

Propensity Evidence Reform

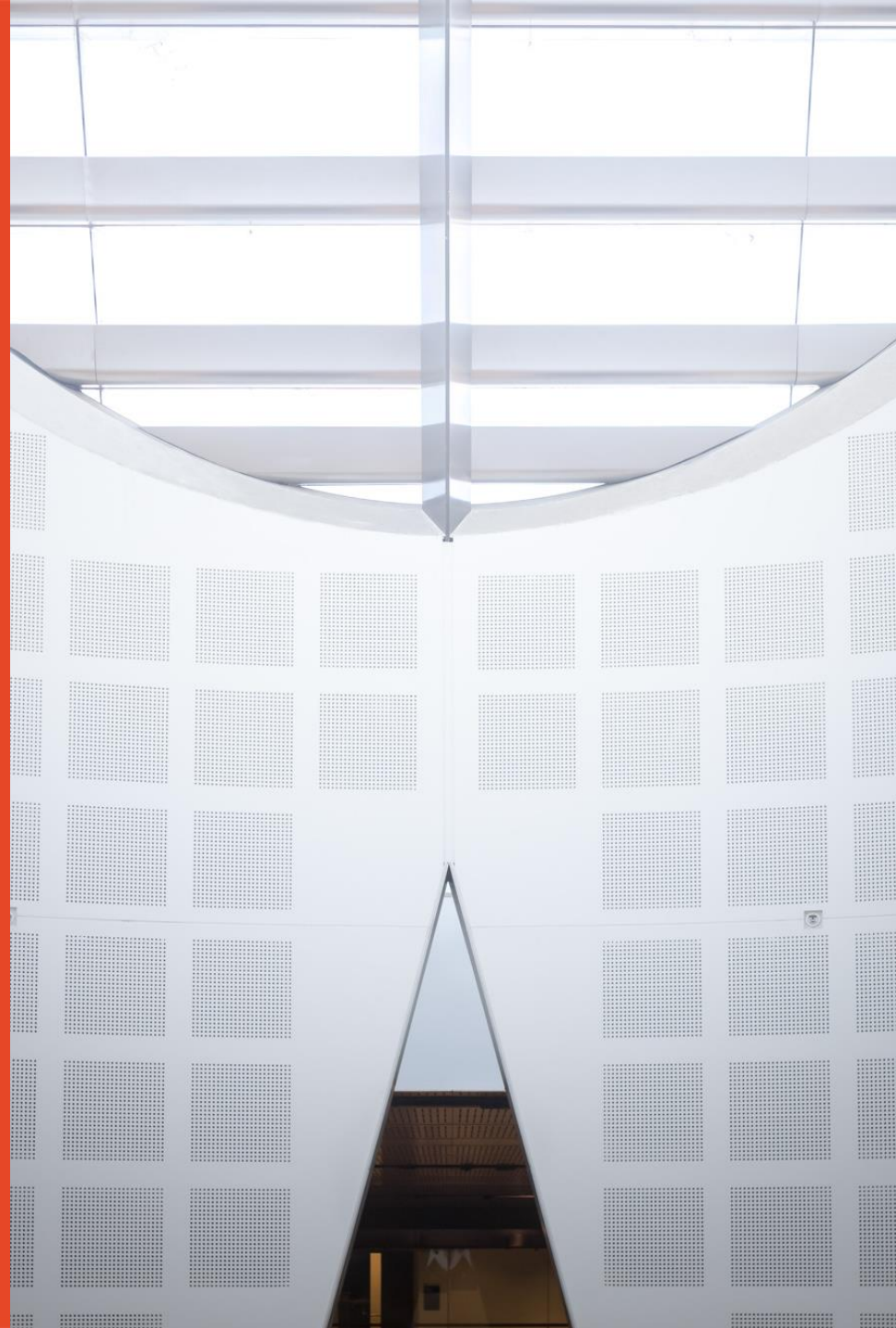
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Propensity: probative value and prejudice

Propensity inference

Eg, prior convictions – tendency?

allegations – coincidence?

Epistemic prejudice

- jury overvaluation
- jury nullification

Non-epistemic prejudice

- inconsistent with autonomy and rehabilitation

Exclusionary rules and admissibility tests

Pre-modern

- propensity reasoning is ‘forbidden’
- evidence revealing propensity *may* be admitted for other purposes
 - eg, *Boardman v DPP* [1975] AC 421, 453 (Lord Hailsham); US Federal Rule of Evidence 404(b).

Modern

- evidence may be admitted for propensity reasoning if sufficiently probative
- eg, balancing test: **probative value > prejudicial risk**
 - eg, *DPP v P* [1991] 2 AC 447, 460; *Handy* [2002] 2 SCR 908 [55]; *Evidence Act 2006* (NZ) s 43(1).

Australian common law *Pfennig* test

Fixed probative value threshold

- ‘**no reasonable explanation**’ for the propensity evidence consistent with defendant’s innocence
Pfennig (1995) 182 CLR 461, 483
- derived from criminal standard of proof
Hodges Case (1838) 2 Lewin 228; 168 ER 1136.

Conceptual problem

- conflation of probative value and proof

Practical problem

- too strict, eg *Martin v Osborne* (1936) 55 CLR 370

Uniform Evidence Law

Two types of propensity evidence

- tendency evidence (s 97)
- coincidence evidence (s 98)

1. Fixed threshold

- ‘significant probative value’ (ss 97, 98)

2. Asymmetric balancing test

- probative value must ‘substantially outweigh’ prejudicial risk (s 101)

Problems

- unclear rationale
- complexity

Contextual operation of *Pfennig* test

- State courts' efforts to make *Pfennig* test workable:
 - O'Keefe [2000] 1 Qd R 564 – criticised for 'qualifying or ignoring' authority: *Phillips* (2006) 225 CLR 303 [60].
 - WRC (2002) 130 A Crim R 89 – endorsed: *BBH* (2012) 245 CLR 499 [155]–[159]; *HML* (2008) 235 CLR 334 [27], [285].
- HCA's solution:
 - *Pfennig* 'does not require ... that the similar fact evidence, standing alone, would demonstrate ... guilt'
 - 'the necessity to view the similar fact evidence in the context of the prosecution case'
Phillips (2006) 225 CLR 303 [63]

Problems:

- lack of focus on propensity evidence
- the greater the prosecution's need, the harder to gain admission

Stringent application in *Phillips* (2006) 225 CLR 303

- six young women, similar allegations of sexual assault
- each assault at a social gathering
- defendant engineered an opportunity to be alone
- first sought consent and failing that threats of violence
- all within a couple of years

Admitted at trial, upheld by QCA, overturned by HCA

‘The similarities relied upon were not merely not “striking”, they were entirely unremarkable’: (2006) 225 CLR 303 [56].

Relevance and consent in *Phillips* (2006) 225 CLR 303

Evidence of other complainants' lack of consent 'can say nothing about the mental state of the first complainant on a particular occasion affecting her': (2006) 225 CLR 303 [47].

- fundamental misunderstanding of relevance
- *indirect* relevance
- common thread provided by defendant's conduct – use of threats/force

Inconsistent application of *Pfennig* test in QCA

Gregory [2011] QCA 86: permissive application

- child sexual offence (CSO) charges
- 14-year-old boy complainant
- met on the streets
- a friend of the boy present

- propensity evidence – prior, 11-year-old boy
- 16 years earlier
- social connection
- offences committed when alone

QCA found sufficient ‘striking similarities’, ‘pattern’ or ‘unusual features’: [24].

- striking friendship with a male child
- child very rapidly shared bed in the evening
- massage as a pretext, part of grooming

Inconsistent application of *Pfennig* test in QCA

Little [2018] QCA 113, permissive application

- adult sexual assault
- propensity evidence – 3 priors, 16, 17 and 21 years earlier
- similarities:
 - breaking in
 - balaclava
 - threats with a knife
 - bound their hands and feet (except in one case)
- major dissimilarity
 - defendant knew complainant – consent in issue

on consent, *Phillips* distinguished

- here propensity evidence showed conduct leading to non-consensual sex

Inconsistent application of *Pfennig* test in QCA

***Collins* [2014] QCA 389, stringent application**

- joinder of sexual offence charges
- seven young women complainants
- lured onto defendant's yacht by offer of employment
- isolated and vulnerable
- plied with alcohol

QCA emphasised relatively fine distinction

- only some complainants felt stupefied by the drink, suggesting it was spiked
- only those counts could be joined.

where consent in issue, following *Phillips*

- 'joinder was impermissible': [38]
- 'evidence ... as to lack of consent is irrelevant': [50].

Inconsistent application of *Pfennig* test in QCA

***Nibigira* [2018] QCA 115, stringent application**

- joinder of CSO charges
- around the same time
- four girl complainants aged around 10
- members of church choir
- defendant, church leader

QCA: charges should be severed into groups

- no ‘underlying unity’ or ‘pattern’; similarities at ‘rather generalised level’: [104]-[106]

emphasised differences

- extent of grooming
- seriousness of the acts engaged, from indecent touching to penetration
- locations, whether a car or at the defendant’s house
- riskiness, in terms of the proximity of other people

UEL, 'significant probative value': *Vic v NSW*

Victoria, stringent approach

- need 'sufficient similarity or distinctiveness in the features of the proposed tendency evidence'
- may require something ““remarkable”, “unusual”, “improbable” [or] “peculiar”:

Velkoski (2014) 45 VR 680 [133]

– disapproved NSWCCA

- not requiring 'closely similar' features
- lowering the admissibility threshold 'too far': [120], [155], [164]

Inconsistent application of UEL: *Vic v NSW*

NSWCCA ‘did not accept’ VCA approach: *Hughes* (2015) 93 NSWLR 474 [188].

- upheld joinder and admissibility
- CSO charges, five girl complainants
- six other tendency witnesses
- ages ranged from six to early twenties
- variety of social and professional relationships with the defendant
- various sexual touching, penetration and exposure behaviours
- in various social and work contexts

Inconsistent application of UEL: HCA

HCA upholds NSWCCA: *Hughes* (2017) 344 ALR 187

- expressly disapproving *Velkoski* as ‘unduly restrictive’: [12], [32].
- ‘operative features of similarity’ are not required: [39].

But,

- limited to commission – on identity, ‘probative value [will require] close similarity’: [39].

And

- probative value is in proportion to ‘particularity’: [64]
- in this case, common features of opportunism and riskiness: [2]

Inconsistent application of UEL: HCA

Hughes in HCA – Nettle J dissenting preferred Victoria’s ‘orthodox’ approach: [173].

- require ‘logically significant connection’: [158].
- riskiness and opportunism insufficient: [159], [169].

***Bauer* [2018] HCA 40, more in line with Nettle J in *Hughes*:**

- ‘special, particular or unusual feature’: [48].
- ‘some feature ... which links the two together’: [58].
- link in this case – same complainant

Inconsistent application of UEL: HCA

McPhillamy [2018] HCA 52

- acolyte was charged with CSOs against an 11-year-old altar boy
- admitted CSOs against two 13 year old boys at a boarding school, ten years earlier when a housemaster.

HCA held this evidence inadmissible

- similar supervisory role, ages of boys, alleged misconduct?
- ‘generality of the tendency’: [18]
- ‘absence of sufficient similarity’: [24]
- time gap and dissimilarities of location and context

Reform following the CSO Royal Commission

- propensity exclusion ‘one of the most significant issues affecting criminal justice’

Royal Commission (RC), *Criminal Justice Report* (2017), Parts III-VI, 411

- even the majority in *Hughes* too stringent: RC, 635

Council of Attorneys General (CAG) proposes:

- maintain UEL tendency/coincidence distinction
- maintain first test of ‘significant probative value’ requirement, but presume this for CSO cases
- second balancing test: probative value > prejudicial risk
- guidelines to overcome undervaluation

Mark Speakman, NSW AG, Media Release, 28 June 2019

CAG reforms would increase complexity

- adding the CSO/non-CSO distinction
- justified by greater need, availability, probative value in CSO cases?

A simpler reform

- eliminate tendency/coincidence distinction
- single admissibility test: probative value > prejudicial risk
 - UK common law, Canada and New Zealand

DPP v P [1991] 2 AC 447, 460; *Handy* [2002] 2 SCR 908 [55]; *Evidence Act 2006* (NZ) s 43(1).

These changes would signal relaxed admissibility.

Supplemented by guidelines.

Guidelines on assessing probative value – admissibility and judicial directions

1. Correcting notion that recidivists are highly specialised

- ‘The two most important similarities are already present – *sexual offending against a child*’: RC, 595.
- CS offenders target ‘both girls and boys and children of quite different ages, ... in a variety of ways [and] in different contexts – institutional, familial and others’: *ibid*.
- criminals are “specialised generalists”: Mike Redmayne, *Character in the Criminal Trial* (2015), 30.

2. (General) tendency reasoning is allowed

- ‘the kind of person who commits this kind of offence’
Queensland *SDC Criminal Directions Benchbook* (March 2017), ‘Similar Fact Evidence’ [52].

Guidelines – admissibility and judicial directions

3. Addressing conflation of probative value and proof

Examples

- *Pfennig* ‘no reasonable view’ admissibility test.
- ‘the evidence, being circumstantial evidence, has probative value only if it bears no reasonable explanation other than the happening of the events in issue’: *Hoch* (1988) 165 CLR 292, 296.

Judicial directions

- embodying *Pfennig* test: Queensland *SDC Benchbook* (March 2017) [52].
- NSW requiring other misconduct to be proved beyond reasonable doubt
 - disapproved in *Bauer* [2018] HCA 40 [86]; abolished in *Jury Directions Act 2015* (Vic) ss 61-62.

Guidelines – admissibility and judicial directions

4. Probative value turns on comparative propensity

- low recidivism figures, < 50%
- improbable that defendant would reoffend after prior conviction
- but reoffending much more likely than that someone without prior conviction would offend
- evidence still much more consistent with guilt than innocence