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# Admissibility and the Use of Relationship Evidence in HML V The Queen: One Step Forward, Two Steps Back

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# Admissibility and use of relationship evidence in HML v The Queen: One step forward, two steps back

**David Hamer***

*In HML v The Queen, the High Court considered whether relationship evidence may be admissible to provide context and/or to support propensity reasoning. Unfortunately, common ground among the judgments is difficult to find. It remains unclear whether the exclusionary rule is limited to evidence tendered for the purpose of showing the defendant's propensity, or whether it also covers context evidence that only incidentally reveals the defendant's propensity. There was broad agreement that evidence of uncharged sexual offences will satisfy the admissibility test, and can then be used for propensity and context. However, it is unclear how far this conclusion extends. It appears possible that evidence of grooming may be admissible for neither propensity nor context. Furthermore, a clear majority supported a proposition at odds with the logic of circumstantial proof – the jury may only use relationship evidence for propensity reasoning if sexual attraction is considered proven beyond reasonable doubt.*

## 1. Introduction

On 24 April 2008, the High Court dismissed the appeals of HML, SB and OAE[1] from unrelated decisions of the Full Court of the South Australian Supreme Court. The complainants were all adolescent girls. The defendants were the complainants' fathers in *HML* and *SB*, and the complainant's mother's brother in *OAE*. As well as giving evidence of the charged offences, the complainant in each case gave "relationship evidence" – evidence of other incidents in the sexual relationship of the defendant and complainant. Some of the other alleged incidents were uncharged sexual offences.[2] Other incidents constituted lesser misconduct, not necessarily criminal. In *HML*, for example, as well as evidence of uncharged intercourse, the prosecution adduced evidence that the defendant had bought her g-string underpants.[3] In each case, the defendant challenged the admissibility of the relationship evidence, and the adequacy of the trial judge's directions as to how it could be used. As discussed in Part 2, difficulties arise because evidence of this kind, as well as providing necessary context for the evidence of the charged offences also prejudicially reveals other sexual misconduct of the defendant. These questions were to be resolved as a matter of common law; however, the High Court's decision also has implications for jurisdictions now governed by the uniform evidence law or other legislation.[4]

As Kirby J points out, relationship evidence is a topic on which there is a "mass of decisional authority … much of it difficult to reconcile".[5] Kirby J, the High Court's leading dissenter,[6] suggests that, given the frequency with which relationship evidence is adduced in child sexual assault cases, "if

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[1] Collectively, *HML v The Queen* (2008) 245 ALR 204.

[2] *HML v The Queen* (2008) 245 ALR 204 at 265 (Heydon J), 220 (Kirby J).

[3] *HML v The Queen* (2008) 245 ALR 204 at 244 (Hayne J), 264 (Heydon J).

[4] *HML v The Queen* (2008) 245 ALR 204 at 219 (Kirby J), 275 (Heydon J); see also *Criminal Law Consolidation Act 1935* (SA), s 278(2a)(c)(ii), passed a week before *HML* was decided, but yet to be proclaimed, making it easier to join charges in multiple complainant sexual assault cases.

[5] *HML v The Queen* (2008) 245 ALR 204 at 224. High Court decisions include *Gipp v The Queen* (1998) 194 CLR 106; 102 A Crim R 299; *KRM v The Queen* (2001) 206 CLR 221; 118 A Crim R 262; *Tully v The Queen* (2006) 230 CLR 234 at 250; 167 A Crim R 192.



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at all possible, this Court should make a particular effort to speak with a clear voice".[7] To this end, Kirby J joined with Gummow J in endorsing the principles as stated by Hayne J.[8] However, the other four justices gave separate judgments obscuring the authority of the principles propounded in the case. It remains unclear whether or not relationship evidence can avoid the propensity exclusionary rule by being treated as context evidence (Part 3 below). If it is caught, however, a clear majority consider that evidence of uncharged offences would gain admission for a propensity purpose under the *Pfennig*[9] test, but it is unclear whether this extends to evidence of grooming (Part 4). A majority suggests that relationship evidence tendered to provide context may be excluded by the bolster rule (Part 5). A majority support the notion that the jury cannot employ the propensity inference unless they find the defendant's pre-existing sexual attraction for the complainant proved beyond reasonable doubt (Part 6).

Adding to the difficulty in determining *HML*'s authority is that the court's underlying reasoning is often unclear, particularly when considered alongside previous decisions, such as the relationship evidence case, *Gipp v The Queen*,[10] the recent multiple-complainant case, *Phillips v The Queen*,[11] and *Shepherd v The Queen*[12] which provided sound guidance on the application of the standard of proof to circumstantial evidence. Indeed, *HML* has the potential to create more problems than it solves with regard to relationship evidence, propensity evidence and circumstantial reasoning more generally.

## 2. Context and propensity reasoning

The problems with relationship evidence are largely due to its capacity to support two different forms of reasoning.[13] First, relationship evidence "may provide a context helpful, or even necessary, for an understanding of a narrative".[14] Where the prosecution only pursues charges in respect of certain incidents out of a more extensive sexual relationship, it may be "misleading" and "unfair" to restrict the complainant's evidence to the charged offences.[15]

> [Relationship] evidence may disclose a course of events leading up to the first charged incident, which enables the jury to understand that the incident did not, as it were, "come out of the blue". The evidence will also sometimes explain how the victim might have come to submit to the acts the subject of the first charge. Without the evidence, it would probably seem incredible to the jury that the victim would have submitted to what would seem an isolated act, and likewise it might seem incredible to the jury that the accused would suddenly have committed the first crime charged. The evidence of uncharged acts may also disclose a series of incidents that make it believable or understandable that the victim might not have complained about the incidents charged until much later in the piece, if at all. They may show a pattern of behaviour under which the accused has achieved the submission of the victim. The evidence may establish a pattern of guilt on the part of the child, that could also explain the submission and silence of the child.[16]

However, as well as providing context, relationship evidence has the potential to be used to support "propensity" or "tendency" reasoning. The defendant's commission of the uncharged sexual offences

[6] For example, Lynch A, "Does the High Court Disagree More in Constitutional Cases? A Statistical Study of Judgment Delivery 1981-2003" (2005) 33 *Federal Law Review* 485 at 508-518.

[7] *HML v The Queen* (2008) 245 ALR 204 at 217.

[8] *HML v The Queen* (2008) 245 ALR 204 at 218. Kirby and Gummow JJ disagreed with Hayne J a point of relevance which will not be discussed here.

[9] *Pfennig v The Queen* (1995) 182 CLR 461; 77 A Crim R 149.

[10] *Gipp v The Queen* (1998) 194 CLR 106; 102 A Crim R 299.

[11] *Phillips v The Queen* (2006) 225 CLR 303; 153 A Crim R 431.

[12] *Shepherd v The Queen* (1990) 170 CLR 573; 51 A Crim R 181.

[13] For further uses of other misconduct evidence, see *HML v The Queen* (2008) 245 ALR 204 at 213 (Gleeson CJ); Palmer A, "Propensity, Coincidence and Context: The Use and Admissibility of Extraneous Misconduct Evidence in Child Sexual Abuse Cases" (1999) 4 *Newcastle Law Review* 46 at 50-51.

[14] *HML v The Queen* (2008) 245 ALR 204 at 208 (Gleeson CJ).

[15] *HML v The Queen* (2008) 245 ALR 204 at 208 (Gleeson CJ).

[16] *R v Nieterink* (1999) 76 SASR 56 at 66 (Doyle CJ); see also *HML v The Queen* (2008) 245 ALR 204 at 266 (Heydon J); *R v Vonarx* [1999] 3 VR 618 at 625; *R v Beserick* (1993) 30 NSWLR 510 at 515; 66 A Crim R 419.

against the complainant demonstrates the defendant's propensity for committing sexual offences against the complainant, and this propensity of the defendant increases the probability that the defendant committed the charged sexual offences against the complainant.

A particular variant of propensity reasoning is coincidence reasoning.[17] Propensity reasoning is sequential, moving from the uncharged allegations, to the defendant's propensity, to the defendant's guilt as charged. Coincidence reasoning is more holistic, treating the uncharged and the charged allegations as a group. Having regard to the similarities between the various allegations, there would appear to be three possible explanations: "[they would] all be true, or have arisen from a cause common to the witnesses, or from pure coincidence".[18] If there is no evidence of a common cause and coincidence appears implausible, then the allegations can be accepted as true. The propensity inference appears more appropriate where the other misconduct is accepted to have occurred, whereas the coincidence inference deals with the situations where the other misconduct is doubtful. But the defendant's propensity for misconduct is central to coincidence reasoning. "[A]n assumption of constancy or uniformity of action"[19] underpins both inferences.[20] Essentially the same admissibility principles apply to both coincidence and propensity reasoning.[21]

Where relationship evidence is used to provide context, the defendant's propensity for misconduct is disclosed. However, this propensity is incidental rather than necessary to contextual reasoning. The focus of contextual reasoning is the complainant, not the defendant. The same contextual reasoning might be supported by evidence that did not disclose the defendant's propensity. For example, the complainant's submission and delayed complaint could be explained by evidence that the complainant had been sexually abused by someone other than the defendant. This background evidence may be weaker than evidence disclosing previous abuse by the defendant, but this still demonstrates that the defendant's propensity is not essential to contextual evidence.

By contrast, the defendant is at the centre of propensity reasoning, whether from uncharged offences, or lesser acts, such as grooming[22] or the buying of g-string underwear. In *HML*, Heydon J appears to question this, suggesting that tendency should be distinguished from mere sexual attraction. He quotes with approval Hodgson JA's observation that "I do not think it could be said that, because a married man feels sexually attracted towards a woman other than his wife, he therefore has a tendency to commit adultery with her, *even if he never does so*".[23] Fair enough. But the situation is entirely different if the evidence is used to support the claim that the man actually did go on to commit adultery. Of course, evidence of a pre-existing sexual relationship with the "other woman" would support a far stronger propensity inference, but the difference is one of degree rather than of kind.[24]

[17] See Hamer D, "The Structure and Strength of the Propensity Inference: Singularity, Linkage and the Other Evidence" (2003) 29 *Monash University Law Review* 137 at 157-162; Hamer D, "Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious" (2007) 30 *University of New South Wales Law Journal* 609 at 618-620.

[18] *DPP v Boardman* [1975] AC 421 at 444 (Lord Wilberforce).

[19] Acorn A, "Similar Fact Evidence and the Principle of Inductive Reasoning: Making Sense" (1991) 11 *Oxford Journal of Legal Studies* 63 at 65.

[20] Carter is clearly wrong to suggest that coincidence reasoning "does not depend upon any assumption that a defendant has not mended his ways": Carter PB, "Forbidden Reasoning Permissible: Similar Fact Evidence a Decade After Boardman" (1985) 48 *Modern Law Review* 29 at 31.

[21] For example, the *Evidence Act 1995* (NSW), ss 97-98, 101.

[22] See, eg *R v Fletcher* (2005) 156 A Crim R 308 at 322-324.

[23] *HML v The Queen* (2008) 245 ALR 204 at 268 quoting from *R v Leonard* (2006) 67 NSWLR 545 at 556; 164 A Crim R 374.

[24] Hoffman LH, "Similar Facts After Boardman" (1975) 91 *Law Quarterly Review* 193 at 200; Heydon J acknowledges that "evidence tendered to prove 'grooming' … can render more likely the occurrence of that for which [the complainant] was being groomed": *HML v The Queen* (2008) 245 ALR 204 at 298. And he ultimately considers the g-string evidence "relevant to prove a disposition to act on the sexual attraction experienced by HML" (at 270).

## 3. Propensity exclusionary rule

The law has long had misgivings about the legitimacy of propensity reasoning. As Lord Herschell said in *Makin v Attorney-General (NSW)*:[25]

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.[26]

But the exclusion is not absolute. Lord Herschell immediately added that "the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury".[27] However, the limits of the exclusion have been extremely difficult to pin down ever since.

Broadly speaking, there are two possible ways in which the exclusion may be confined. First, it may be limited in scope. Secondly, evidence caught by the exclusionary rule may exceptionally be admitted. As far as scope is concerned, one plausible interpretation of the rule is that the exclusion applies only where evidence is tendered, in Lord Herschell's words, "for the purpose" of propensity reasoning, and not where the evidence provides background and only incidentally reveals the defendant's propensity. This is the scope of the exclusion under the uniform evidence law,[28] and the common law has been widely assumed to also operate this way. However, uncertainties have lingered. *HML* brings these uncertainties to the fore without providing any clear resolution.

What is now clear is that evidence within the scope of the exclusion can exceptionally gain admission. To do so, the evidence must satisfy a special admissibility test. In 1991, in *DPP v P*[29] Lord Mackay, delivering the unanimous opinion of the House of Lords, suggested that the test was "[w]hether the evidence has sufficient probative value to outweigh its prejudicial effect".[30] Lord Mackay recognised that this balancing exercise presents "a question of degree";[31] however, he added that "[j]udgments properly made in the light of appropriate principles should not, I think, yield results which could properly be described as a lottery".[32] In Australia, the High Court lent some support to the balancing test;[33] however, in 1995, a majority in *Pfennig v The Queen* expressed concern that "striking the balance … resemble[s] the exercise of a discretion rather than the application of a principle".[34] Instead, the majority fixed a high threshold of admissibility – similar fact evidence must be so probative that there is "no reasonable view of the evidence consistent with innocence of the accused".[35] The balancing exercise is eliminated. "[T]here is nothing to be weighed – at all events by the trial judge. The law has already done the weighing."[36] This was established as a matter of common law, which is the focus of the present discussion. Partly in response to *Pfennig* and its aftermath, most jurisdictions have reverted to a version of the balancing test.[37]

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[25] *Makin v Attorney-General (NSW)* [1894] AC 57.

[26] *Makin v Attorney-General (NSW)* [1894] AC 57 at 65 quoted in *HML v The Queen* (2008) 245 ALR 204 at 234 (Hayne J).

[27] *Makin v Attorney-General (NSW)* [1894] AC 57 at 65 quoted in *HML v The Queen* (2008) 245 ALR 204 at 316 (Crennan J).

[28] For example, *Evidence Act 1995* (NSW), ss 97-98.

[29] *DPP v P* [1991] 2 AC 447.

[30] *DPP v P* [1991] 2 AC 447 at 461.

[31] *DPP v P* [1991] 2 AC 447 at 461. See also *DPP v Boardman* [1975] AC 421 at 457 (Lord Cross), 442 (Lord Wilberforce).

[32] *DPP v P* [1991] 2 AC 447 at 463.

[33] For example, *Markby v The Queen* (1978) 140 CLR 108 at 117.

[34] *Pfennig v The Queen* (1995) 182 CLR 461 at 484 (Mason CJ, Deane and Dawson JJ); 77 A Crim R 149.

[35] *Pfennig v The Queen* (1995) 182 CLR 461 at 484; 77 A Crim R 149.

[36] *Pfennig v The Queen* (1995) 182 CLR 461 at 516 (McHugh J); 77 A Crim R 149.

[37] See n 4.

The *Pfennig* test appears to be a strict one. The standard that it imposes is derived from the circumstantial evidence direction, which in turn is derived from the criminal standard of proof.[38] A reasonable view of the evidence consistent with innocence equates with a reasonable doubt. The chief concern[39] with the evidence covered by the exclusionary principle is the risk of unfair prejudice – the risk that juries will be unduly influenced by it, and may convict on the basis of insufficient evidence.[40] But if the evidence is considered to eliminate innocence as a reasonable possibility – that is, prove guilt beyond reasonable doubt – then there is no room left for prejudice to operate.[41] Actually, while the *Pfennig* test is presented as a strict rule, it raises many questions of interpretation, and on one view which is given considerable support in *HML*, it may not be very demanding at all. This is explored in the next part of the article.

Nevertheless, the *Pfennig* test has been widely portrayed and viewed as "stringent",[42] and many courts and commentators doubted whether relationship evidence could satisfy it.[43] This in turn gave rise to some confusion as to how relationship evidence should be dealt with.[44] Many courts, perhaps as a trade-off against the stringency of the admissibility test, gave the exclusionary rule narrow scope.[45] It applies only where evidence is tendered for the purpose of propensity reasoning. Contextual relationship evidence is not excluded.[46]

This was the dominant view, but it was not universally held. On occasion, relationship evidence, even for a context purpose, was considered to fall within scope of the exclusionary rule.[47] (The trade-off seemingly applied once more; a more relaxed interpretation of the *Pfennig* admissibility test was adopted.[48]) On other occasions, it was thought that relationship evidence, even for a propensity purpose, could avoid the exclusionary rule.[49] Commentators, although noting the dominant

[38] On the derivation: *Pfennig v The Queen* (1995) 182 CLR 461 at 482-483; 77 A Crim R 149; *Sutton v The Queen* (1984) 152 CLR 528 at 563-564; 11 A Crim R 331. On the circumstantial evidence direction see: *R v Hodge* (1838) 2 Lew CC 227; *Grant v The Queen* (1975) 11 ALR 503 at 505; *Knight v The Queen* (1992) 175 CLR 495 at 502; 63 A Crim R 166. See further Hamer (2007), n 17 at 613.

[39] There are others – see, generally, Hamer (2003), n 17 at 140-141.

[40] For example, *HML v The Queen* (2008) 245 ALR 204 at 210 (Gleeson CJ).

[41] Hoffman, n 24 at 194; *R v Handy* [2002] 59 SCR 908 at 945.

[42] For example, *Pfennig v The Queen* (1995) 182 CLR 461 at 516 (McHugh J); 77 A Crim R 149; *Phillips v The Queen* (2006) 225 CLR 303 at 327; 153 A Crim R 431.

[43] *R v W* [1998] 2 Qd R 531 at 537 (de Jersey J), 533-534 (Pincus JA and Muir J); 105 A Crim R 453; *R v Le* [2000] NSWCCA 49 (unreported, NSWCCA, Sully, Hulme and Hidden JJ, 7 March 2000) at [116]-[118] (Hulme J); *R v Nieterink* (1999) 76 SASR 56 at 69, 72; Palmer, n 13 at 52; Smith TH and Holdenson OP, "Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions: Part I" (1999) 73 ALJ 432 at 439; Flatman G and Bagaric M, "Non-similar Fact Propensity Evidence: Admissibility, Dangers and Jury Directions" (2001) 75 ALJ 196.

[44] See Palmer, n 13 at 64.

[45] Trade-off apparent in *R v W* [1998] 2 Qd R 531 at 534 (Pincus JA and Muir J); 105 A Crim R 453; see also Palmer, n 13 at 52.

[46] This basic approach was taken in *R v W* [1998] 2 Qd R 531; 105 A Crim R 453; *R v Nieterink* (1999) 76 SASR 56; *R v Vonarx* [1999] 3 VR 618 and in the cases giving rise to the appeals in *HML*.

[47] *R v Kemp (No 2)* [1997] 1 Qd R 383 at 398 (Fitzgerald P); *R v Wackerow* [1998] 1 Qd R 197 at 199 (Macrossan CJ), 204 (Pincus JA); 90 A Crim R 297. The court subsequently, having regard to the "weight of authority", adopted the predominant approach of viewing relationship evidence for context as lying beyond the scope of the exclusionary rule: *R v W* [1998] 2 Qd R 531 at 534 (Pincus JA and Muir J); 105 A Crim R 453.

[48] *Wackerow* [1998] 1 Qd R 197 at 202 (Macrossan CJ), 204 (Pincus JA); 90 A Crim R 297. Subsequently, this more flexible test was developed in *R v O'Keefe* [2000] 1 Qd R 564 but it drew sharp criticism from the High Court in *Phillips v The Queen* (2006) 225 CLR 303 at 322-23; 153 A Crim R 431.

[49] This seems to occur where "guilty passion" or "sexual attraction" is identified as "essential background" and "context" rather than being recognised as involving propensity reasoning, eg *R v Vonarx* [1999] 3 VR 618 at 624-625.

approach,[50] described the law as "unclear",[51] "perplexing"[52] and the subject of "considerable confusion".[53] The High Court did not help. In 1999, Andrew Palmer suggested that *Gipp v The Queen* supported the dominant view,[54] but added, with particular reference to *BRS v The Queen*,[55] "[t]he High Court's pronouncements … are so ambiguous that there is little to be gained from a close textual analysis of them".[56] The same year Doyle CJ in *Nieterink* also suggested it is "not easy to extract clear and precise statements of principle", but considered "most members of the [High] Court have, at various stages, accepted the admissibility of uncharged criminal conduct, independently of the exclusionary principle".[57]

In 2001 in *KRM v The Queen*,[58] McHugh J described the scope of the exclusionary rule as "an important question still to be resolved".[59] With Hayne J agreeing, he proposed that courts should continue to treat evidence that only "incidentally reveals propensity" as lying beyond the exclusion until the High Court decided otherwise.[60] But then in *Tully v The Queen*,[61] Callinan J challenged this proposal,[62] warning that "the prosecution may obtain the benefit of [the] prejudicial effect [of propensity evidence] without the disadvantage of the strictures that apply to evidence of that kind".[63] Callinan J, however, agreed with other members of the court that this was not a suitable case to resolve these issues.[64]

*HML*, *SB* and *OAE*, were clearly perceived by the High Court to be suitable vehicles for resolving the issues surrounding relationship evidence. But the court was unable to agree upon what the resolution should be. Hayne J, with whom Gummow J and Kirby J agreed, gave the exclusion broad scope: evidence is subject to the exclusionary rule where it "will reveal an accused person's commission of discreditable acts other than those … charge[d] … [T]he exclusionary rule is not to be circumvented by admitting the evidence but directing the jury to confine its uses".[65] Gleeson CJ and Crennan J take a narrower view, supporting what was formerly the dominant approach – the exclusion is limited to evidence that is adduced to support propensity reasoning, including to demonstrate sexual attraction.[66] Kiefel J takes a similar line to Gleeson CJ and Crennan J, but considers that the scope of the exclusionary rule may be still narrower. Generally, the exclusionary rule – and the *Pfennig* test for admissibility – is limited to evidence tendered for the purpose of propensity reasoning.[67] However, where relationship evidence is tendered for a propensity purpose, Kiefel J suggests that "the test is

[50] Palmer, n 13 at 52-53, 64-66; Flatman and Bagaric, n 43 at 196; Smith and Holdenson suggest that relationship evidence should be subject to the *Pfennig* test, but most of the decisions they discuss do not take this approach: Smith and Holdenson, n 43 at 436-440.

[51] Smith and Holdenson, n 43 at 432.

[52] Flatman and Bagaric, n 43 at 190.

[53] Palmer. n 13 at 64.

[54] Palmer, n 13 at 65-66.

[55] *BRS v The Queen* (1997) 191 CLR 275; 95 A Crim R 400.

[56] Palmer, n 13 at 51.

[57] *R v Nieterink* (1999) 76 SASR 56 at 71.

[58] *KRM v The Queen* (2001) 206 CLR 221; 118 A Crim R 262.

[59] *KRM v The Queen* (2001) 206 CLR 221 at 231; 118 A Crim R 262.

[60] *KRM v The Queen* (2001) 206 CLR 221 at 231, 233 (McHugh J), 264 (Hayne J); 118 A Crim R 262. Kirby J "resist[ed] the temptation to respond" (at 256).

[61] *Tully v The Queen* (2006) 230 CLR 234; 167 A Crim R 192.

[62] *Tully v The Queen* (2006) 230 CLR 234 at 276-277; 167 A Crim R 192.

[63] *Tully v The Queen* (2006) 230 CLR 234 at 278; 167 A Crim R 192.

[64] *Tully v The Queen* (2006) 230 CLR 234 at 254-255 (Kirby J), 256 (Hayne J), 280 (Callinan J); 167 A Crim R 192.

[65] *HML v The Queen* (2008) 245 ALR 204 at 235. See also at 246-247 (Hayne J), 223-224 (Kirby J).

[66] *HML v The Queen* (2008) 245 ALR 204 at 213, 216 (Gleeson CJ), 319-320, 322 (Crennan J).

[67] *HML v The Queen* (2008) 245 ALR 204 at 325, 330-331.

artificial, and therefore not very useful".[68] Heydon J notes the "sharp divisions" in previous High Court decisions as to whether relationship evidence falls within the scope of the exclusionary rule,[69] but indicates that it is unnecessary to resolve them in the present case.[70]

With the court spilt three or four ways, courts in future cases may look to the unified approach of Hayne, Gummow and Kirby JJ. However, their approach gives rise to difficult questions at different levels. Their broad exclusionary rule is a departure from their previous views,[71] contrary to what was previously the dominant approach, and inconsistent with the uniform evidence law. It has ramifications beyond just relationship evidence. There are other forms of evidence incidentally revealing the defendant's propensity that have previously been considered admissible, such as evidence that the defendant's motive for assaulting the victim was that the victim was blackmailing the defendant,[72] and evidence that the charged offence was committed by one prisoner on another.[73] Will evidence of this kind now be subject to the exclusionary rule?

The reason Hayne J gives for advocating the broad exclusion raises still broader concerns. He says:

> [T]he foundation of the general exclusionary rule is that uses of the evidence cannot be segregated in the manner suggested. The very risk to which the general rule of exclusion is directed is the risk that the evidence will be *misused*. Judicial directions about use of such evidence have not hitherto been seen, and should not now be seen, as solving that problem.[74]

Kirby J may not endorse this. Though "dubious … in scientific terms", Kirby J expressly adopts the "assumption, inherent in much appellate examination of jury decision-making, that members of a jury reach their conclusions by a process of deliberation from evidence to verdict by way of an accurate application of judicial directions on the law".[75] Heydon J also adopts this assumption,[76] and the remaining members of the court clearly consider it generally feasible for the jury to use relationship evidence to provide context while avoiding propensity reasoning.[77] If, in a given case, doubts arise as to whether the jury could be successfully confined to the legitimate reasoning, then the evidence can be excluded by exercise of the general trial judge discretion.[78]

## 4. PFENNIG ADMISSIBILITY TEST

As has been seen, *HML* contains conflicting views as to whether relationship evidence can bypass the *Pfennig* test. There is much greater agreement, even approaching unanimity, that relationship evidence can satisfy *Pfennig* if required to do so. This may simplify courts' treatment of much relationship evidence in the future. But uncertainties remain both as to the breadth of the court's conclusion on this point and the underlying reasoning. And HML does little, if anything, to clear up a range of uncertainties in relation to *Pfennig*, particularly when the court's fairly open approach in *HML H* is contrasted with the very stringent approach taken by the court in *Phillips* only 16 months before.

In *HML*, a majority of four hold, as a necessary part of their reasoning, that the vast bulk of the relationship evidence in these three cases supports propensity reasoning of sufficient strength to

[68] *HML v The Queen* (2008) 245 ALR 204 at 333. See also 332.

[69] *HML v The Queen* (2008) 245 ALR 204 at 289.

[70] *HML v The Queen* (2008) 245 ALR 204 at 275, 291.

[71] *HML v The Queen* (2008) 245 ALR 204 at 223 (Kirby J), referring to his views in *KBT v The Queen* (1997) 191 CLR 417; 99 A Crim R 18 and *Gipp v The Queen* (1998) 194 CLR 106; 102 A Crim R 299.

[72] *HML v The Queen* (2008) 245 ALR 204 at 213 (Gleeson CJ).

[73] Palmer, n 13 at 50, where a number of other examples are also provided.

[74] *HML v The Queen* (2008) 245 ALR 204 at 236 (emphasis in original).

[75] *HML v The Queen* (2008) 245 ALR 204 at 219.

[76] *HML v The Queen* (2008) 245 ALR 204 at 296-297, quoting *Gilbert v The Queen* (2000) 201 CLR 414 at 420 (Gleeson CJ and Gummow J); 109 A Crim R 580, but at 289-294 acknowledging the difficulty of framing such directions.

[77] *HML v The Queen* (2008) 245 ALR 204 at 209, 216, (Gleeson CJ), 322 (Crennan J), 325-326, 330-331, 333-334 (Kiefel J).

[78] *HML v The Queen* (2008) 245 ALR 204 at 214 (Gleeson CJ), 333-334 (Kiefel J).

comply with the *Pfennig* test. Hayne J goes so far as to offer this general statement: "sexual offences committed by an accused against the complainant (other than the offences being tried) … will usually, if not invariably" gain admission under *Pfennig*.[79] Gummow J and Kirby J agree with this aspect of Hayne J's judgment with little additional comment,[80] and Heydon J expresses a similar view.[81] The remainder of the court decided the case on other grounds, but all suggested *Pfennig* would be satisfied.[82] Kiefel J added, however, "that largely follows because the test is somewhat artificial, and therefore not very useful, in its application to cases of this kind".[83] And Crennan J indicates *Pfennig* "may" be satisfied, but unlike the rest of the court, her assessment is on the basis of context reasoning not propensity reasoning.[84]

Despite the court's broad agreement about the satisfaction of the *Pfennig* test, questions remain. Relationship evidence may contain a diverse range of other incidents. How far does the *HML* proposition of admissibility extend? And what guidance does *HML* provide for non-relationship cases. Does it, for example, clarify or qualify what was said in the multiple-complainant case of *Phillips* in which propensity evidence was held inadmissible?[85] To answer these questions it is necessary to look behind *HML*'s seeming consensus.

## From Phillips to HML

As discussed in the previous section, *Pfennig* establishes a threshold of probative value that the disputed evidence must meet to gain admission. In *Phillips*, the High Court gave conflicting signals on *Pfennig*'s operation. On the one hand, the court noted that a "stringent" rule was needed to guard against prejudice and ensure a "fair trial", and stated that *Pfennig* set "a high threshold … The evidence must possess particular probative qualities; a strong degree of probative force; a really material bearing on the issues to be decided".[86] On the other hand, the court mentioned certain assumptions – detailed below – that mitigate its stringency. But when it came to applying the *Pfennig* test to the disputed evidence in *Phillips*, it appears that the court had little regard to the mitigating assumptions and the evidence was held inadmissible.[87]

*HML* contains similar competing elements, but with a changed emphasis. The risk of prejudice receives less attention and is at times downplayed.[88] To some extent this reflects evidential differences between the two cases. Relationship evidence may be less problematic than allegations from another alleged victim. As Hayne J points out, relationship evidence consists of allegations of a similar kind to the charged allegations and from the same source, but with less detail.[89] There is no obstacle to joining a number of counts relating to the same complainant, and evidence on different counts will be cross-admissible.[90] But joinder and cross-admissibility are highly contested in a multiple-complainant case like *Phillips*.

However, the factual differences with *Phillips* do not fully explain the greater openness to propensity reasoning in *HML*. There are other signs of a shift in favour of admissibility. In marked contrast with *Phillips*, Kirby J refers to a number of policy grounds favouring admissibility, including

[79] *HML v The Queen* (2008) 245 ALR 204 at 248. See also 234, 257, 260.

[80] *HML v The Queen* (2008) 245 ALR 204 at 223 (Kirby J).

[81] *HML v The Queen* (2008) 245 ALR 204 at 274, 298, 304.

[82] *HML v The Queen* (2008) 245 ALR 204 at 213-214.

[83] *HML v The Queen* (2008) 245 ALR 204 at 333.

[84] *HML v The Queen* (2008) 245 ALR 204 at 319 (emphasis added).

[85] *Phillips* has attracted criticism: Hamer (2007), n 17; Gans J, "Similar Facts after Phillips" (2006) 30 Crim LJ 224; *R v JCM* (unreported, District Court of Queensland, Judge White, 18 May 2007) at [12].

[86] *Phillips v The Queen* (2006) 225 CLR 303 at 328; 153 A Crim R 431.

[87] Hamer (2007), n 17.

[88] *HML v The Queen* (2008) 245 ALR 204 at 235, 239, 260 (Hayne J), 325-326 (Kiefel J).

[89] *HML v The Queen* (2008) 245 ALR 204 at 239.

[90] *HML v The Queen* (2008) 245 ALR 204 at 247.

the social problem of child sexual assault, difficulties of enforcement, and the interests of victims.[91] He and Crennan J both cite landmark decisions from other jurisdictions favouring admissibility over exclusion.[92] "A law which prevents the trier of fact from getting at the truth by excluding relevant evidence runs counter to our fundamental conceptions of justice and what constitutes a fair trial."[93]

In *HML*, a decision far longer than *Phillips*,[94] there are relatively few references to the test being "stringent"[95] or "narrow"[96] or setting a "high threshold".[97] The *Pfennig* test is occasionally formulated in a way "perhaps more favourable to admission";[98] all that is required is that "there is no reasonable view of it other than as *supporting an inference* that the accused is guilty".[99] In comparison with *Phillips*, *HML* gives full force to the mitigating assumptions, and the probative value of propensity evidence is assessed with a far more positive attitude.

## Credibility

It is helpful to break down the assessment of the probative value of the propensity inference into three parts.[100] First, how credible are the allegations of other misconduct? Did the defendant commit the other misconduct as alleged? Secondly, if the defendant did commit those other acts, to what extent does that suggest he committed the charged offence? The strength and peculiarity of the defendant's propensity will be revealed by the frequency of the other incidents and any distinctive or unusual features that they share with the charged offence. These first two factors determine the strength of the propensity inference in isolation. The third step is to place the propensity inference into the context of the prosecution case. What contribution does the propensity inference make to primary evidence of guilt?

In assessing, first, the credibility of the other allegations, the court in *HML* frequently refers to one of the mitigating assumptions identified in *Phillips*: "the trial judge assesses the probative value of the evidence in question upon the assumption that it is accepted".[101] Given that the disputed evidence is direct, this amounts to an assumption that the uncharged acts occurred as the complainant alleges. The first step in the propensity is therefore at maximal strength.

While this assumption has been noted in earlier cases, its effect has not been properly appreciated. In *Phillips*, it should have been assumed that the defendant *did* sexually assault all the other complainants, greatly strengthening the prosecution's propensity argument. But this effect of the

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[91] *HML v The Queen* (2008) 245 ALR 204 at 220-221 (Kirby J); see also Hamer (2007), n 17 at 634-637.

[92] *HML v The Queen* (2008) 245 ALR 204 at 220-221 (Kirby J), citing *DPP v P* [1991] 2 AC 447 and *R v H* [1995] 2 AC 596 each of which concerned the joinder and cross-admissibility of the allegations of two child sexual assault complainants; *HML v The Queen* (2008) 245 ALR 204 at 323 (Crennan J) citing *R v H* and also the rape-shield cases, *R v Seaboyer* [1991] 2 SCR 577 and *R v A* [2002] 1 AC 45; see also Hamer (2007), n 17 at 635.

[93] *R v A* [2002] 1 AC 45 at 71; *HML v The Queen* (2008) 245 ALR 204 at 323 (Crennan J).

[94] *HML* occupies exactly six times as many pages in the ALRs compared with *Phillips*: 132 pages to 22 pages.

[95] *HML v The Queen* (2008) 245 ALR 204 at 229 (Kirby J), 330-331 (Kiefel J), 316, 319-320, 323 (Crennan J).

[96] *HML v The Queen* (2008) 245 ALR 204 at 235-236 (Hayne J).

[97] This phrase does not appear in *HML v The Queen* (2008) 245 ALR 204. Hayne J makes reference to "special probative value" (at 249), but there is nothing like the emphatic statement in *Phillips* quoted in n 86 above.

[98] *Wackerow* [1998] 1 Qd R197 at 204 (Pincus JA); 90 A Crim R 297; see also *R v O'Keefe* [2000] 1 Qd R 564 at 573-574 (Thomas JA).

[99] *Pfennig v The Queen* (1995) 182 CLR 461 at 481-482; 77 A Crim R 149 (emphasis added). This or similar is quoted or stated at *HML v The Queen* (2008) 245 ALR 204 at 212 (Gleeson CJ), 234-237, 248 (Hayne J). In *Phillips*, this formulation only appeared as a quote from *R v O'Keefe* [2000] 1 Qd R 564, a case which received considerable criticism for relaxing the proper *Pfennig* test: *Phillips v The Queen* (2006) 225 CLR 303 at 308, 322-23; 153 A Crim R 431.

[100] Hamer (2003), n 17; Hamer (2007), n 17 at 618-638.

[101] *HML v The Queen* (2008) 245 ALR 204 at 213-214 (Gleeson CJ), citing *Phillips v The Queen* (2006) 225 CLR 303 at 323-324; 153 A Crim R 431. See also *HML v The Queen* (2008) 245 ALR 204 at 236-237, 244-245 (Hayne J, Gummow and Kirby JJ agreeing), 272-274 (Heydon J), 333 (Kiefel J).

assumption was not expressly noted and the evidence was ultimately held inadmissible.[102] The assumption was noted in *Pfennig* and *Hoch*,[103] however, inconsistently, the court also suggested that the probative value of multiple allegations should be assessed as a coincidence inference, on the basis of the "improbability of similar lies".[104] In *Hoch*, the High Court held that that "joint concoction … destroys the probative value of the evidence" and if the judge considers this a "rational view" of the evidence, it should not be admitted.[105] Concoction may be viewed as a special case of credibility,[106] but *Hoch* is difficult to reconcile with *HML*. Obviously the risk of a "common cause"[107] – the various allegations being concocted together, destroying their probative value – is far greater with a single complainant than with multiple complainants. And yet there is no suggestion in *HML* that this risk could be an obstacle to admission.

## Strength and peculiarity

The second step concerns the strength and peculiarity of the propensity evidenced by the uncharged acts, and its significance for the charges. This feature was the focus of admissibility in cases such as *Boardman*[108] which emphasised the need for "striking similarity" between the other misconduct and the charged offence. In *Phillips*, the court held that "striking similarity" is "not essential", but suggested that "usually the evidence will lack the requisite probative force" without it.[109] In *HML* the expression "striking similarity" does not appear at all, but other comparable terms are employed. Hayne J indicates that the evidence would need to demonstrate a "particular distinctive propensity", and to have a "specific connexion with … the issues for decision".[110] Heydon J distinguishes "'general' or 'bare' disposition reasoning" from "specific disposition reasoning", recognising the distinction to be one of degree.[111] More problematically, Kiefel J suggests that the distinction is one of kind, between "forbidden reasoning" and "conventional probability reasoning".[112]

In this connection, Hayne J highlights a particular feature of relationship evidence. "[T]he evidence would demonstrate that *this* accused had used *this* complainant as the object of sexual gratification. It is the particularity of that conclusion which gives the evidence its 'special probative value'."[113] Clearly, the propensity shown by allegations of multiple complainants would lack this specificity, even in a case like *Phillips* where the complainants were all girls of a similar age from the defendant's social circle.[114] As Heydon J, suggests, "to use various victims, without scruple and against their will, as objects of sexual gratification … is different from … the frequent use by the accused of his daughter as an object of sexual gratification".[115] This statement of Heydon J identifies a further respect in which relationship evidence may provide the basis for a strong propensity

[102] Hamer (2007), n 17 at 621-23.

[103] *Pfennig v The Queen* (1995) 182 CLR 461 at 481; 77 A Crim R 149; *Hoch v The Queen* (1988) 165 CLR 292 at 294; 35 A Crim R 47.

[104] *Pfennig v The Queen* (1995) 182 CLR 461 at 482; 77 A Crim R 149; *Hoch v The Queen* (1988) 165 CLR 292 at 295; 35 A Crim R 47.

[105] *Hoch v The Queen* (1988) 165 CLR 292 at 296; 35 A Crim R 47.

[106] Heydon J refers to the "qualification for the possibility of contamination through collusion enunciated in *Hoch*": *HML v The Queen* (2008) 245 ALR 204 at 274-275, fn 227.

[107] *DPP v Boardman* [1975] AC 421 444 (Lord Wilberforce).

[108] *DPP v Boardman* [1975] AC 421 at 427, 439-441 (Lord Morris), 443-444 (Lord Wilberforce), 452-454 (Lord Hailsham), 457-458, 460 (Lord Cross), 462-463 (Lord Salmon).

[109] *Phillips v The Queen* (2006) 225 CLR 303 at 320; 153 A Crim R 431 quoting *Pfennig v The Queen* (1995) 182 CLR 461 at 484; 77 A Crim R 149.

[110] *HML v The Queen* (2008) 245 ALR 204 at 248 quoting *Pfennig v The Queen* (1995) 182 CLR 461 at 483; 77 A Crim R 149.

[111] *HML v The Queen* (2008) 245 ALR 204 at 294-295; but see discussion above at nn 22-24.

[112] *HML v The Queen* (2008) 245 ALR 204 at 326-327. See also Hoffman, n 24 at 200; Hamer (2003), n 17 at 144-146.

[113] *HML v The Queen* (2008) 245 ALR 204 at 249 (Hayne J, emphasis in original).

[114] Hamer (2007), n 17 at 624.

[115] *HML v The Queen* (2008) 245 ALR 204 at 294.

inference: typically, the other incidents are frequent and regular. The complainant in *OAE*, for example, said that the defendant's sexual contact with her "happened quite often … every couple of days" over a period of several years.[116] Compare this with *Phillips* which, for a multiple-complainant case, involved a relatively high number of incidents: eight counts relating to six complainants.

By its inclusion of frequent and numerous other incidents against the same complainant, relationship evidence may lend strong support for a propensity inference. A further factor to consider is the extent to which the other incidents resemble the charged offence. The resemblance will often be strong. For example, in *OAE*, one of the counts was for digital penetration, and the complainant indicated that she had "lost count" of the number of times the defendant had done this, but that it may have been "40, 50 times between when was I was 12 until I was 16".[117] However, relationship evidence covers quite a spectrum and may include incidents very different from the charged offence. In child sexual assault cases, evidence of grooming is common and can be important;[118] of its very nature, grooming builds up from relatively innocuous interactions with the child.[119] The relationship evidence in the present cases included conduct such as hugging, rubbing through clothes, and kissing.[120] Such evidence is capable of supporting propensity reasoning, but as the similarity with the charged offence decreases, the propensity inference will weaken, and the question arises whether such evidence would satisfy *Pfennig*. In *Phillips*, the court suggested "striking similarity" would ordinarily be required,[121] and the other complainants' allegations were held inadmissible because they were insufficiently similar in their details.

In *HML*, Hayne J's general statement about the admissibility of relationship evidence under *Pfennig* is confined to uncharged "sexual *offences*".[122] Kiefel J emphasises that "evidence of the offences themselves will largely be indistinguishable from the acts the subject of the relationship evidence … [R]elationship evidence is highly probative is because it is of the same type".[123] While Heydon J appears to consider that the defendant's purchase of g-string underwear for the complainant is admissible,[124] Hayne J views it as inadmissible,[125] and Crennan J suggests it is a "possible exception" to admissibility.[126] *HML* is authority that some relationship evidence will satisfy *Pfennig*, but just how much remains far from clear.

## Primary evidence of guilt

The final matter to be considered in determining the strength of a propensity inference is its relationship with the primary evidence of guilt. Propensity evidence will rarely satisfy the *Pfennig* test by itself. As Gleeson CJ indicates:

> [A] complainant's evidence of uncharged acts, even when received and used as evidence of motive, is unlikely to compel, as a matter of logic, a conclusion that the charged offence or offences occurred. To prove that a person did something many times does not compel a conclusion that he did it again.[127]

[116] *HML v The Queen* (2008) 245 ALR 204 at 258-259 (Hayne J); see also 242, 256, 264-265, 297, 303 (Heydon J).

[117] *HML v The Queen* (2008) 245 ALR 204 at 258-259 (Hayne J).

[118] *HML v The Queen* (2008) 245 ALR 204 at 256, (Hayne J), 298-300 (Heydon J), 310-311 (Crennan J).

[119] See Craven S, Brown S and Gilchrist E, "Sexual Grooming of Children: Review of Literature and Theoretical Considerations" (2006) 12 *Journal of Sexual Aggression* 287.

[120] For example, *HML v The Queen* (2008) 245 ALR 204 at 256, 297.

[121] Above n 109.

[122] *HML v The Queen* (2008) 245 ALR 204 at 248 (emphasis in original); see also at 223 (Kirby J).

[123] *HML v The Queen* (2008) 245 ALR 204 at 333.

[124] *HML v The Queen* (2008) 245 ALR 204 at 270-271, 291-293.

[125] *HML v The Queen* (2008) 245 ALR 204 at 248-249. Though his Honour seemed to think that the evidence of the defendant filming the complainant naked was stronger, and potentially admissible.

[126] *HML v The Queen* (2008) 245 ALR 204 at 319.

[127] *HML v The Queen* (2008) 245 ALR 204 at 209-210.

This seems irrefutable notwithstanding Heydon J's observation that the evidence in *HML* revealed a "disposition … to act on his sexual desire for his daughter frequently, indeed on almost all occasions on which they met".[128] But *Pfennig* "*does not require the judge to conclude that the similar fact evidence, standing alone, would demonstrate the guilt of the accused*".[129] It is assessed "in the context of the other evidence".[130] But while this reduces the unworkable stringency of the *Pfennig* test, it may present the opposite danger, making the test too lax.[131] It becomes crucial how the contribution of the primary prosecution evidence is determined.

At this point the second mitigating assumption from *Phillips* comes into play: "it must be assumed … that the [other] prosecution evidence … *may* be accepted by the jury".[132] Of course, where the primary prosecution evidence consists of direct evidence of the offence, as it does in cases like *HML*, this assumption potentially has great power.[133] Indeed, as Heydon J recognises, if it is assumed that the jury accepts the complainant's evidence of the offences, then the offences are proved and there is no need for the propensity evidence.[134] To avoid this difficulty, Heydon J endorses an approach developed in a series of cases by Hodgson JA.[135] It should first be "assumed that all the other evidence in the case left the jury with a reasonable doubt about the guilt of the accused".[136] Then, "the propensity evidence must be such that, when it is added to the other evidence, it would eliminate any reasonable doubt which might be left by the other evidence".[137]

This approach also receives the approval of Gleeson CJ[138] and Kiefel J.[139] However, it leaves the precise division of work between the primary evidence and the propensity evidence unclear. What size deficit is assumed to be left by the primary evidence? This will determine how much is demanded of the propensity evidence.[140] In *Phillips*, the court stated the mitigating assumption without detailing its application. As in *HML* the primary evidence was direct. However, it appears that more than a negligible deficit was assumed to be left because the propensity evidence was ultimately held inadmissible. In *HML*, the propensity evidence was considered very strong; the defendant "revealed himself to be under the influence of a strong sexual attraction to her, and he endeavoured to gratify it in a variety of ways on numerous occasions",[141] and this was "sufficient to remove the reasonable

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[128] *HML v The Queen* (2008) 245 ALR 204 at 272.

[129] *HML v The Queen* (2008) 245 ALR 204 at 237-238 (Hayne J) quoting *Phillips v The Queen* (2006) 225 CLR 303 at 323-324; 153 A Crim R 431 (emphasis in original).

[130] *HML v The Queen* (2008) 245 ALR 204 at 213-214 (Gleeson CJ); see also 236-237, 247-248 (Hayne J), 273 (Heydon J).

[131] Hamer (2003), n 17 at 185-186; Hamer (2007), n 17 at 632-634.

[132] *Phillips v The Queen* (2006) 225 CLR 303 at 323-324; 153 A Crim R 431 (emphasis added) quoted in *HML v The Queen* (2008) 245 ALR 204 at 236-237, 247-248 (Hayne J), 272-273 (Heydon J). This assumption about the complainant's credit contrasts with the first, revealing artificiality and awkwardness: "It is necessary first to assume that *the daughter's evidence* about the charged acts *could leave the jury with a reasonable doubt*. It is necessary also to assume that *her evidence* about the uncharged acts, whether they took place before or after the charged acts, *will be accepted*" (at 277-278) (Heydon J, emphasis added).

[133] See, eg *HML v The Queen* (2008) 245 ALR 204 at 272 (Heydon J), 320 (Crennan J).

[134] *HML v The Queen* (2008) 245 ALR 204 at 272-273.

[135] See *HML v The Queen* (2008) 245 ALR 204 at 273-274 (Heydon J) citing *R v WRC* (2002) 130 A Crim R 89; *R v Joiner* (2002) 133 A Crim R 90 at 98-99; *R v Folbigg* [2003] NSWCCA 17 (unreported, NSWCCA, Hodgson JA, Sully and Buddin JJ, 13 February 2003) at [27]; see also Heydon D, "Similar Fact Evidence: The Provenance of and Justification for Modern Admissibility Tests" in Rahemtula A (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (2006) pp 241, 251.

[136] *HML v The Queen* (2008) 245 ALR 204 at 273-274 (Heydon J) quoting *R v WRC* (2002) 130 A Crim R 89 at [29].

[137] *HML v The Queen* (2008) 245 ALR 204 at 273-274.

[138] *HML v The Queen* (2008) 245 ALR 204 at 213-214.

[139] *HML v The Queen* (2008) 245 ALR 204 at 333.

[140] Hamer (2007), n 17 at 631.

[141] *HML v The Queen* (2008) 245 ALR 204 at 274 (Heydon J).

doubt which must be assumed to exist in relation to the evidence of charged acts by itself".[142] Future cases where the relationship evidence includes uncharged offences are likely to be decided in the same way as *HML*. But where the relationship evidence consists merely of grooming, the size of the deficit assumed to be left by the primary evidence may be crucial in determining whether *Pfennig* is satisfied.

## 5. INADMISSIBILITY OF CONTEXT EVIDENCE

As discussed in Part 3, Hayne, Gummow J and Kirby JJ support an exclusionary rule of broad scope. In their view, relationship evidence could not avoid exclusion by being admitted for a non-propensity purpose. Independently of this, they express some doubt as to whether relationship evidence would be admissible *purely* to provide context. Heydon J expresses similar doubts. However, if admissible for a propensity purpose, they would allow the evidence to be used to provide context.

The majority's hesitation about admitting relationship evidence under the banner of "context" or "background" is expressed in both general and specific terms. The general concern is that these terms are too vague to justify bypassing the exclusionary rule. Kirby J indicates, "[i]f such a vague criterion were adopted, virtually any evidence of discreditable conduct, uncharged in the information or indictment, would arguably be relevant and admissible in such a trial, because every alleged crime has a 'context'".[143] One might respond that this objection, by itself, argues for caution rather than exclusion. Kiefel J holds:

> [R]elationship evidence is relevant, but not in a general way and not by way of background or contextual evidence. It is relevant to answer questions which, in cases of the kind under consideration, may fairly be expected to arise in the minds of the jury were they limited to a consideration of evidence of the offences charged.[144]

She lists familiar questions: "whether the offences are isolated incidents; why the accused felt confident enough to demand the acts in question; why the child was compliant; and why he or she did not make a complaint to another person."[145]

However, evidence tendered for such purposes does appear to pose heightened risks of muddy thinking. Kiefel J suggests that, in such a case, "the trial judge might fairly observe that the reference to other acts … does not logically prove the prosecution case or enhance the complainant's credit".[146] But as Heydon J points out:

> [T]he uncharged acts evidence relied on to give background or context would be irrelevant and hence inadmissible unless the evidence rendered probable the existence of the charged act, or a fact relevant to a charged act … Background evidence "does support the guilt of the accused, by making the complainant's account of the assaults more believable".[147]

This leads to the majority's more specific objection to relationship evidence used to provide background or context. While not expressing a final view, Heydon J questions whether using the evidence to answer these questions would be an "impermissible bolstering of the daughter's credit in

[142] *HML v The Queen* (2008) 245 ALR 204 at 274; see also 333 (Kiefel J).

[143] *HML v The Queen* (2008) 245 ALR 204 at 223-224. See also 229 (Kirby J), 236 (Hayne J), 289 (Heydon J) discussing Callinan J's view in *Gipp v The Queen* (1998) 194 CLR 106 at 168-169; 102 A Crim R 299 and *Tully v The Queen* (2006) 230 CLR 234 at 278; 167 A Crim R 192.

[144] *HML v The Queen* (2008) 245 ALR 204 at 329-330.

[145] *HML v The Queen* (2008) 245 ALR 204 at 329.

[146] *HML v The Queen* (2008) 245 ALR 204 at 330.

[147] *HML v The Queen* (2008) 245 ALR 204 at 287-288 quoting from *R v Leonard* (2006) 67 NSWLR 545 at 557 (Hodgson JA); 164 A Crim R 374.

chief".[148] Hayne J, with Gummow J and Kirby J agreeing, suggests that the evidence "might be said to deal only with collateral issues that should not be explored at trial".[149] The remainder of the court did not agree with the majority.[150]

The issue is a tricky one. As McHugh J notes in *Palmer v The Queen*, "[t]he line between evidence relevant to credit and evidence relevant to a fact-in-issue is often indistinct and unhelpful".[151] However, the minority view appears preferable. The evidence should be recognised as advancing the prosecution's case more broadly, and not as merely supporting the complainant's credit. In child sexual assault cases, it is often the case that the prosecution has direct evidence of the offence from the complainant, and little else. Background evidence giving plausibility to the prosecution's version of events does bolster the complainant's credibility. But the broader purpose of the evidence should not be lost sight of. Crennan J notes that evidence of a hostile pre-existing relationship between defendant and victim has served a similar function in circumstantial murder cases. Such evidence has been "properly admitted to proof as integral parts of the history of the alleged crime"[152] so that jurors do not have to decide the case "in a vacuum".[153] Without such evidence, the prosecution case would be "unreal and not very intelligible".[154] Clearly relationship evidence does not bolster the victim's credibility in a murder case. Evidence serving this function should not be excluded from child sexual assault cases simply because the prosecution case is heavily dependent on the complainant's direct evidence.

The rigid approach that the majority take to the bolster rule is arguably inconsistent with its function and nature. According to McHugh J in *Palmer v The Queen*, bolstering evidence is excluded "to prevent the trial of a case being burdened with the side issues that would arise if parties could investigate matters whose only real probative value was that 'they tended to show the veracity or falsity of the witness who was giving evidence which *was* relevant to the issue'".[155] Unlike the propensity exclusionary rule, the bolster rule is a "rule of convenience, and not of principle".[156] To "elevate" it to a "fixed [rule] of law … would be a mistake … If evidence going to credibility has real probative value with respect to the facts-in-issue … it ought not to be excluded unless the time, convenience and cost of litigating the issue that it raises is disproportionate to the light that it throws on the facts-in-issue".[157] However, it seems others on the High Court have not accepted the full implications of McHugh J's views.[158]

Even on the majority view, there is potential for relationship evidence to be used for a bolstering purpose. This use will be open where the evidence is admissible for a propensity purpose.[159] To seek to prevent this would be inefficient and inconvenient. Further, the prosecution may be allowed to elicit bolstering evidence in re-examination, where the defence has raised those familiar questions about the complainant's credibility in cross-examination. As Heydon J points out, this carries the difficulty that

[148] *HML v The Queen* (2008) 245 ALR 204 at 283; see also 275-286.

[149] *HML v The Queen* (2008) 245 ALR 204 at 246.

[150] *HML v The Queen* (2008) 245 ALR 204 at 329-230 (Kiefel J), 213 (Gleeson CJ).

[151] *Palmer v The Queen* (1998) 193 CLR 1 at 22.

[152] *HML v The Queen* (2008) 245 ALR 204 at 314, quoting *R v Bond* [1906] 2 KB 389 at 401 (Kennedy J), approved by Barwick CJ in *Wilson v The Queen* (1970) 123 CLR 334 at 338.

[153] *HML v The Queen* (2008) 245 ALR 204 at 314 quoting *Wilson v The Queen* (1970) 123 CLR 334 at 343 (Menzies J).

[154] *HML v The Queen* (2008) 245 ALR 204 at 314-315 quoting *O'Leary v The King* (1946) 73 CLR 566 at 577 (Dixon J).

[155] *Palmer v The Queen* (1998) 193 CLR 1 at 22 (McHugh J) quoting *Toohey v Metropolitan Police Commissioner* [1965] AC 595 at 607 (Lord Pearce).

[156] *Palmer v The Queen* (1998) 193 CLR 1 at 23, quoting *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 551 (Starke J), citing *R v Burke* (1858) 8 Cox CC 44 at 53 (Christian J).

[157] *Palmer v The Queen* (1998) 193 CLR 1 at 23-24.

[158] *Nicholls v The Queen* (2005) 219 CLR 196 at 206 (Gleeson CJ), 298 (Hayne and Heydon JJ); Odgers S, *Uniform Evidence Law* (7th ed, Lawbook Co, 2006) p 426.

[159] *HML v The Queen* (2008) 245 ALR 204 at 291-292 (Heydon J), 236-237 (Hayne J).

"the complainant's account of all the abuse she has experienced may be offered in a fragmented way".[160] This inconvenience and inefficiency could be easily averted by adopting McHugh J's approach and allowing the contextual evidence to be provided in examination-in-chief.

The applicability of the bolster rule was not crucial to the resolution of the issues in *HML* since the evidence was otherwise admissible. But it may become decisive in other common law cases. Grooming evidence can provide essential context but it may not satisfy *Pfennig*. The majority views on the bolster rule also have implications for uniform evidence law jurisdictions. The tendency and coincidence rules has narrow scope, and relationship evidence may be admitted to provide context without attaining the threshold level of probative value. Under *Adam v The Queen*,[161] such evidence is not currently excluded by the credibility rule.[162] However, amendments have been proposed that would give the statutory "credibility rule" a similar operation to the common law "bolster rule".[163] If, following the majority approach in *HML*, contextual relationship evidence is classified as "credibility evidence" it would be excluded.[164] Although, as at common law, if the relationship evidence is found admissible under the tendency or coincidence rule, the evidence could also be used for a credibility purpose. And, despite the credibility rule, the evidence could also be adduced in re-examination.[165]

## 6. Sexual attraction and the standard of proof

The final major issue in *HML* concerns, not the admissibility of relationship evidence, but its use. A majority of the court supports the proposition that the jury should not draw a propensity inference from the defendant's demonstrated sexual interest in the complainant,[166] unless that sexual interest is found beyond reasonable doubt. Hayne J, with Gummow J and Kirby J agreeing, would have allowed the appeal in *OAE* on this basis.[167] They were in dissent. Gleeson CJ and Kiefel J supported the proposition, but held that the issue did not arise because the evidence was admitted to provide context not to demonstrate sexual attraction.[168] Heydon and Crennan JJ did not express a view since if such a direction was required it had been provided.[169] But despite majority support, it is very difficult to find a sound basis for this principle, either in the majority's reasoning or elsewhere. Indeed, the application of the standard of proof to this circumstantial inference appears contrary to the logic of proof.

Following the confusion generated by the majority in *Chamberlain v The Queen*,[170] a majority of the High Court laid down sound logical principles regarding the standard of proof and circumstantial evidence in *Shepherd v The Queen*.[171] Clearly the standard of proof applies to the material facts constituting the elements of the offence. But generally, the standard does not apply to the evidence and

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[160] *HML v The Queen* (2008) 245 ALR 204 at 290, discussing Gaudron J's view in *Gipp v The Queen* (1998) 194 CLR 106 at 112-113; 102 A Crim R 299.

[161] *Adam v The Queen* (2001) 207 CLR 96; 123 A Crim R 280.

[162] *Evidence Act 1995* (NSW), s 102; Odgers, n 158, pp 426-427.

[163] Proposed s 101A: Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) pp 394-398, 710.

[164] Odgers S, "Editorial: 'Relationship' Evidence" (2007) 31 Crim LJ 269 at 269, fn 1.

[165] For example, *Evidence Act 1995* (NSW), s 108.

[166] It appears that the appellants were arguing for a broader application of the standard of proof even where relationship evidence was being used merely for context. See *HML v The Queen* (2008) 245 ALR 204 at 306-307 (Heydon J); *R v Nieterink* (1999) 76 SASR 56 at 72-73 (Doyle CJ). This broader proposition was not directly addressed by the court.

[167] *HML v The Queen* (2008) 245 ALR 204 at 240, 244-245, 262-263 (Hayne J), 216 (Gummow J), 386 (Kirby J).

[168] *HML v The Queen* (2008) 245 ALR 204 at 331-332, 334 (Kiefel J), 215 (Gleeson CJ), citing *R v Nieterink* (1999) 76 SASR 56 at 72-73 (Doyle CJ).

[169] *HML v The Queen* (2008) 245 ALR 204 at 292-293, 302, 306-307 (Heydon J), 324 (Crennan J).

[170] *Chamberlain v The Queen* (1984) 153 CLR 521 at 536-37 (Gibbs CJ and Mason J), 570 (Murphy J), 599 (Brennan J), 627 (contra, Deane J).

[171] *Shepherd v The Queen* (1990) 170 CLR 573 at 579-580 (Dawson J, with whom Mason CJ, Dawson, Toohey and Gaudron JJ agreed), 590 (contra, McHugh J); 51 A Crim R 181; Hamer D, "The Continuing Saga of the Chamberlain Direction: Untangling the Cables and Chains of Criminal Proof" (1997) 23 *Monash University Law Review* 43.

"intermediate facts"[172] underlying the material facts. The only occasion where the standard may be applicable to intermediate facts is where they are "indispensable links in a chain of reasoning towards an inference of guilt".[173] The standard has no application where the evidence operates "cumulatively", where "the evidence consists of strands in a cable rather than links in a chain".[174]

*Shepherd* then poses a question about the role played by an intermediate fact in the proof of guilt. In HML the intermediate fact is the defendant's pre-existing sexual attraction[175] for the complainant, as demonstrated by the uncharged incidents. Is this intermediate fact an "indispensable link" on which the guilty verdict hangs? Or is it just one inferential strand in a larger cable inference, with the various strands operating cumulatively, and no single strand having to carry the weight of a conviction by itself?

The *Shepherd* principles are acknowledged in *HML* at various points. However, they appear to have been misunderstood and misapplied. Clearly a finding of a pre-existing sexual attraction was not indispensable to a finding of guilt. The complainant also provided direct evidence of the offences. The court recognises this.[176] Why then did the majority subject the intermediate fact of sexual attraction to the criminal standard of proof?

At times the court seems to consider the criminal standard applicable merely on the basis that sexual attraction is an "intermediate fact"[177] or a "step towards inferring guilt".[178] They fail to ask the crucial question, whether this intermediate fact or step in reasoning is indispensable to a finding of guilt. On other occasions the majority appears to provide a more defensible basis for the application of the criminal standard to the propensity inference. The intermediate fact of sexual attraction is not indispensable – it operates cumulatively with direct evidence. However, both inferential strands come from the same source – the complainant's testimony. The relationship evidence is not independent,[179] and "it may be unrealistic … [to] differentiate" between the two strands.[180] The two are "so 'intertwined' … as to require a direction that the jury not act on the evidence of other sexual misconduct unless satisfied of it beyond reasonable doubt".[181] But this rationale is undercut by the majority's other observations. Differentiation between a complainant's different allegations may be possible on the basis of corroboration,[182] the complainant's response,[183] apparent exaggeration[184] or other defects.[185] Heydon J suggests that "[o]nce admitted, the evidence was capable of being used as an 'independent' – a separate – element in a course of reasoning towards guilt".[186]

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[172] *Shepherd v The Queen* (1990) 170 CLR 573 at 579; 51 A Crim R 181.

[173] *Shepherd v The Queen* (1990) 170 CLR 573 at 579; 51 A Crim R 181.

[174] *Shepherd v The Queen* (1990) 170 CLR 573 at 579; 51 A Crim R 181.

[175] The relationship evidence may show the defendant's sexual attraction for the complainant after as well as before the charged offences. But in the absence of a better expression, the adjective "pre-existing" will be used. On one view, the defendant's sexual attraction towards the complainant *at the time of the offence* may be an indispensable fact. However, there may be other motivations for a sexual attack, such as humiliating the victim.

[176] *HML v The Queen* (2008) 245 ALR 204 at 240, 250-251 (Hayne J), 320 (Crennan J), 331-332 (Kiefel J).

[177] *HML v The Queen* (2008) 245 ALR 204 at 331-332 (Kiefel J).

[178] *HML v The Queen* (2008) 245 ALR 204 at 253 (Hayne J), 229-230 (Kirby J).

[179] *HML v The Queen* (2008) 245 ALR 204 at 309 (Kiefel J).

[180] *HML v The Queen* (2008) 245 ALR 204 at 215 (Gleeson CJ).

[181] *HML v The Queen* (2008) 245 ALR 204 at 262 (Hayne J) quoting from *R v OAE* (2007) 172 A Crim R 100 at 108; see also *HML v The Queen* (2008) 245 ALR 204 at 224 (Kirby J).

[182] *HML v The Queen* (2008) 245 ALR 204 at 215 (Gleeson CJ).

[183] *HML v The Queen* (2008) 245 ALR 204 at 215.

[184] *HML v The Queen* (2008) 245 ALR 204 at 250 (Hayne J).

[185] *HML v The Queen* (2008) 245 ALR 204 at 250.

[186] *HML v The Queen* (2008) 245 ALR 204 at 250.

The court's reasoning on the application of the standard of proof to the intermediate fact of sexual attraction is muddled and contradictory. In its jurisprudence on the criminal standard of proof, the High Court has expressed concern about juries being invited to "to analyse their own mental processes",[187] on the basis that the jury is "unaccustomed"[188] to doing this, and may be misled by it. A fortiori jurors should not be required to analyse their mental processes and subject them to illogical constraints.

## 7. Conclusion

Relationship evidence is a common form of evidence in the many sexual offence trials where the adult or child complainant knows the defendant. The law's lack of clarity about the admissibility and use of this evidence is highly unsatisfactory. *HML* presented the High Court with an opportunity to resolve these uncertainties. Unfortunately, while the decision brings greater certainty on some points, on others there is no progress at all, and in one important respect the High Court has regressed.

It is remarkable and regrettable that, after all this time and so many High Court decisions, the scope of the exclusionary rule at common law is still clouded in obscurity. Whether context evidence that only incidentally reveals the defendant's propensity for misconduct is subject to exclusion is still unsettled. On the positive side, *HML* appears to be a clear authority that the defendant's uncharged sexual offences against the complainant is admissible for a propensity purpose, and is then also usable to provide context. However, it is less clear how far this extends beyond other criminal conduct. In particular it remains uncertain whether grooming evidence will be admissible either to show propensity or to provide context.

But the most troubling aspect of *HML* is the proposition that where relationship evidence is admitted for a propensity purpose, before using it this way, the jury must be satisfied that the defendant's pre-existing sexual attraction for the complainant is proven beyond reasonable doubt. A majority of the High Court supports this principle, and the minority does not actually oppose it. However, it is inconsistent with the sensible logical principles of circumstantial proof as endorsed by the High Court in *Shepherd*.

[187] *Thomas v The Queen* (1960) 102 CLR 584 at 606 quoted in *Darkan v The Queen* (2006) 227 CLR 373 at 396; 163 A Crim R 80.

[188] *Green v The Queen* (1971) 126 CLR 28 at 33 quoted in *Darkan v The Queen* (2006) 227 CLR 373 at 396; 163 A Crim R 80.