PFENNIG v R*

TWO VERSIONS OF THE SIMILAR FACT RULE

Pfennig v R is the latest in a long line of High Court decisions dealing with what is commonly, but misleadingly, referred to as similar fact evidence. That the High Court considered another decision to be necessary is both a testament to the difficulty of the questions that are raised by this rule and confirmation of the fact that previous High Court decisions have failed to provide final answers to them. *Pfennig*, unfortunately, will not be the final word either. Its great virtue, however, is that it does set out the questions with greater clarity than has been done before.

The Facts and Issues

The accused was charged with the murder of a 10 year old boy, Michael Black, who had disappeared from a reserve on the Murray River in South Australia. The only two possible causes of the boy's disappearance were drowning or abduction followed by murder. There was, however, evidence establishing that the boy was very unlikely to have gone swimming on the day in question. Furthermore, the river had been extensively searched. If the boy had drowned his body would almost certainly have been found. It was not. The evidence therefore suggested that drowning was probably not the cause of the boy's disappearance.

This left the possibility of abduction. The evidence established that the accused was at the reserve in his Volkswagon Kombi van on the day of the disappearance and that he spoke with the boy. Thus the accused had both the means and the opportunity to abduct the boy. But did he have the inclination to do so? It is here that the disputed evidence came in. It established that the accused had abducted and raped a 13 year old boy, H, some 12 months after the disappearance of Michael Black. The means by which Michael Black was abducted (if indeed he was abducted) were unknown; the most that could be said was that the means used by the accused to abduct H could also have been used by him to abduct Michael Black and were in fact consistent with several of the circumstances surrounding Michael's disappearance. This was not, therefore, a case where there were such 'striking similarities' between the two crimes that the only reasonable conclusion was that the same person had committed both. Nonetheless, the H evidence did establish that the accused had a propensity to commit the type of crime with which he was charged.

The judge instructed the jury that they could not use the evidence when deciding whether or not Michael had been abducted. But once they had eliminated the possibility of drowning, they could use it on the question of identity. The basis

* (1995) 127 ALR 99. High Court of Australia, 17 February 1995, Mason CJ, Brennan, Dawson, Deane, Toohey, Gaudron and McHugh JJ (*'Pfennig'*).

for doing so was that the person who committed the crime had a particular and, in the judge's view, unusual[1] propensity which the accused happened to share. In this context he instructed the jury that:

> It would, in my opinion, be an affront to common sense to postulate two persons in Michael Black's vicinity at Murray Bridge, and both almost certainly at Sturt Reserve, about the same time that afternoon, each with a propensity to kidnap and sexually assault young boys and each having the physical means that afternoon of doing so, one of them befriending the boy and lending him a fishing knife and the other within a fairly short space of time but quite independently engaging, presumably, in some kind of pre-abduction dealing with him, however brief, and both leaving Sturt Reserve in separate vehicles at much the same time.[2]

The accused's appeal against the admission of this evidence was unanimously dismissed by the High Court. All of the judgments approved of the judge's directions, although McHugh J suggested that they were in fact unduly favourable to the accused. In his view, the evidence could also have been used by the jury to assist them in deciding whether or not the boy had been abducted.[3] All agreed, though, that the evidence in *Pfennig* was being used as 'propensity' evidence. That is to say, its relevance depended upon an inference that the accused possessed a particular propensity, namely a propensity to abduct children. This kind of evidence lies at the very core of the similar fact rule; what is interesting about *Pfennig*, though, is the difference in the views taken about evidence falling at the margins of the rule.

What the High Court essentially did in *Pfennig* was to set out at least two fundamentally different versions of the similar fact rule. I say 'at least' because it is not entirely clear to this reader what version of the rule Toohey J was intending to endorse. There is, however, a very clear divide between the judgment of Mason CJ, Deane and Dawson JJ on the one hand, and that of McHugh J on the other. Although there was a clear majority in *Pfennig* itself for the version of the rule favoured by Mason CJ, Deane and Dawson JJ, the absence of Brennan and Gaudron JJ from the bench together with the obscurities in the judgment of Toohey J mean that the questions raised in *Pfennig* cannot yet be regarded as answered.

The similar fact rule basically prohibits the use of the accused's character or prior criminal conduct to prove the commission of the crime charged. Its precise scope and operation are, however, a matter of dispute. There are essentially two questions to consider. One question corresponds to the exclusionary aspect of the rule, the other to the rule's inclusionary aspect. First, the exclusionary question: what is the scope of the rule? In other words, to what evidence does it apply? Evidence falling within the scope of the rule is *prima facie* inadmissible. But there is a second, inclusionary question: under what circumstances will evidence rendered *prima facie* inadmissible by the exclusionary aspect of the rule in fact

[1] *Pfennig* (1995) 127 ALR 99, 151.
[2] Ibid 106.
[3] Ibid 152-3.

be admitted? The answers to these two questions are related. If the scope of the rule is narrow then it may seem appropriate to impose an exacting and inflexible test of admissibility. On the other hand, if the scope of the rule is broad, then a less demanding and more flexible test might be more appropriate. In crude terms the differences between the judgments in *Pfennig* follow this divide, with Mason CJ, Deane and Dawson JJ favouring a narrow rule and an inflexible test of admissibility, and McHugh J preferring instead a broader rule with a correspondingly more flexible test of admissibility.

The limited agreement that did exist between the judgments was that the similar fact rule places no absolute prohibition on the use of propensity reasoning. Whilst there have been several statements of similar effect in recent High Court judgments,[4] *Pfennig* contains probably the clearest and most unanimous acknowledgment of the reality that propensity reasoning has always been permitted, whatever description it may have been given in the past. As Mason CJ, Deane and Dawson JJ admitted, the

> insistence in some of the judgments of this court on the need to show that propensity evidence was relevant to 'some other issue' as one of the prerequisites of its admissibility so as to prove the commission of the offences charged [has] contributed to a misunderstanding of the *Makin* principles and to statements of principles which lacked a clear and coherent theoretical foundation.[5]

On this point McHugh J noted that 'it is impossible to maintain that the Anglo-Australian law of evidence prohibits the use of propensity reasoning in all circumstances.'[6]

The Divergent Approaches

... A Narrow and Inflexible Rule

Although Mason CJ, Deane and Dawson JJ ('the majority') did not explicitly address the first question dealing with the scope of the rule, a particular view of the rule is implicit in what they do say. The judgment begins, for example, with the observation that:

> This appeal raises questions as to the admissibility of what has been described as propensity or similar fact evidence and the use to which it can be put. There is no one term which satisfactorily describes evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged. It is always propensity evidence but it may be propensity evidence which falls within the category of similar fact evidence, relationship evidence or identity evidence. These categories are not exhaustive and are not necessarily mutually exclusive. The term 'similar fact' evidence is often used in a general but inaccurate sense.[7]

What this passage clearly suggests is that the defining characteristic of evi-

[4] *Perry v R* (1982) 150 CLR 580, 592-3 (Murphy J), 604 (Wilson J); *Harriman v R* (1989) 167 CLR 590, 600 (Dawson J), 613 (Gaudron J); *S v R* (1989) 168 CLR 266, 275 (Dawson J).

[5] *Pfennig* (1995) 127 ALR 99, 113.

[6] Ibid 147.

[7] Ibid 101.

dence which falls within the scope of the rule is that it is 'propensity' evidence; it may fall into one of several sub-categories, but 'it is always propensity evidence'. If we accept this view, then a better name for the similar fact rule would be the rule against propensity evidence, or the 'propensity rule'. Unfortunately, the majority do not define exactly what they mean by 'propensity evidence', a problem I will return to later. Despite this, it is possible to say that whether or not a particular piece of evidence can be described as propensity evidence depends not so much on the nature of the evidence itself, but on the way in which it is used. If its relevance relies on 'propensity reasoning' then it is certainly being used as propensity evidence. Propensity reasoning occurs whenever the inference that the accused possesses a particular propensity is an essential step in the process of reasoning from evidence to guilt. This interpretation of what the majority meant by 'propensity evidence' seems to be confirmed by their comment that there is a

> general principle that it is not competent for the prosecution to adduce evidence tending to show 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.[8]

In many cases evidence which tends to show that the accused has been guilty of wrongful acts is not used for a propensity purpose. For example, in the case of *R v Evans & Gardiner [No 2]*[9] the two accused were charged with a murder committed while they and the deceased were the inmates of a prison. The evidence would clearly have revealed this fact and thus suggested that the accused had been 'guilty of criminal acts other than those covered by the indictment'. The evidence would not have fallen within the scope of the rule against propensity evidence, however, because it would not have been led 'for the purpose of leading to the conclusion that the accused were persons likely from their criminal conduct or character to have committed the offence for which they were being tried.' Similarly, to use an example from the judgment of McHugh J, the majority's version of the rule would not apply to 'evidence that the proceeds of a robbery carried out by the accused were found at the scene of a murder'.[10] In such a case, the relevance of the evidence would simply lie in the fact that an object or objects connected with the accused had been found at the scene of the crime. The fact that the object was the proceeds of a robbery committed by the accused — rather than, for example, an item of clothing belonging to the accused — is immaterial. The relevance of the evidence does not depend on any inference as to the accused's criminal propensity.

What of the second aspect of the rule, the test for admissibility? The test in every case, according to the majority, is that 'the objective improbability of [the evidence] having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the

[8] Ibid 108.

[9] [1976] VR 523 ('*Evans & Gardiner*').

[10] *Pfennig* (1995) 127 ALR 99, 138.

offence charged.'[11] This is a test for probative value, the same test as that which a jury must apply when dealing with circumstantial evidence.[12] This test is to be applied 'in the context of the prosecution case; that is ... as a step in the proof of that case.'[13] The adoption of this test means that 'striking similarity, underlying unity and other like descriptions of similar facts are not essential to the admission of such evidence' although it is nevertheless the case that 'usually the evidence will lack the requisite probative force if the evidence does not possess such characteristics.'[14]

The 'no rational explanation' test is both exacting and inflexible. It is exacting because it sets a very high threshold for admissibility. It is inflexible, because the requirement is the same no matter how great — or small — the likely prejudicial effect of the specific evidence may actually be. Indeed, on the majority view one need not even consider the amount of prejudice likely to be caused by the evidence, nor is there any need to ask whether the probative value of the evidence 'outweighs' its prejudicial effect. McHugh J therefore gave an accurate description of the majority's test when he commented that:

> If evidence revealing criminal propensity is not admissible unless the evidence is consistent with the guilt of the accused, the requirement that the probative value 'outweigh' or 'transcend' the prejudicial effect is superfluous. The evidence either meets the no rational explanation test or it does not. There is nothing to be weighed — at all events by the trial judge. The law has already done the weighing.[15]

Instead, the only question for the judge is whether there is a rational view of the evidence which is consistent with the innocence of the accused; and rather than being something which the judge must consider and weigh when applying the rule, the possibility of prejudice simply becomes the rule's rationale. It is the fact that the rule requires no weighing of prejudicial effect, or balancing of probative value against prejudicial effect, which distinguishes it from a discretion.[16]

In the majority's version of the rule, then, the rule's scope is narrow and focused, and its test for admission exacting and inflexible. There is a natural fit between these two halves of the rule. If the evidence is being used as propensity evidence (which it must be because otherwise it falls outside the scope of the rule) then it can be assumed to carry with it a high degree of prejudice.[17] If a high degree of prejudice can be *assumed*, then there is little point in requiring the judge to weigh the exact degree of prejudice in every case. Moreover, if a

[11] Ibid 113. See also *Hoch v R* (1988) 165 CLR 292, 294-5 (Mason CJ, Wilson and Gaudron JJ).

[12] This is explicitly acknowledged in the judgment: *Pfennig* (1995) 127 ALR 99, 114.

[13] Ibid.

[14] Ibid 115.

[15] Ibid 138. For an argument that the majority's test is in fact consistent with the case law see Andrew Palmer, 'The Scope of the Similar Fact Rule' (1994) 16 *Adelaide Law Review* 161, 164-9.

[16] See *Pfennig* (1995) 127 ALR 99, 114.

[17] For some of the reasons why, see ibid 118 (Mason CJ, Deane and Dawson JJ). See also Palmer, above n 15, 169-70.

high degree of prejudice can be assumed, then it is reasonable to demand a correspondingly high degree of probative value. The 'no rational explanation consistent with innocence' test does just that. In cases where the evidence is not being used as propensity evidence, the assumption of a high degree of prejudice cannot be safely made. It is, therefore, necessary to consider in each case the actual degree of prejudice which the evidence is likely to carry. In such cases, the general discretion to exclude evidence more prejudicial than probative probably provides adequate safeguard against the risk of an unfair trial.

... A Broad and Flexible Rule

Even though McHugh J favoured a fundamentally different version of the rule from the majority, the two halves of his rule fit together just as well. Where the scope of the majority's rule is narrow and focused, McHugh J's rule is broad and general. Where the inclusionary aspect of the majority's rule is exacting and inflexible, the threshold for admissibility under McHugh J's rule varies from case to case.

In a footnote to his judgment[18] McHugh J disapproves of the New South Wales Court of Criminal Appeal's decision in *Rogerson & Paltos*.[19] In *Rogerson*, Lovejoy J put forward a view of the rule which is entirely consistent with the views of the majority in *Pfennig*:

> *Harriman v R* is therefore not an authority for the broad proposition that where evidence tends to disclose criminality other than that charged it must have a high degree of probative force to be admissible. Only if it is tendered merely as 'propensity' or 'similar fact' or 'improbability' evidence must it pass some such initial test.[20]

Contrary to this, McHugh J claims that *Harriman v R*[21] is authority for just such a broad proposition:

> As the reasoning of the court's decision in *Harriman v R* shows, the principles concerning the admissibility of evidence revealing other acts of misconduct are not confined to the so-called similar fact cases. They apply in any criminal trial where the Crown wishes to lead evidence tending to show that the accused has been guilty of wrongful acts other than those with which the accused is charged.[22]

McHugh J does not explain the meaning of the word 'wrongful' in this passage. One might assume it would mean 'criminal' but this is not certain. His Honour claims at one point that 'the law generally excludes evidence of other incidents that reveals the *criminal or discreditable* propensities of the accused.'[23] Later in the judgment, however, he refers only to evidence which

[18] *Pfennig* (1995) 127 ALR 99, 136 n 99.
[19] (1992) 65 A Crim R 530 (*'Rogerson'*).
[20] Ibid 543.
[21] (1989) 167 CLR 590 (*'Harriman'*).
[22] *Pfennig* (1995) 127 ALR 99, 136.
[23] Ibid 135 (emphasis added). A similar comment was made later: ibid 147.

'discloses, directly or indirectly, the *criminal* propensities of the accused'.[24]

The precise scope of McHugh J's version of the rule is therefore unclear. What can be said is that the rule applies whenever the evidence suggests that the accused may have committed criminal offences other than those which are the subject of the indictment, no matter how that evidence is being used. This is confirmed by the fact that he treats the example referred to above where evidence that the proceeds of a robbery carried out by the accused were found at the scene of a murder[25] as an example of evidence falling within the scope of the rule. The *Evans & Gardiner* example would also presumably fall within the scope of McHugh J's version of the rule, although there is certainly no suggestion of that in *Evans & Gardiner* itself.

With the breadth of McHugh J's version of the rule, it might be more accurately described as a '(criminal) misconduct' rule. The broad scope of the rule means that evidence falling within the scope of the rule cannot be assumed to carry with it a uniformly high degree of prejudice. In particular, if the evidence does not suggest that the accused is likely from his or her character or conduct to have committed the crime charged, then it will not carry with it all the prejudice associated with propensity evidence. With this in mind my own view is that the scope of McHugh J's version of the rule is too broad because it goes beyond what he himself identifies as the rule's purpose: to uphold the fundamental principle that guilt is 'not to be "inferred from the character and tendencies of the accused"'.[26] The accused's guilt will only be inferred from his or her character or tendencies when the jury is invited to use, or might conceivably use, the evidence as propensity evidence. If the criminal propensities of the accused are only incidentally revealed, or bear little connection to the facts of the case then the jury is unlikely to infer the accused's guilt from his or her character or tendencies. In such cases, the residual discretion provides an adequate safeguard against the risk of an unfair trial.

The fact that the evidence falling within the scope of the rule cannot be assumed to carry with it a uniformly high degree of prejudice also has obvious implications for the inclusionary aspect of the rule. If the 'no rational explanation test' must always be applied, then the courts will be demanding a uniformly high degree of probative value of evidence carrying with it vastly varying levels of prejudice. Even if the risk of prejudice was small, the prosecution would not be permitted to use the evidence unless it passed the exacting 'no rational explanation' test. This might result in evidence being excluded 'even though in a practical sense its probative value outweighs its prejudicial effect'.[27]

Varying levels of prejudice demand a varying threshold of admissibility. McHugh J does not suggest that the test is whether the probative value

[24] Ibid 149 (emphasis added). For an argument that the rule only applies to criminal propensities see Palmer, above n 15, 181-7.

[25] *Pfennig* (1995) 127 ALR 99, 138.

[26] Ibid 135. McHugh J quotes the words of Dixon CJ in *Dawson v R* (1961) 106 CLR 1, 16. I also believe that the scope of McHugh J's version of the rule is inconsistent with the case law: see Palmer, above n 15, 172-7.

[27] *Pfennig* (1995) 127 ALR 99, 138.

'outweighs' the prejudicial effect because the two are incommensurable.[28] Rather the test for the admissibility of evidence falling within the scope of the rule is that the 'interests of justice require its admission despite the risk, or in some cases the inevitability, that the fair trial of the charge will be prejudiced.'[29] This requires the judge to make 'a value judgment, not a mathematical calculation'.[30] Before making this value judgment, the judge must 'identify the nature of the risk, if any, to which the admission of the evidence gives rise.'[31] This will depend on the way in which the evidence is being used.

The greatest risk to a fair trial will arise if the evidence is being used as propensity evidence. In such cases the 'no rational explanation' test will be appropriate.[32] The risk is less in what McHugh J refers to as the 'true similar fact cases'.[33] These are the cases, such as *Makin*[34] and *Perry v R*,[35] where the jury is invited to infer that 'the association of the accused with so many similar deaths, injuries or losses, as the case may be, makes it highly improbable that there is any innocent explanation for the accused's involvement in the matter.'[36] In such cases the risk of prejudice is not from propensity reasoning, but from the fact that '[c]ommon assumptions about improbability of sequences are often wrong'.[37] In other cases, perhaps the *Evans & Gardiner* and robbery/murder examples given above, mere relevance may suffice.[38] Each case will turn on its own facts.

A Third Alternative?

There is, arguably, a third version of the rule on offer in the judgment of Toohey J. As his version of the rule is not fully articulated, however, it is difficult to say with any degree of confidence what his views on the two aspects of the rule are. Nonetheless there are some intriguing hints. First, where the majority saw similar fact evidence as a sub-set of propensity evidence, Toohey J apparently sees the opposite relationship between the two. At one point he talks of propensity evidence being placed 'within the area of similar fact evidence',[39] and shortly afterwards of 'evidence of similar facts (including propensity)'.[40] Equally intriguing is his claim that *Harriman* 'was not truly a decision on similar fact or propensity evidence. The evidence in question was admissible for the light it threw on an association between the accused and another man'.[41] True,

28 Ibid.
29 Ibid.
30 Ibid 147.
31 Ibid 149.
32 Ibid 148.
33 Ibid 149.
34 *Makin v Attorney-General (NSW)* [1894] AC 57 ('*Makin*').
35 *Perry v R* (1982) 150 CLR 580.
36 *Pfennig* (1995) 127 ALR 99, 149.
37 Ibid. McHugh J quotes Murphy J in *Perry v R* (1982) 150 CLR 580, 594.
38 *Pfennig* (1995) 127 ALR 99, 148.
39 Ibid 130.
40 Ibid 131.
41 *Pfennig* (1995) 127 ALR 99, 131.

but the light it threw on that association was surely to suggest a propensity on the part of the two men to engage in criminal acts together, and it was this joint propensity which rendered the possibility of innocent association on the occasion in question unlikely. The correct view of the case — and this is the view taken by both the majority and McHugh J in *Pfennig* — is surely, therefore, that *Harriman* was a case of propensity evidence.

In relation to the inclusionary aspect of the rule, Toohey J's views are closer to those of the majority than to those of McHugh J. He agrees with the majority that the criterion of admissibility is the probative force of the evidence as measured by the question whether it is consistent with any reasonable explanation for the innocence of the accused.[42] This criterion was identified in *Hoch v R*.[43] Further to this, Toohey J adds that even if this criterion is satisfied, 'it remains with the trial judge to consider the prejudicial effect of the evidence and whether, in the circumstances, it is just to admit it.'[44] This seems to suggest that the question of admissibility is ultimately a question for the trial judge's discretion, an approach the majority were at pains to avoid.

Conclusion

The most significant difference between the views of the majority and McHugh J relates to the scope of the exclusionary rule. For McHugh J, the rule arguably applies whenever the evidence *discloses* 'wrongful' propensity on the part of the accused. This will occur, at the very least, whenever the evidence suggests that the accused may have committed criminal acts other than those covered by the indictment. For the majority, on the other hand, the rule only applies when the evidence is being used as propensity evidence; that is, when the jury is invited to infer that the accused is likely, from his or her character or conduct, to have committed the offence charged. The different approaches to the scope of the rule demand different approaches to the test for admission.

It is not entirely clear, however, what the majority meant by the phrase 'propensity evidence'. What can be said is that they give this phrase a wider meaning than that given to it by McHugh J. The majority, for example, regard the cases of *Makin* and *Perry v R* as falling within the scope of their rule. But as we have already seen, McHugh J claimed that these were cases involving 'objective improbability reasoning', and he specifically rejected the argument put forward by Dawson J in *Harriman* for regarding *Makin* as a case of propensity reasoning.[45] It is perhaps worth noting that the Evidence Act 1995 (Cth) actually refers to two rules: the 'tendency rule' in s 97 and the 'coincidence rule'

[42] Ibid.

[43] (1988) 165 CLR 292.

[44] *Pfennig* (1995) 127 ALR 99, 131.

[45] Ibid 149. The positions taken by McHugh and Dawson JJ in relation to the evidence in *Makin* mirror those taken, respectively, by L Hoffman, 'Similar Facts After *Boardman*' (1975) 51 *Law Quarterly Review* 193, 199 and Colin Tapper, 'Proof and Prejudice' in Enid Campbell and Louis Waller (eds), *Well and Truly Tried* (1982) 177, 198. Tapper's view is also endorsed by the Australian editors of *Cross on Evidence*: David Byrne and J Heydon (eds), *Cross on Evidence* (4th ed, 1991) para 21,060.

in s 98. The tendency rule is clearly aimed at propensity reasoning, while the coincidence rule seems to cover cases of what McHugh J refers to as 'objective improbability reasoning.' It may well be that the enactment of the Evidence Act 1995 (Cth) will eventually lead to the recognition that the common law rule also applies to two forms of reasoning: propensity reasoning and objective improbability reasoning. In any case, the High Court will, at some point, need to clearly explain what they mean by propensity evidence.

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