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**
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:

– 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
  

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].
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
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