant to whether the defendant had forced two complainants to have sexual contact with him and whether he had assaulted a third with that intent. The defendant's propensity was also relevant to whether three of the complainants had consented to sexual contact with the defendant and whether, in making this unwanted contact, the defendant was labouring under an honest and reasonable mistake about their consent. The inferential reasoning does not differ significantly between the different issues. The question in each case is the strength of the defendant's propensity for committing this style of sexual assault.

The Court in *Phillips* considered the evidence was not strong enough to satisfy the *Pfennig* test. However, its reasoning is swift, disjointed and unpersuasive. An examination of the three elements of the similar fact inference in *Phillips* indicates that the evidence was far more probative than the High Court appreciated, throwing further doubt on its decision. Consider first the element of connection. To what degree does the evidence establish that the defendant committed the other misconduct? The complainants knew the defendant and were able to identify him clearly, and so the defendant's connection with the other misconduct turned on their credibility. But *Phillips* leaves a fundamental ambiguity as to the role that credibility plays in determining admissibility.

The Court appears to have viewed the similar fact evidence as a particular type of coincidence evidence. The prosecution argued that, as in *Hoch v The Queen*,<sup>90</sup> the value of the evidence was in 'the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the

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<sup>89</sup> *Phillips* (2006) 225 CLR 303, [44], [55].

<sup>90</sup> (1988) 165 CLR 292.

happenings occurred ... [T]he central question is that of the improbability of similar lies'.<sup>91</sup> The lower courts and the High Court seem to have assessed the evidence on this basis.<sup>92</sup> However, the High Court made more general comments that are wholly inconsistent with the improbability of similar lies approach. In seeking to mitigate the apparent strictness of the *Pfennig* test, the Court emphasised that it is applied on the assumption 'that the similar fact evidence would be accepted as true'.<sup>93</sup> But on this basis, the possibility of the similar fact witnesses lying should not weaken the case for admissibility. The evidence should not be viewed merely as a series of similar allegations of questionable credibility. The evidence should be viewed as establishing that *the defendant did commit the other sexual assaults*. Tendency rather than coincidence reasoning is called for.

A distinction should be drawn at this point between direct and circumstantial evidence of other misconduct. The joint judgment in *Pfennig* suggested: '[o]bviously the probative value of disputed similar facts is less than the probative value those facts would have if they were not disputed.'<sup>94</sup> This is unproblematic with regards to a poisoning case like *Perry*. The defendant's connection with the similar events was circumstantial, and would remain open to challenge even if the evidence were accepted.<sup>95</sup> However, this statement appears inapplicable to *Phillips* in which acceptance of the direct similar fact evidence clearly establishes the defendant's connection with the other misconduct.

It is in keeping with general principle for the trial judge to take evidence at its highest in determining its admissibility, leaving credibility for the jury to assess. As the High Court commented in *Doney v The Queen*:<sup>96</sup>

[T]he purpose and the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters. It is fundamental to that purpose that the jury be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful.

Of course, there are often exceptions to general principles.<sup>97</sup> And some courts have been inclined to exceptionally allow the trial judge to assess credibility where the correspondence between the stories of alleged victims may be due to

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91 Ibid 295 (Mason CJ, Wilson and Gaudron JJ).

92 *R v PS* [2004] QCA 347 [65], [67]; *Phillips* (2006) 225 CLR 303, [33], [39], [42], [46]; Transcript of Proceedings, *Phillips v The Queen* (High Court of Australia, Gleeson CJ, Kirby, Hayne, Heydon, Gummow JJ, 11 November 2005).

93 *Phillips* (2006) 225 CLR 303, [63]. The same contradiction regarding the treatment of the credibility of other alleged victims is also found in *Pfennig* and *Hoch*. In both decisions it was suggested that probative value is to be assessed on the assumption that the similar fact evidence is 'accepted': *Pfennig* (1995) 182 CLR 461, 481; *Hoch* (1988) 165 CLR 292, 294. However, both decisions also endorsed the 'improbability of similar lies' approach: *Pfennig* (1995) 182 CLR 461, 482; *Hoch* (1988) 165 CLR 292, 295.

94 *Pfennig* (1995) 182 CLR 461, 482.

95 See *Sutton v The Queen* (1984) 152 CLR 528, 565 (Dawson J).

96 (1990) 171 CLR 207, 214; see also *Rozenes v Beljajev* [1995] 1 VR 533, 554.

97 See *Rozenes v Beljajev* [1995] 1 VR 533, 559: 'there is no discretion to exclude evidence which is based wholly or primarily upon the trial judge's conclusion that the evidence is unreliable. But if this view be too extreme, then at least it would have to be said that the circumstances calling for a favourable exercise of the discretion would have to be most exceptional.'

collusion. As the Supreme Court of Canada explained in *R v Handy*,<sup>98</sup> collusion is ‘more than just another “factor”’.<sup>99</sup> ‘[C]ollusion ... would be destructive of the very basis on which the similar fact evidence was sought to be admitted, namely the improbability that two women would independently concoct stories with so many (as the Crown contends) similar features.’<sup>100</sup> A majority of the High Court in *Hoch* similarly held that ‘joint concoction ... destroys the probative value of the evidence’.<sup>101</sup> On this approach, if joint concoction is a ‘rational view’<sup>102</sup> of the evidence, it should not be admitted.

However, the House of Lords in *R v H* rejected the approach in *Hoch* and held that collusion is a question of fact for the jury and should not affect admissibility.<sup>103</sup> Lord Griffiths held that ‘to remove this essential role from the jury [would] strike root and branch at the very reason we have jury trial’.<sup>104</sup> And a number of Australian legislatures have followed *R v H*, including Queensland. Section 132A of the *Evidence Act 1977* (Qld) provides that similar fact evidence ‘must not be ruled inadmissible on the ground of collusion or suggestion, and the weight of that evidence is a question for the jury’.<sup>105</sup> In applying the corresponding Victorian provision<sup>106</sup> in *R v Best*,<sup>107</sup> Callaway JA held:

It is entirely consonant with the common law as understood in Australia to leave the reliability of evidence to a jury. They are able, and in some cases better qualified, than a judge to assess the weight of an argument that evidence has been concocted or is the product of unconscious influence.<sup>108</sup>

In *Phillips* there was little evidence of collusion,<sup>109</sup> so the narrow exception from *Hoch* would have been unlikely to apply in any event. The complainants’ credibility should have been left to the jury. The connection element had maximal strength. The High Court seems to have underestimated the strength of the similar fact evidence in this respect. Of course, the defendant disputed the claim that he had committed the other sexual assaults, but this challenge should not keep evidence of these other assaults from the jury.

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98 [2002] 2 SCR 908.

99 Ibid [110].

100 Ibid [99].

101 (1988) 165 CLR 292, 296 (Mason CJ, Wilson and Gaudron JJ).

102 Ibid.

103 [1995] 2 AC 596, 610-11 (Lord Mackay), 618, 621 (Lord Mustill) and 625 (Lord Lloyd).

104 Ibid 613 (Lord Griffiths); see also 612 (Lord Mackay), 620 (Lord Mustill), 624 (Lord Lloyd).

105 See also *Crimes Act 1958* (Vic) s 398A; *Evidence Act 1906* (WA) s 31A. The weight of authority suggests that the Uniform Evidence Act adopts *Hoch*; see, eg, *W v The Queen* (2001) 115 FCR 41; *R v OGD (No 2)* (2000) 50 NSWLR 433, although this may be open to challenge since *Ellis* (2003) 58 NSWLR 700. See Stephen Odgers (7<sup>th</sup> ed, 2006), 406, 416-7.

106 *Crimes Act 1958* (Vic) s 398A.

107 [1998] 4 VR 603.

108 Ibid 611.

109 *R v PS* [2004] QCA 347 [72]; Transcript of Proceedings, *Phillips v The Queen* (High Court of Australia, Gleeson CJ, Kirby, Hayne, Heydon, Gummow JJ, 11 November 2005).

## VI SINGULARITY AND THE STRENGTH OF THE TENDENCY

For the purpose of determining the admissibility of the similar fact evidence, the direct evidence of connection should be taken to establish that *the defendant did sexually assault the other complainants*. How probative is this to the question of whether the defendant assaulted the complainant? This depends upon the degree of shared singularity between the other assaults and the present offence.

It is with respect to the singularity element that courts have looked for a ‘striking similarity’<sup>110</sup> or ‘underlying unity’<sup>111</sup> between the other misconduct and the charged offence. In general, the greater the similarity, the easier it will be to view the charged offence as the product of the defendant’s demonstrated tendency. In a sexual assault case, prior convictions for fraud may lack any probative value and prior convictions for possession of child pornography might have slight probative value.<sup>112</sup> However, prior convictions for other sexual assaults could possess considerable probative force, particularly if the assaults all bore the same signature, for example, the perpetrator forcing the victim to fellate him while he was driving in a particular location.<sup>113</sup> In an identity case, putting the possibility of copy-cat crime to one side, it would be extremely difficult to believe that someone else coincidentally possessed the defendant’s distinctive trademark. In a commission case, putting collusion to one side, it would appear highly improbable that the complainant, although lying, had described the defendant’s distinctive style of assault.

In *Phillips* the High Court noted that ‘striking similarity’ is ‘not essential’, but added that ‘usually the evidence will lack the requisite probative force’ without this.<sup>114</sup> The Court held that the series of assaults in *Phillips* lacked any ‘striking similarity, unusual features, underlying unity, system, pattern or signature ... [and] the high probative value required ... was not shown to exist for any other reason’.<sup>115</sup> Obviously, whether or not evidence reaches the probative threshold depends upon how high the threshold is set. The High Court clearly set the threshold at a high level in *Phillips*<sup>116</sup> and the Court’s finding may be explained on this basis. Nevertheless, the Court’s view that the singularity shared by the complainants’ accounts was insufficient is open to a number of criticisms.

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110 *R v Sims* [1946] KB 531, 539, 544.

111 *Moorov v HM Advocate* 1930 JC 68, 73. See generally *Boardman*, [1975] AC 421, 427 (CA), 439-41 (Lord Morris), 443-4 (Lord Wilberforce), 452-454 (Lord Hailsham), 457-8, 60 (Lord Cross), 462-3 (Lord Salmon); *Hoch* (1988) 165 CLR 292, 294-5 (Mason CJ, Wilson and Gaudron JJ).

112 But see Mike Redmayne, ‘The Relevance of Bad Character’ (2002) 61 *Cambridge Law Journal* 684, 700: ‘statistics confirm that offenders are generalists: while not as pronounced as same-crime comparative propensity, different-crime comparative propensity is significant’.

113 See *R v Butler* (1986) 84 Cr App R 12.

114 (2006) 225 CLR 303, [53], quoting *Pfennig* (1995) 182 CLR 461, 484; see also *R v Sims* [1946] KB 531, 539, 544; *Moorov v HM Advocate* 1930 JC 68, 73. See generally *Boardman*, [1975] AC 421, 427 (CA), 439-41 (Lord Morris), 443-4 (Lord Wilberforce), 452-454 (Lord Hailsham), 457-8, 60 (Lord Cross), 462-3 (Lord Salmon); *Hoch* (1988) 165 CLR 292, 294-5 (Mason CJ, Wilson and Gaudron JJ).

115 (2006) 225 CLR 303, [58].

116 See especially *ibid* [54].



The Court did not explain in detail how it reached its conclusion. Most of its reasoning is contained in the following paragraph:

The similarities relied upon were not merely not “striking”, they were entirely unremarkable. That a male teenager might seek sexual activity with girls about his own age with most of whom he was acquainted, and seek it consensually in the first instance, is not particularly probative. Nor is the appellant’s desire for oral sex, his approaches to the complainants on social occasions and after some of them had ingested alcohol or other drugs, his engineering of opportunities for them to be alone with him, and the different degrees of violence he employed in some instances. His recklessness in persisting with this conduct near other people who might be attracted by vocal protests is also unremarkable and not uncommon.<sup>117</sup>

This passage suggests that, despite having acknowledged that ‘striking similarity’ is just one way in which similar fact evidence may acquire the requisite probative value, the Court became fixated on this particular concept.<sup>118</sup> Individually, each shared feature may not be particularly unusual or distinctive. But the Court appears to have disregarded the prosecution argument that it was the combination of elements that gave the similar fact evidence its probative value in this case.<sup>119</sup> In this aspect, *Phillips* resembles *Sutton v The Queen*,<sup>120</sup> which Dawson J described as ‘not ... a case in which any one circumstance common to the various offences was sufficiently striking to eliminate any reasonable possibility of coincidence. Rather it was the accumulation of common circumstances which had that effect.’ He added that ‘mere coincidence is not a reasonable hypothesis’ even though it might be ‘viewing each set of similar facts separately’.<sup>121</sup>

Admittedly, the assaults related by the complainants in *Phillips* were not identical in every particular.<sup>122</sup> A few of the complainants knew the defendant before the assaults; a couple did not previously know him; and one had been his girlfriend for a few weeks the previous year (although she denied previous sexual activity with him). A few assaults had taken place during or following parties; in two cases the complainants were invited to a party which never took place; in another case the assault occurred after the defendant had helped the complainant move out of her boyfriend’s house. Various amounts of alcohol were consumed by the defendant and complainant in all cases; and also marijuana in two of the cases. In a couple of the cases, there had been some degree of consensual sexual contact prior to the assault. In a few cases the defendant employed some degree of deception to get the complainant on her own; in one case this was not necessary as they were left alone; in another she willingly went off with the defendant. There was some variation in the style of sex involved in the assaults: two complainants said they had been forced to perform fellatio; one or two reported digital penetration; three made reference to the defendant masturbating; all but one complainant reported penile penetration of the vagina, in some cases

117 Ibid [56].

118 See also Gans, above n 9, 236.

119 (2006) 225 CLR 303, [51].

120 (1984) 152 CLR 528.

121 Ibid 567; see also 536 (Gibbs CJ); *Hooper* [1999] QCA 310 [11] (De Jersey CJ).

122 See *Phillips* (2006) 225 CLR 303, [11]-[25], [28]-[29], [42]; *R v PS* [2004] QCA 347 [7]-[44], [58]-[64], [74].

less than full; the assault on the last complainant was interrupted. In one case the defendant videotaped the complainant after the assault while she was still naked. All complainants indicated having felt threatened and being forced to do what they did not want to do; to a lesser degree in one case where the contact took place while the intoxicated complainant had momentarily passed out. One complainant reported being threatened with a baseball bat; another complainant said she had been menaced by a thick necklace-like chain. All but one or two of the assaults took place even though there was at least one other person nearby.

While there is a lack of total uniformity in the assaults described by the complainants, the differences appear slight, unimportant and explicable by reference to the context<sup>123</sup> – ‘a difference in opportunity rather than a different modus operandi’.<sup>124</sup> The assaults involved a degree of opportunism; they were more a matter of manoeuvring and tactics than the product of any grand stratagem. They were of a totally different style to abduction or the use of a date-rape drug, where greater planning and control might be expected to produce greater similarity. Given the relative lack of control it is not surprising that the assaults diverge to some extent, but they are recognisable as variations on a theme.<sup>125</sup> Indeed, given the opportunistic element, the ‘family resemblance’ is quite striking.<sup>126</sup>

It appears questionable for the High Court to describe the style of assault in *Phillips* as ‘unremarkable and not uncommon’. Statistically, offences to the person are uncommon, the subset of sexual assault less common, and this particular style of sexual assault extremely uncommon.<sup>127</sup> As Jeremy Gans observes, ‘most of us get through life without ever being accused of rape’.<sup>128</sup> Of course, any non-zero crime rate is too high, particularly for a crime as serious as sexual assault. And naturally, the criminal courts become intimately familiar with

123 *R v PS* [2004] QCA 347, [74]; *Sutton* (1984) 152 CLR 528, 536 (Gibbs CJ); *Familic v The Queen* (1994) 75 A Crim R 229, 240-41.

124 *Geldreich v State of Florida*, 763 So 2d 1114 (Fla 4<sup>th</sup> DCA, 1999), 1118, citing *Gore v State*, 599 So 2d 978 (Fla 4<sup>th</sup> DCA, 1992), 983, cert denied 506 US 1003; see also *R v BAR* (2005) 152 A Crim R 428 [32] (Mackenzie JA, in dissent).

125 The alleged assault of the fifth complainant may appear the most distinctive – the assault took place while the defendant was helping her move, there was no-one else nearby, he threatened her with a baseball bat, he videotaped her naked afterwards. However, while the singularity quotient may have been lower, these charges were supported by the most primary evidence: Gans, above n 9, 240-241.

126 Ludwig Wittgenstein, *Philosophical Investigations* (1953) 67.

127 The Australian Bureau of Statistic’s Crime and Safety Survey, which covered ‘more serious crime’, reported an overall personal victimisation prevalence rate of persons aged 15 years and over of 5.3 per cent, over a 12 month period. This covered robbery, assault and sexual assault. Of these, sexual assault had the lowest rate. For persons aged 18 years and over the victimisation rate was 0.3 per cent: Australian Bureau of Statistics, *Crime and Safety* Report No 4509 (2005) 2. Other surveys suggest that 0.9 to 1.9 per cent of women are subjected to sexual violence in a 12 month period: Australian Bureau of Statistics, *Women’s Safety Australia* Report No 4128 (1996); Home Office *British Crime Survey*, Home Office Statistical Bulletin No 18 (2000); Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* Report No 4523 (2004). Variation is explained by differences in the breadth of definition of sexual violence, and also differences in the methodology by which the figures are obtained. For a variety of reasons, estimating the incidence of child sexual abuse is extremely difficult: Kylie Miller, ‘Detection and Reporting of Child Sexual Abuse (Specifically Paedophilia): A Law Enforcement Perspective’ in Marianne James (ed), *Paedophilia: Policy and Prevention* (1997) 32, 34.

128 Gans, above n 9, 229.

a good number of the sexual assaults that do occur. Indeed, because of their exposure to such a steady stream of shocking criminality, courts may not be the best judges of the incidence of crime in general or of particular crimes. It is, perhaps, understandable for McPherson JA in *R v BAR*,<sup>129</sup> a case in which the defendant was charged with the sexual assault of two four-year old stepdaughters by different mothers, to describe the allegations as ‘depressingly familiar concomitants of dozens of other cases of this kind of criminal behaviour that come before courts in this State and elsewhere in Australia’.<sup>130</sup> But just because a criminal appeal court has come across similar crimes before does not make the crime common. A court is presented with a very unrepresentative sample of cases, and a frequency assessment based on this sample would be biased and inaccurate. The High Court appears to employ the same questionable reasoning in *Phillips* in describing it as ‘unremarkable and not uncommon’ for a teenage boy to have a ‘strong desire for sexual intercourse (with consent if he could get it, without it if he could not)’<sup>131</sup> and administering ‘different degrees of violence’ in the process.<sup>132</sup> The Court may have seen similar behaviour before, but statistically, and for most of us, sexual violence of this kind is very uncommon.

There is a further significant respect in which the Court in *Phillips* failed to appreciate the strength of the similar fact evidence. The evidence tended to show that the defendant had sexually assaulted not just one or two other women, but five other women in circumstances similar to those reported by the complainant. Is it merely a coincidence that the present charges so resemble the sexual assaults of *five* other women? As Lord Cross pointed out in *Boardman*: ‘The likelihood of such a coincidence obviously becomes less and less the more people there are who make the similar allegations’.<sup>133</sup> But in *Phillips* the High Court appears to have placed no weight on the ‘frequency of the occurrence’.<sup>134</sup> The similar fact evidence showed that the defendant had committed five other assaults, all but the last in his hometown and within just 15 months (the last was 16 months later in Brisbane, while the defendant was on bail in respect of the earlier offences). This suggests that the defendant possessed a deep-seated and dominant propensity for this style of sexual assault. For the High Court to view evidence of his propensity to be irrelevant or lacking in probative value is an affront to common sense.

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129 (2005) 152 A Crim R 428.

130 Ibid [10]. This style of reasoning tends towards circularity. Justice of Appeal McPherson suggests ‘Offences of the *same kind* are almost always likely to be *similar*, and even substantially so’: [10] emphasis added.

131 (2006) 224 ALR 216 [55].

132 Ibid [56]. Similarly, Keane JA is repeating this mistake in applying the terms ‘unremarkable and not uncommon’ from *Phillips* to the defendant’s alleged digital penetration of the vaginas of different sleeping complainants on separate occasions: *MAP* [2006] QCA 220 [44]. Justice McHugh does not make this mistake in *Pfennig* (1995) 182 CLR 461, 541: ‘Sexually assaulting young boys is regrettably not unknown ... But luring boys into vehicles, tying them up, sexually assaulting and keeping them imprisoned is.’

133 [1975] AC 421, 459.

134 *Perry v The Queen* (1982) 150 CLR 580, 610.

## VII CONTEXT AND THE PRIMARY EVIDENCE

Above I have suggested that the High Court may not have fully accounted for the probative value of the similar fact evidence in *Phillips*, both with regard to the defendant's connection with the other misconduct, and the singularity that conduct shared with the charged offence. The Court also failed to give due account to the third element – the primary evidence of the defendant's guilt. However, before examining this aspect of *Phillips*, it is necessary to examine in more detail the role of this element in the structure of the similar fact inference.

First, it should be noted that the distinction between primary evidence and similar fact evidence is less clear for coincidence inferences than it is for tendency inferences. With the tendency inference, it is necessary to refer to the primary evidence in order to assess the degree of singularity that the other incidents share with the charged offence, but otherwise it appears possible to view the tendency inference in isolation. Given the defendant's commission of the other misconduct, and his tendency to commit this kind of misconduct, how likely is it that he committed the charged offence? But primary evidence is integral to the coincidence inference. The inference recognises the defendant's connections with the other events *and the charged offence*, and asks how plausible it is that these all arose by coincidence. Despite this, it is still possible to separate the probative contribution of the primary evidence. Simply ask how strong the prosecution case would be without the similar fact evidence. And, as discussed above, the tendency and coincidence categories are not mutually exclusive. If it is necessary to assess the strength of the similar fact evidence in isolation from the primary evidence, a tendency inference can be constructed instead of a coincidence inference. It is not clear, however, that this is necessary.

As discussed above, *Pfennig* is authority for the proposition that, for similar fact evidence to be admissible, there should be no rational view of it consistent with innocence. This effectively requires the trial judge to determine that the similar fact evidence is capable of proving guilt beyond reasonable doubt in order for it to gain admission. Of course, the criminal standard of proof in its usual operation applies to the evidence as a whole. It would appear very difficult if not impossible for similar fact evidence to satisfy the standard by itself.<sup>135</sup> *Pfennig* does not appear to require this. While not wholly unequivocal, *Pfennig* is authority that similar fact evidence should be 'viewed in the context of the prosecution case'<sup>136</sup> and 'taken together with the other evidence'.<sup>137</sup>

But if the focused application of the *Pfennig* test appears too stringent, the contextual approach presents the opposite difficulty. If, in assessing probative value, the similar fact evidence is to be taken together with the other evidence, the *Pfennig* test appears potentially too weak. In every criminal case the prosecution must present evidence 'capable of bringing satisfaction beyond

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135 *R v W* [1998] 2 Qd R 531. See above n 41.

136 *Pfennig* (1995) 182 CLR 461, 485 (Mason CJ, Deane and Dawson JJ).

137 *Ibid* 478 (Mason CJ, Deane and Dawson JJ), quoting from *Boardman* [1975] AC 421, 456-7 (Lord Cross); but see *Melbourne v The Queen* (1999) 198 CLR 1, 17 (McHugh J).

reasonable doubt to the minds of a reasonable jury'.<sup>138</sup> What would *Pfennig* add to the prosecution's ordinary evidential burden? Highly prejudicial similar fact evidence with little probative value could gain admission on the back of an otherwise strong prosecution case. It seems necessary for the admissibility test to focus on the contribution of the similar fact evidence in isolation in some respect. *Pfennig*, however, left it unclear as to how this should be achieved.<sup>139</sup>

State appeal courts sought to address this issue by developing interpretations of *Pfennig* with separate contextual and focused elements. In *R v O'Keefe*<sup>140</sup> Thomas JA of the Queensland Court of Appeal held that admissibility should be assessed in two steps: (i) there should be 'no reasonable view of [the similar fact evidence] other than as supporting an inference that the accused is guilty of the offence charged'; (ii) 'the evidence as a whole [should be] capable of excluding all innocent hypotheses'.<sup>141</sup> The first test focuses on the similar fact evidence in isolation, but it is not clear just what it demands. Despite the reference to 'no reasonable view', the degree of 'support' that the similar fact evidence must provide the inference of guilt is left unclear.<sup>142</sup> The second contextual test is more clearly expressed, however, it has the problem noted above – it looks like the prosecution's ordinary evidential burden applied at an earlier stage. On its terms, the *O'Keefe* test appears to place no particular demand on the similar fact evidence other than relevance, although Thomas JA indicated that it should be applied 'with special care because of the potential danger of misuse of such evidence by the jury'.<sup>143</sup>

Justice of Appeal Thomas, with Pincus and Davies JJA agreeing, upheld the trial judge's admission of similar fact evidence in that case, but he failed to give a clear explanation as to how his test applied to the facts.<sup>144</sup> On arson charges the disputed evidence was that the defendant had committed arson on one other occasion more than 20 years earlier. The trial judge may have been overstating the prosecution case to suggest that there were striking similarities of motive and method. There was nothing that could be called a signature,<sup>145</sup> and given the minimal frequency and extremely long interval between occurrences, it appears that strong primary evidence of motive, opportunity, means and identification did considerable work in lifting the similar fact evidence to a level where it could be considered to exclude any reasonable hypothesis consistent with innocence.

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138 Harold H Glass, 'The Insufficiency of Evidence to Raise a Case to Answer' (1981) 55 *Australian Law Journal* 842, 847; *Doney v The Queen* (1990) 171 CLR 207, 212, 214-5.

139 See also Gans, above n 9, 241.

140 [2000] 1 Qd R 564 ('*O'Keefe*').

141 *Ibid* 573-4.

142 Heydon, above n 33, 253.

143 *O'Keefe* [2000] 1 Qd R 564, 574.

144 *Ibid* 574. Justice of Appeal Thomas merely commented: 'Both the propensity evidence and the evidence as a whole were such as to justify affirmative answers by the trial judge to each of the two questions posed'.

145 *Ibid* 567. It does not seem particularly striking that, in both cases the defendant had a grudge against the property owner, the defendant was found drunk on both occasions, or that the fires were set using paper. The most unusual feature common to both was the setting of second fire near the target premises apparently to distract attention from the primary fire.

The High Court in *Phillips* was critical of the *O'Keefe* court's development of its own interpretation of the *Pfennig* test. This criticism was not based upon any analysis of the problems with *Pfennig* or the *O'Keefe* court's response to them.<sup>146</sup> The High Court merely noted that the *O'Keefe* test is 'expressed differently [and] it cannot be assumed that in every case they would operate identically to the tests expressed in *Pfennig*'.<sup>147</sup> The *O'Keefe* court and those following it were then admonished for 'qualifying or ignoring a rule established by a decision of this court', contrary to the rules of precedent.<sup>148</sup> As Gans points out, the High Court appears here to be viewing its decisions 'like sacred texts',<sup>149</sup> an approach which 'would threaten to ossify the common law, rather than allowing its development'.<sup>150</sup>

In view of the attitude expressed by the Court in *Phillips*, it is surprising that Heydon J, a member of the *Phillips* Court, has since extra-curially endorsed another state appeal court's gloss on *Pfennig*, that of Hodgson JA in *R v WRC*,<sup>151</sup> subsequently applied by him in *R v Joiner*.<sup>152</sup> But the *WRC* test shares similar difficulties to the *O'Keefe* test. It would allow the primary evidence to do the bulk of the work in satisfying the admissibility test, and could potentially demand little of the similar fact evidence.

In *WRC*, Hodgson JA held:

[*Pfennig*] does not mean that the judge must look at the propensity evidence in isolation, and not admit it unless there is no reasonable view of the evidence so considered that is consistent with the innocence of the accused of the offence with which the accused stands charged. That approach would be quite inconsistent with the correct approach for considering circumstantial evidence ... [N]or can it mean that the judge must look at all the evidence in the case, including the propensity evidence, and admit the propensity evidence if and only if there is no reasonable view of all the evidence that is consistent with the innocence of the accused: that approach would disregard altogether the need for some special probative value of the propensity evidence.

In my opinion, what it must mean is that, if it first be assumed that all the other evidence in the case left the jury with a reasonable doubt about the guilt of the accused, the propensity evidence must be such that, when it is considered along with the other evidence, there will then be no reasonable view that is consistent with the innocence of the accused. That is, the propensity evidence must be such that, when it is added to the other evidence, it would eliminate any reasonable

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146 The Court suggested '[t]here was no argument in this case specifically directed to the issue of whether *Pfennig v R* should be overruled or qualified or whether, if *R v O'Keefe* differs from *Pfennig v R*, it should be preferred': (2006) 225 CLR 303, [61]; see also Heydon, above n 33, 243. But these comments are misleading. The transcript shows that the Court spent some time considering the history and meaning of the *Pfennig* test and potential difficulties with it: Transcript of Proceedings, *Phillips v The Queen* (High Court of Australia, Gleeson CJ, Kirby, Hayne, Heydon, Gummow JJ, 11 November 2005).

147 (2006) 225 CLR 303, [64].

148 *Ibid* [60].

149 Gans, above n 9, 237.

150 *Ibid*.

151 (2002) 130 A Crim R 89 ('*WRC*').

152 (2002) 133 A Crim R 90; Heydon, above n 33, 251. Since *Ellis* (2003) 58 NSWLR 700, the *Evidence Act 1995* (NSW) is no longer considered to embody the *Pfennig* test, however, Heydon J still endorsed the accuracy of Hodgson JA's perception of the common law as expounded in *Pfennig* (1995) 182 CLR 461, at fn 47.

doubt which might be left by the other evidence.<sup>153</sup>

Despite Justice Heydon's claims to the contrary, this does not resolve the problem with *O'Keefe*. Justice Heydon approves of the assumption 'that the evidence in the case other than the similar fact evidence is insufficient to exclude a reasonable doubt'.<sup>154</sup> But a reasonable doubt of what magnitude? *WRC* is open to the same criticism that Heydon J makes of *O'Keefe*. It 'does not state what strength the inference of the accused's guilt which flows from the [similar fact] evidence must have – strong or weak or intermediate'.<sup>155</sup>

The potential weakness of the *WRC* test is apparent from its application in *Joiner*. As mentioned above, the defendant, who was charged with murder, conceded that he struck his wife but claimed that her death was an accident. The defendant denied that evidence of his violence towards previous partners was sufficiently probative to the fact in issue – whether he intended his wife grievous bodily harm. As discussed in Part III, the relevance of the previous violence to the intent issue was open to question, since those attacks had not caused grievous bodily harm. But, in this case, the strength of the primary evidence was such that little was required of the similar fact evidence. Justice of Appeal Hodgson considered that 'even without the tendency evidence, there was a strong Crown case',<sup>156</sup> including extensive injuries to the deceased, an injury to the defendant's hand, and his guilty post-offence conduct. In applying the first step of the *WRC* test, Hodgson JA assumed that 'the possibility [of the defendant not intending grievous bodily harm], although very remote, was not excluded beyond reasonable doubt'.<sup>157</sup> The result of the second step was then a foregone conclusion. Adding the similar fact evidence 'it is ... no longer reasonable to regard such a highly improbable scenario as a reasonable possibility'.<sup>158</sup> *Joiner* demonstrates that, contrary to the claims of Hodgson JA and Heydon J, the *WRC* test provides no guarantee that similar fact evidence must possess 'special'<sup>159</sup> or 'exceptional'<sup>160</sup> probative value to gain admission.

The High Court in *Phillips* made several brief observations addressing these issues. The Court made it clear that '*Pfennig* does not require the judge to conclude that the similar fact evidence, standing alone, would demonstrate the guilt of the accused'.<sup>161</sup> '[D]ue weight must be given to the necessity to view the

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153 *WRC* (2002) 130 A Crim R 89 [27]-[29].

154 Heydon, above n 33, 251.

155 *Ibid* 253.

156 *Joiner* (2002) 133 A Crim R 90 [39].

157 *Ibid*.

158 *Ibid* [40] (emphasis added). Another potentially lax version endorsed by Heydon J is that the trial judge 'must accept at least the possibility of the truth of the accused's account'; *R v Cahill (No 2)* [1999] 2 VR 387 392 (Buchanan JA); Heydon, above n 33, 251. Again, similar fact evidence of slight probative value may remove such a slight possibility.

159 (2002) 130 A Crim R 89 [28].

160 Heydon, above n 33, 253. Indeed, if the High Court was looking for an opportunity to affirm the stringency of the *Pfennig* admissibility test, *Joiner* would have provided a more obvious vehicle than *Phillips*. And yet special leave to appeal was refused: Transcript of Proceedings, *Joiner v The Queen* (High Court of Australia, Gleeson CJ and Callinan J, 8 August 2003).

161 (2006) 225 CLR 303, [63].

similar fact evidence in the context of the prosecution case.<sup>162</sup> And the Court added

[T]he test is to be applied by the judge on certain assumptions. Thus it must be assumed that the similar fact evidence would be accepted as true and that the prosecution case (as revealed in evidence already given at trial or in the depositions of witnesses later to be called) may be accepted by the jury. ... [T]he judge [should] *exclude* the evidence if, viewed in the context and way just described, there is a reasonable view of the similar fact evidence which is consistent with innocence.<sup>163</sup>

While expressed differently from the Hodgson/Heydon approach, this formulation also appears to allow the primary evidence to make a considerable contribution towards the similar fact evidence gaining admission. The similar fact evidence is to be viewed ‘in the context’ of the primary evidence, and on the basis that the primary evidence ‘may be accepted by the jury’.<sup>164</sup>

This statement in *Phillips* suggests that the presence of direct primary evidence, in particular, would provide considerable assistance to similar fact evidence in gaining admission. This is consistent with statements in a number of other cases. In *DPP v P*, a case in which successive daughters alleged sexual assault against their father, Lord Mackay, with whom the rest of the court agreed, overruled earlier decisions which ‘required, as an essential feature, a similarity beyond the stock in trade’.<sup>165</sup> Such cases are to be distinguished from those where the similar fact evidence is virtually the only evidence on identity.<sup>166</sup> There, ‘evidence of a character sufficiently special reasonably to identify the perpetrator is required’.<sup>167</sup> In *R v BAR*,<sup>168</sup> Mackenzie J similarly suggested:

strict similarity ... that is relevant to ‘signature’ cases because the purpose is to prove identity by reason of the improbability of two offences being identically carried out by separate offenders, is not as critical ... in ‘same family’ cases where the issue is often whether the acts attributed to an identified person occurred at all.<sup>169</sup>

He quoted from Thomas JA in *R v S*: ‘In “same family” cases the key might not be as difficult to turn as has sometimes been thought.’<sup>170</sup>

Of course, in *Phillips* itself, there was direct evidence of the offence – the complainant’s testimony of the defendant’s sexual assault.<sup>171</sup> Placed in the

162 Ibid.

163 Ibid (emphasis in original).

164 It appears by ‘prosecution case’, the High Court means, in the anticipated ‘primary evidence’; ‘prosecution case’ is a broader term than ‘similar fact evidence’, and the High Court distinguishes between the two in the passage quoted.

165 [1991] 2 AC 447, 461.

166 It would be a very unusual case in which there was no primary evidence of identity. There would ordinarily be opportunity evidence at the least: see, eg, *R v Straffen* [1952] 2 QB 911.

167 [1991] 2 AC 447, 460; *R v John W* [1998] Cr App R 289.

168 (2005) 152 A Crim R 428.

169 Ibid [32].

170 Ibid [31], quoting *R v S* [2001]QCA501; see also *R v Rajakaruna* (2004) 8 VR 340 [12], [13]; *R v Papamitrou* (2004) 7 VR 375, 390-91 [31].

171 In respect of a number of the charges there were additional items of evidence such as recent complaints and testimony of other prosecution witnesses confirming circumstantial details in the complainants’ stories. In respect of the fifth complainant in particular there was some ‘quite weighty additional prosecution evidence’: Gans, above n 9, 240-41.



context of this direct account which ‘may be accepted as true’, it seems that little would be expected of the other complainants’ allegations for them to gain admissibility. However, as discussed in the previous part, the High Court demanded a high degree of shared singularity between the similar fact evidence and the charged offence and ultimately held the evidence to be inadmissible. Having highlighted the contextuality of the *Pfennig* test so as to mitigate its stringency, in applying the test to the similar fact evidence, the Court appeared to ignore the context of the complainant’s primary testimony.

*Phillips* fails to resolve the question as to the degree to which the *Pfennig* test requires focus on the one hand, or contextualism on the other. The High Court’s ambivalence about this issue may reflect a deeper dilemma. The problem with the focused approach has been identified by Brennan J in *Sutton*. There are cases where similar fact evidence ‘appears insignificant in isolation but clearly reveals the guilty inference’ when put ‘in context with the rest of the evidence’.<sup>172</sup> As Thomas JA noted in *O’Keefe*, similar fact evidence may be the ‘clinching factor, and it would be very difficult to understand let alone explain why such evidence should be kept from the jury.’<sup>173</sup> On the other hand, the contextual approach may set the bar too low: ‘a point will come at which the rest of the evidence is so strong that any evidence of past crime can add only little weight but much prejudice’.<sup>174</sup> The solution may be to introduce a need requirement – the evidence should be excluded unless it is genuinely necessary to the prosecution case, and capable of fulfilling that need.<sup>175</sup> Of course, this approach carries risks. The jury may not rate the primary evidence as highly as anticipated by the judge and crucial similar fact may be excluded, setting the perpetrator free.<sup>176</sup> But similar fact evidence is the textbook example of evidence which, being both probative and prejudicial, carries grave risks whether excluded or admitted.<sup>177</sup> The need principle, although a compromise, may be the best way of managing the competing risks.

In *Phillips* the prosecution’s need for the similar fact evidence was clear.<sup>178</sup> The complainant’s evidence, although providing direct proof of the offence, was vulnerable. There was, on most counts, very little corroborating evidence beyond that of the other complainants.<sup>179</sup> Taken individually, each allegation may have appeared implausible. It appears inherently improbable that the defendant would attack an acquaintance, someone capable of providing a clear identification, and carry out the attack with other people relatively nearby. With a conviction resting largely on the complainant’s testimony, and a sworn denial by the defendant, the

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172 (1984) 152 CLR 528, 550.

173 *O’Keefe* [2000] 1 Qd R 564 [19].

174 Adrian Zuckerman, *Principles of Criminal Evidence* (1989), 229. Indeed, in an extreme case, the primary evidence may narrow the issues in such a way as to render the similar fact evidence irrelevant, as in *Tweed* [1992] NI 269, discussed in Part III.

175 Donald Piragoff, *Similar Fact Evidence: Probative Value and Prejudice* (1982), 146.

176 Heydon, above n 73 [21130]; Hamer, above n 12, 186-7.

177 See, eg, Mike Redmayne, ‘The Structure of Evidence Law’ (2006) 26 *Oxford Journal of Legal Studies* 805, 806.

178 *R v PS* [2004] QCA 347 [62], [65].

179 See above n 171.

defence may have had little trouble cultivating a reasonable doubt in the minds of jurors. In such circumstances the testimony of the other alleged victims appears crucial. In establishing the defendant's pattern of behaviour, his propensity for this unusually brazen style of sexual assault, the similar fact evidence would have the capacity to allay jurors' doubt about the plausibility of the complainant's story.

## VIII THE NEED FOR SIMILAR FACT EVIDENCE IN SEXUAL ASSAULT CASES

Prosecutorial proof difficulties resulting from the exclusion of similar fact evidence are not unique to *Phillips*. They are an inherent structural feature of a large class of sexual assault prosecutions. Where the perpetrator is a stranger to the victim and violence is used, the prosecution may be little different from that of other serious offences. Indeed, in a sexual assault case, unlike many murder cases, there will be an eyewitness,<sup>180</sup> and there may be a greater chance of forensic identification evidence than, for example, robbery or burglary. But, contrary to the stereotype,<sup>181</sup> few sexual assaults are perpetrated by strangers. The vast bulk are committed by someone known to the victim.<sup>182</sup> Such cases frequently turn into a battle of credibility between the complainant and the defendant. In some cases, including many involving child complainants, the relationship between the parties may present an obstacle to prompt complaint and forensic evidence may be lost.<sup>183</sup> In other cases, the defendant is able to neutralise any forensic evidence of contact or intercourse by claiming consent. The defendant's denials, either of commission or non-consent, may be sufficient to sustain a reasonable doubt in the minds of the jurors.

These difficulties are reflected in the statistics. Many of the incidents that are reported do not result in the laying of charges or any other official action.<sup>184</sup> Even where charges are laid, the rate of guilty pleas and convictions is far lower than

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180 Chris William Sanchirico, 'Character Evidence and the Object of Trial' (2001) 101 *Columbia Law Review* 1227, 1300.

181 See eg, Christina E Wells and Erin E Motley, 'Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation' (2001) 81 *Boston University Law Review* 127.

182 Australian Bureau of Statistics, *Women's Safety Australia* Report No 4128 (1996). Only 22 per cent of sexual violence is perpetrated by strangers, and the figure drops to 11 per cent for the more serious category of sexual assault: Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* Report No 4523 (2004) 46.

183 There are many cases involving delayed complaint, see, eg, *Longman v The Queen* (1989) 168 CLR 79 and its progeny.

184 According to Australian Bureau of Statistics, *Recorded Crime – Victims* Report No 4510 (2006) a little over half of investigations were finalised at 180 days, and in only 24.5 per cent of cases was an 'offender proceeded against'. By comparison, the figures for murder are 71 per cent and 63.7 per cent, and for assault, 64.7 per cent and 49.1 per cent: Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* Report No 4523 (2004) 74-75.

for other serious crime.<sup>185</sup> But the problem of under-enforcement is still greater than that. The vast majority of incidents are not reported to the police in the first place.<sup>186</sup> Sexual assault is clearly a very serious crime in terms of its incidence<sup>187</sup> and its lasting impact on the victim and society.<sup>188</sup> As Lord Hope has observed, ‘the balance between the rights of the defendant and those of the complainant is in need of adjustment if women are to be given the protection under the law to which they are entitled against conduct which the law says is criminal conduct’.<sup>189</sup>

Legislatures have recognised the need to remove barriers to prosecutions. Most jurisdictions have abolished the pernicious requirement that the complainant’s word be corroborated,<sup>190</sup> a demand that ‘reflected sexist stereotyping of – predominantly female – sexual assault complainants, rather than well-founded assessments of complainants’ testimonial unreliability’.<sup>191</sup> More controversial are ‘rape shield’ provisions, which aim to block the defendant’s unwarranted and irrelevant cross-examination on the complainant’s sexual history and supposed promiscuity.<sup>192</sup> Restrictions on the admissibility and use of complaint evidence have also been relaxed.<sup>193</sup>

In other respects, however, the High Court of Australia has continued to present obstacles to the prosecution of sexual assault cases. Where complaint has been significantly delayed<sup>194</sup> or there are other potential weaknesses in the

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185 According to Australian Bureau of Statistics *Criminal Courts Report No 4513 (2005-06)* 13, of charges reaching the Higher Courts less than 60 per cent of sexual assault charges ended in guilty pleas, compared with 80 per cent overall. For sexual assaults, 23.5 per cent ended in acquittals, compared with 8.8 per cent overall. See also Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview Report No 4523 (2004)* 77.

186 Eighty-nine per cent of women victims do not report the matter according to Australian Bureau of Statistics, *Women’s Safety Australia Report No 4128 (1996)*; 80 per cent according to Australian Bureau of Statistics, *Crime and Safety Report No 4509 (2005)*; see also Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview Report No 4523 (2004)* 58. Data is unavailable, but under-reporting is likely to be higher still for sexual offences against children. Note that only the last two complainants in *Phillips* made unprompted reports to the police. The other complainants were either contacted by the police, or came forward having heard of the police investigation.

187 See above n 127.

188 Joyce R Lombardi, ‘Because Sex Crimes are Different: Why Maryland Should (Carefully) Adopt the Contested Federal Rules of Evidence 413 and 414 that Permit Propensity Evidence of a Criminal Defendant’s Other Sex Offences’ (2004) 34 *University of Baltimore Law Review* 103, 118.

189 *R v A* [2002] 1 AC 45, 71, a comment which Lord Hope repeated in *DS v HM Advocate* [2007] UKPC 36 (22 May 2007) [5].

190 See, eg, *Evidence Act 1995 (NSW)* s 164; *Criminal Code 1899 (Qld)* s 632. Scottish law still requires corroboration of sexual assault complainants: *McNairn v HM Advocate* [2005] HCJAC 112; The Scottish Law Commission, ‘Rape and Other Sexual Offences’ (Discussion Paper No 131, Scottish Law Commission, 2006), [7.26]–[7.27].

191 Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2004) 479; see also *Longman v The Queen* (1989) 168 CLR 79, 85–86.

192 See, eg, *People v Hackett*, 421 Mich 338 (1984); *R v Seaboyer* (1991) 66 CCC (3d) 321; *Grills v The Queen* (1996) 70 ALJR 905; *R v A* [2002] 1 AC 45.

193 See, eg, *Criminal Law (Sexual Offences) Act 1978 (Qld)* s 4A; *Evidence Act 1995 (NSW)* s 66.

194 *Longman v The Queen* (1989) 168 CLR 79.

complainant's testimony,<sup>195</sup> the trial judge may be required to warn the jury to exercise considerable caution before convicting on the basis of the complainant's evidence alone.<sup>196</sup> And the High Court has held that, where the sexual assault complainant has testified, the prosecution can derive no support from the defendant's election not to testify.<sup>197</sup> The jury should be told that the defendant's silence 'does not constitute an admission by the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt'.<sup>198</sup> In excluding similar fact evidence on the consent issue and restricting its admissibility on other issues, the High Court in *Phillips* has created still further difficulties for the prosecution of sexual assault cases.<sup>199</sup>

A number of other jurisdictions have moved in the opposite direction. The virtual abolition of the similar fact exclusionary rule in the United Kingdom has already been mentioned.<sup>200</sup> In the United States, the exclusionary rule remains, but a number of jurisdictions give special treatment to sexual assault prosecutions. Federal Rules of Evidence 413 and 414, enacted by Congress in 1994 and subsequently adopted in a number of States,<sup>201</sup> essentially abolish the exclusionary rule in sexual offence and child molestation cases as regards the defendant's other similar offences.<sup>202</sup> A majority of commentators initially criticised this as a politically motivated assault on the time-honoured ban on bad

195 Such as the complainant's youth, inconsistencies or inherent implausibilities in her statements, or motive for her to lie: *Robinson v The Queen* (1999) 197 CLR 162 [25]; but see *Tully v The Queen* (2006) 81 ALJR 391, [132] (Callinan J), [181]-[186] (Crennan J), [151] (Heydon J, agreeing with Crennan J), [57] (Kirby J, in dissent), [86]-[89] (Hayne J, in dissent).

196 *Longman v The Queen* (1989) 168 CLR 79, 94 (Deane J).

197 This is on the illogical basis that the prosecution case is not purely circumstantial: *RPS v The Queen* (2000) 199 CLR 620 [23]; *Azzopardi v The Queen* (2001) 205 CLR 50 [58]. Criticised in David Hamer, 'The Privilege of Silence and the Persistent Risk of Self-Incrimination: Part II' (2004) 28 *Criminal Law Journal* 199, 207-211. The Court has also made sexual assault prosecutions difficult by maintaining a subjective mens rea even in the face of legislative attempts to shift to an objective position: Heather Douglas, 'Stories of Mistaken Consent: Still in the Shadow of *Morgan*' in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (forthcoming, 2007), discussing *Banditt v The Queen* (2005) 224 CLR 262; *DPP (NT) v WJI* (2004) 219 CLR 43.

198 *Azzopardi v The Queen* (2001) 205 CLR 50 [51].

199 It may be that where the other alleged sexual assaults involve the same parties, the evidence may come in more easily as 'relationship evidence'. The High Court position on this is unclear: *Gipp v The Queen* (1998) 194 CLR 106; *Tully v The Queen* (2006) 81 ALJR 391.

200 The difficulties of prosecuting sexual assault have also influenced the departures from *Pfennig* and *Hoch* in various Australian states. See above n 42; and also the reform and relaxation of the similar fact rule in the UK: see above nn 21-28. The difficulties of prosecuting sexual assault have also influenced the departures from *Pfennig* and *Hoch* in various Australian states: see above nn 42, 105-108.

201 By June 2004, 10 states had at least partially adopted the FRE 413 and 414: Lombardi, above n 188, 116. Lombardi notes that nine other states have common law 'lustful disposition' exceptions that cover similar ground; *ibid* 110.

202 The evidence is also subject to the trial judge's general discretion to keep out evidence where its probative value is outweighed by its prejudicial effect (FRE 403) but there is authority that the latter should not be applied heavily handedly so as to negate the clear legislative intent: eg *US v Meacham*, 115 F 3d 1488 (10<sup>th</sup> Cir 1997) discussed by R Wade King, 'Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection from Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather than Guilt?' (2002) 33 *Texas Tech Law Review* 1167, 1185.

character evidence,<sup>203</sup> but the reforms have developed a growing body of support.<sup>204</sup> The combination of the seriousness of the crime and its relatively high incidence with low reporting rates and the inherent evidentiary obstacles to prosecution make sexual offences ‘different’ and ‘unique’, and justify a shift in the balance to provide greater ‘fairness to the victim’ and greater ‘accountability’ for the perpetrator.<sup>205</sup>

There is insufficient space here to consider whether Australia’s exclusionary rule should be abolished in sexual assault cases or more generally. But these developments in the UK and the US support the claim that rules should be judged by reference to their consequences as well as their logic. The preceding sections of this article have drawn attention to the weak reasoning of the High Court in *Phillips*. This is all the more unforgivable given that it may have the effect of excluding evidence essential to the effective criminalisation of sexual assault.

## IX CONCLUSION

The admissibility of similar fact evidence depends upon its probative value. In *Pfennig* the High Court held that, to be admitted, there should be no rational view of the evidence consistent with innocence. In effect, the Court adopted the criminal standard of proof as an admissibility test. This created uncertainty in the lower courts. In applying the test, how was the trial judge to apply a standard ordinarily applied by the jury? And could similar fact evidence ever prove guilt to such a standard? Criminal appeal courts developed their own interpretations of *Pfennig* so as to make it workable. In *Phillips*, the High Court admonished the temerity of the lower courts in placing their own gloss on *Pfennig*. But the Court provided little by way of authoritative clarification. On the contrary, *Phillips* establishes fertile ground for further confusion.

This article provides a structural analysis of the Court’s probative value assessment in *Phillips*. There are three components to the similar fact inference. The defendant must be *connected* with the other misconduct. That misconduct must share sufficient *singularity* with the charged offence. And the similar fact evidence must be assessed in the context of the *primary evidence* of guilt. In respect of each component, the High Court made statements mitigating the perceived stringency of the *Pfennig* test. But then its application of the law was

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203 David P Leonard, ‘In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character’ (1998) 73 *Indiana Law Journal* 1161, and the references cited at 1162 fn 7. This is not to say that commentators are happy with the current form of the character evidence rules: see eg, Uviller, above n 18.

204 Although there is a consensus that the rules could be better drafted: see, eg, Advisory Committee, *Alternative draft submitted on Evidence Rules*, Cornell Law School, <[www.law.cornell.edu/rules/fre/ACRule413.htm](http://www.law.cornell.edu/rules/fre/ACRule413.htm)> at 6 August 2007.

205 See Leonard, above n 203, 1163 fn 8; see also Sherry Scott, ‘Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials’ (1999) 35 *Houston Law Review* 1729; Lombardi, above n 188, 103; Tamara Larsen, ‘Sexual Violence is Unique: Why Evidence of Other Crimes Should Be Admissible in Sexual Assault and Child Molestation Cases’ (2006) 29 *Hamline Law Review* 177; Pamela Vartabedian, ‘The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence’ (2007) 47 *Santa Clara Law Review* 157.

severe. The evidence of the other five complainants, all making similar allegations of sexual assault, was held to be inadmissible, and the defendant's convictions were quashed.

The defendant in *Phillips* was *connected* to the other sexual assaults by the allegations of other sexual assault complainants. The Court stated that their evidence would be assessed on the basis that it would be accepted. But then the weight given to the evidence was reduced due to the possibility that they were lying. With respect to shared *singularity*, the Court acknowledged that striking similarity was not the only measure. But great emphasis was then placed on its absence, and no account was taken of the many features common to the accounts of all six complainants. In stating the law, considerable emphasis was placed on the contribution of the *primary evidence* and the contextual nature of the probative value assessment. However, in application, the Court made no mention of the fact that the primary evidence, the complainant's testimony, directly narrated all elements of the offence.

*Phillips* creates considerable ambiguity as to the admissibility of similar fact evidence. In another respect, however, it may be taken as a clear precedent. According to the High Court, the evidence of other alleged rape victims is *irrelevant* to the complainant's lack of consent. This ruling is illogical. The relevance of such evidence is clear. The fact that the defendant forced other victims to have non-consensual sex with him tends to show he has a propensity for forcing women to have non-consensual sex with him, and it increases the probability that the defendant forced the complainant to have non-consensual sex with him.

Perhaps the worst aspect of *Phillips* is the pernicious effect it is likely to have on sexual assault prosecutions. Sexual assault charges are already notoriously difficult to prosecute, particularly the most common types, acquaintance rape and child sexual assault, which often become a battle of credibility between complainant and defendant. The presumption of innocence, of course, makes the battle very uneven, and *Phillips* effectively takes away one of the few lines of evidence that may bolster the complainant's credibility. To criticise *Phillips* in this way is not to suggest that the defendant's rights should be carelessly discarded. But sexual assault prosecutions should not be hampered unnecessarily. In *Phillips*, the High Court has done just this without justification in law, policy or logic. *Phillips* sets a very bad precedent.