Case and Comment

Does the "Similar Fact Evidence" rule apply in Civil cases? *Sheldon v Sun Alliance Ltd* [1]

The question of what principles apply to the admission of "similar facts"[2] in civil cases has not been treated consistently by the courts. *Sheldon v Sun Alliance Ltd*[3] is an example of a civil case where "similar facts" were successfully admitted to prove criminal conduct. The case arose when Mrs Sheldon's insurer rejected her claim on severe fire damage caused to her family home in November 1985. When she sued against this rejection, the defence was raised *inter alia* that she had been party to a conspiracy with her husband and son to burn down her house and fraudulently claim on her policies. Mrs Sheldon did not dispute that the fire was deliberately lit, but denied that she or any members of her family were responsible. The Full Supreme Court of South Australia dismissed an argument by the appellant that "similar fact" evidence tendered to prove the conspiracy had been wrongly admitted. Because of the criminal overtones of the facts in issue, *Sheldon* provides an interesting perspective on the use of criminal principles in civil proceedings, their interaction with the concept of relevance, and the standard of proof where criminal conduct is alleged.

The trial judge's examination of the 1985 fire ("the present fire") in isolation showed many facts pointing to an "inside job"[4] by the appellant, her husband and their son Philip, who lived nearby. They included the findings that:[5]

- the house had been vacated by the family and the pets removed;
- accelerant was widely spread in two or more places;
- accelerants were at hand in the house;
- the contents of drawers, cupboards and wardrobes and other possessions were disturbed but no items of value were taken;
- the house was supposedly locked but no signs of forced entry were found afterwards;
- the fitted burglar alarm was not operative;
- Mr and Mrs Sheldon were staying a considerable distance away from the house at the time of the fire;
- Philip was quite close to the house at about the time of the fire;
- Philip acted as spokesman for the family after the fire, answering questions by investigators and suggesting that trouble-makers in relation to the family business might have been responsible;

1 (1989) 53 SASR 97

2 For example, used here to refer to evidence of any conduct by a person tendered to show that there is a "probability or increased probability that it would not be found unless the facts in issue also existed"; *Martin v Osborne* (1936) 55 CLR 367 at 375-6.

3 *Sheldon v Sun Alliance Ltd* (1988) 50 SASR 236.

4 Above n1 at 129 per Bollen J.

5 Paraphrasing the summary of White J, above n1 at 109-110.

- no culprit was ever found;
- information was suppressed by the insured about the potential for gain;
- the family had benefitted financially.

However, because of the gravity of the allegation, the trial judge did not find a "conspiracy" involving the appellant sufficiently proven. He held that criminal-type conduct was alleged in civil proceedings, the civil standard of proof on the balance of probabilities applied, but the "persuasion of the mind must reflect the gravity of these allegations".[6] This included consideration of the presumption of innocence. Being unsatisfied of sufficient proof of a conspiracy on this evidence alone, the trial judge found it necessary to look at evidence of previous fires.

Proof of Crime in Civil Proceedings

On appeal, the Full Court considered what standard of proof had been applied by the trial judge to the conspiracy issue. All agreed that his citation of the authorities was correct, although he had actually applied the criminal standard of proof beyond reasonable doubt "or something very close to it".[7] However White J referred to the proof on the "strong balance of probabilities"[8] while Bollen J gave a slightly different analysis. Rather than requiring that the gravity of the allegation be reflected in the "persuasion of the mind"[9] as the trial judge did, Bollen J held that it was merely "one of the probabilities"[10] to be weighed. It included the presumption of innocence[11] and the "unlikelihood of the defendant committing such a crime". He warned of the danger of "unconsciously slip[ping] into criminal gear"[12] and applying a criminal standard of proof.[13] where such matters were alleged.

He thought that the use of the word "conspiracy" introduced "a criminal atmosphere to the matter"[14] and preferred to call it a "joint enterprise".[15]

The Similar Fact Evidence Before the Trial Judge

The "similar facts" objected to concerned an unusual number of fire-related property losses suffered by the Sheldon family. At trial, these "similar facts" were tendered as allegedly showing the appellant's involvement in previous conspiracies to defraud insurers. The trial judge held[16] that the relevance and admissibility of these "similar facts" depended on proof that they were conspiracies.[17] To be relied on as "intermediate findings", each incident had

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6 Above n3 at 250; see *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; *Bater v Bater* [1951] 35 at 37; *Rejfek v McElroy* (1965) was necessary to 112 CLR 517; *Lemmer v Bertram* (1971) 2 SASR 397 at 399-400; *Mercantile Mutual Insurance Co Ltd v Hewitt (1984)* 3 ANZ Insur Cas 60,611; *Utans v Consolidated Insurances of Australia* (unrep., Sup Ct SA, 17 Feb 1988).

7 Above n1 per White J at 101-2; see also Bollen J at 133-4; Prior J agreeing with Bollen J.

8 Above n1 at 102 per White J.

9 Above n8.

10 Above n1 at 134.

11 (Assuming that to be relevant at all); above n1 at 135.

12 Ibid.

13 Id at 136.

14 Ibid.

15 Id at 137.

16 Above n3 at 248-9.

to be established as a conspiracy "so as to exclude virtually all possibility of error".[18] Accordingly, he discounted evidence of arson destroying two business premises in Dublin and London used by the appellant's husband during the 1960s as irrelevant because it was too vague.[19] However, there was stronger evidence relating to three other incidents. The first and second concerned the family's previous residence in Honor Oak Road, London, owned by the appellant's husband. The third concerned their residence in Adelaide owned by the appellant and now struck again by the present fire. Insurance claims were paid on each of these fires, and only the third was disclosed when the appellant applied for the current house and contents policies.

The first of these alleged "similar fact" incidents occurred in 1963, when a short and rapid series of fires culminated in the destruction of the newly purchased, still-vacant house in Honor Oak Road, London. Conveniently, these fires began immediately after council consent to build a new home on the site was granted. The trial judge found that the appellant and her husband lied about the timing of the consent, but on the evidence was not satisfied of a family conspiracy. However, he found that evidence of the second "similar fact" did show a conspiracy involving the appellant. In 1972, a deliberately lit fire destroyed the now eight year old replacement Sheldon home at Honor Oak Road. Again, the fire was suspiciously convenient to the Sheldons; they had just been offered a high price to sell the land for redevelopment, with or without the house.[20] The trial judge found clear evidence of the appellant's involvement in this fire as she evacuated the family and pets and embarked on a visit to "acquaintances otherwise rarely visited".[21] Having found this 1972 incident to be a conspiracy, the trial judge compared it to the present fire to see if it could be admitted as a "similar fact".[22] He applied the test of "specially high probative value"[23] required by the criminal rule[24] because of the "risk inherent in propensity evidence that it may too easily lead to a conclusion that is erroneous".[25] Finding that the circumstances of the 1972 conspiracy were "striking similar" to the present fire, the trial judge admitted the evidence and found the defence of conspiracy proven. He confirmed this finding by turning to the third "similar fact" and using it as evidence of a pattern or system.[26] This fire had occurred in 1980 at the beginning of the family's interest in the Adelaide house later damaged by the present fire. Again, among other suspicious circumstances, the timing was convenient; the house had recently been vacated by the previous owner, and fire insurance had just been arranged. This fire, even though itself not a proven conspiracy,

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17 *R v Corak and Palmer* (1982) 30 SASR 404 at 405.

18 Above n3 at 248-9, citing *Utans v Consolidated Insurances of Australia* (unrep, Sup Ct SA, 17 Feb 1988) at 4; cf *Chamberlain v R (No 2)* (1984) 153 CLR 521; *Shepherd v R* (1990) 65 ALJR 132.

19 The respondent dAbove not contest this on appeal.

20 Above n1 at 107 per White J.

21 Id at 108.

22 See the summary of features of the present fire above, text at n7; all these were also found in the 1972 fire.

23 Above n3 at 246.

24 The trial judge cited *Markby v R* (1978) 140 CLR 108 at 116-7; *Perry v R* (1982) 150 CLR 580 at 585; *Sutton v R* (1984) 152 CLR 528 at 547.

25 Above n3 at 246.

26 *Martin v Osborne* (1936) 55 CLR 367 at 385.

went to the improbability judging on the "sheer reoccurence"[27] of events that the appellant was innocent of involvement in the present fire.

The Similar Fact Evidence Rule in a Civil Trial

Opinion on the application in civil cases of the "primary exclusionary rule"[28] against the admission of "similar fact" evidence is divided. On one view, the rule does not apply; "similar fact" evidence is like any other circumstantial evidence and must simply affect the probability or increased probability of the facts in issue.[29] The main variation in these cases is in the degree of probity required. Some judges explicitly state that "basically, logical relevance is the test of admissibility"[30] while other judges may endorse a higher standard of probative force[31] and refer to criminal cases as a guide.[32] But this can be explained as a desire to limit remoteness[33] and to guard against the "risk inherent".[34] The concept of relevance itself can give considerable latitude cloaked in the mantle of "logic and experience"[35] to exclude evidence which is mere "speculation".[36] Arguably, on this view the treatment of similar fact evidence in civil cases differs from that of any other circumstantial evidence only by the degree of caution used. Importantly, even though they may refer to it, these judges do not apply the criminal rule. This is because the rule itself excludes similar fact evidence, "not because it is irrelevant, but because it is likely to be unfairly prejudicial to the accused. A jury might attach too much importance to it."[37]

Nevertheless, other judges[38] have expressly held that "prejudice" is an element to be considered in admitting similar facts in civil cases,[39] or tha the

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27 Ibid.

28 Above n3 at 247.

29 See *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] Ch119; *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23; *Gates v City Mutual Life Assurance Society* (1982) 43 ALJR 313; *Smologonov v O'Brien* (1983) 44 ALR 347.

30 *Knight v Jones* (1981) Qd R 98 at 109; and see *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23 at 31; *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] Ch 119 at 127.

31 For example, von Doussa J, above n3 at 245-6; citing *Kitto v Gilbert* (1926) 26 SR (NSW) 441 at 447-8; *Duff v R* (1979) 39 FLR 315 at 348.

32 For example, *Makin v AG for NSW* [1894] AC 57; *DPP v Boardman* [1975] AC 421; *Markby v R* (1978) 140 CLR 108; *Perry v R* (1982) 150 CLR 580; *Sutton v R* (1984) 152 CLR 528; *Hoch v R* (1988) 62 ALJR 582; *Harriman v R* (1989) 63 ALJR 694.

33 Above n33.

34 Above n27.

35 Weinberg, "Judicial Discretion to Exclude Relevant Evidence" (1975) 21 *McGill LJ* 1 at 9.

36 *Hollingham v Head* (1858) 140 ER 1135 at 1136-7; 4 CB (NS) 388 at 391-2.

37 *Perry v R*, above n26 at 585.

38 For example, *Taylor v Harvey* [1986] 2 Qd R 137 at 140; *Aroutsidis v Illawarra Nominees Pty Ltd* (1990) 21 FCR 500 at 508-9.

39 Relying on the dictum of Lord Denning MR in *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] Ch 119 at 127, that in "civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue: provided that it is not *oppressive or unfair* to the other side, and also that the other side has fair notice of it and is able to deal with it" (emphasis added). Cf the cases referred to above n26. In *Knight v Jones* [1981] Qd R 98 it was held that the basis of the rule was the "danger of a wrong conviction" and "considerations of fairness" to the accused, (at 102, 108) and that therefore it does not apply to evidence led by the accused himself. See also *R v Lowery (No 3)* [1972] VR 939 at 944; *Lowery v R* [1974] AC 85 at 102.

test of admission is "the same" as the criminal rule.[40] Fortunately, in *Sheldon* even the criminal nature of the similar facts did not attract the trial judge or any of the Full Court to consider "prejudice". Instead, they appeared with varying formulations to adopt the former view.

Bollen J was clearly in favour of a simple test of relevance for the admission of similar fact evidence in civil trials. Citing a passage of Lord Denning MR in *Mood Music Publishing Co Ltd v De Wolfe Ltd*[41] as authority for this view, he stated:

> In civil cases the courts of South Australia will admit evidence of "similar facts" if that evidence is logically probative, ie if it is logically relevant in determining the matter in issue.[42]

Bollen J thought that the trial judge had erred only in the appellant's favour. He approved the use of the "striking similarity" test as one way of testing the probity of the evidence, but thought it "a very strict way"[43] and that the trial judge had "unconsciously used the standard applicable to criminalproceedings".[44] He was "content to let rest" the trial judge's refusal to admit the 1963 incident, although inclined to think it admissible.[45]

Rather than reducing the test to one of relevance, White J was more inclined towards a requiring a higher standard of probative force for the admission of "similar facts". Citing a passage in *Hoch v R*,[46] he stated;

> The objective improbabilities in a criminal case must be such that they exclude innocent explanations as not being rational or reasonably possible having regard to the state of the evidence. The objective improbabilities in a civil case concerning an allegation of criminal misconduct need not be of such a high order. They must exclude, in this case, the plaintiff's explanations on the strong balance of probabilities...[47]

If it is still necessary to apply a stricter test of admission to "similar facts" than to other circumstantial evidence where they are not alleged against an accused,[48] it is difficult to see how White J's test achieved it. Ironically, he would have admitted at least as many "similar facts" as Bollen J. Like Bollen J, White J thought the trial judge's admission and use of the similar fact evidence erred only on the side of caution. In addition, he said, the trial judge could have returned to consider the 1963 fire, of which there was only a "strong inference" of involvement "after he had first satisfied himself of the involvement of all three parties in the 1972 and 1985 fires"[49] and added it to the evidence of system.

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40 For example, *Berger v Raymond Sun Ltd* (1984) WLR 625 at 630; *HW Thompson Building Pty Ltd v Allen Property Services Pty Ltd* (1983) 48 ALR 667 at 675; followed in *Peet & Co Ltd v Rocci* [1985] WAR 174; *Boyce v Cafred Pty Ltd* (1985) ATPR 46-253.

41 Above n41.

42 Above n1 at 148.

43 Above n1 at 138.

44 Above n1 at 137 per Bollen J.

45 Above n1 at 144.

46 Above n34.

47 Above n1 at 102.

48 Cf *Knight v Jones*, above n41.

49 Above n1 at 101.

Prior J expressed agreement with Bollen J on the trial judge's use of similar fact evidence and appeared to endorse the test of relevance. He thought that evidence of "all the other fires" was "logically probative".[50]

It is submitted that Bollen J's test for the admission of "similar facts" in a civil case is preferable to White J's. As Bollen J commented, it is only the admissibility and not the weight or use of the evidence which is in issue at this stage.[51] There is no need to restrict its admission out of consideration for the "prejudice" likely to be aroused in a jury exposed to it. White J's test, relying as it does on a close analogy with criminal cases, is potentially misleading in this respect. Moreover as shown by contrasting their decisions, White J's test is not necessarily stricter in effect. Bollen J's test has the advantages of simplicity and of ensuring that probity, and not "prejudice", is the focus.

The Christie Discretion

Closely linked to the operation of the similar fact rule in a criminal trial is the "*Christie*" discretion[52] to exclude otherwise admissible evidence where prejudice outweighs probative force.[53] Like the "primary exclusionary rule", the *Christie* discretion is concerned with the risk that a jury will give too much weight to the evidence or use it in an irrational manner against an accused.[54] Although it has been asserted that the *Christie* discretion applies in a civil trial,[55] the better view is that there is no discretion in a civil trial analogous to the *Christie* discretion.[56] There is only the power to determine relevance, and the inherent discretion to restrain abuse of process.[57] In *Sheldon*, the trial judge's reference to the possible exclusion of evidence obtained by a "serious and deliberate infringement of the rights of another"[58] did not appear to go beyond this view.[59] On appeal, none of the Full Court disagreed. Bollen J left open the question of whether "oppression and unfairness will bring into play some discretion of the judge"[60] but clearly did not relate them to "prejudice".

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50 Above n1 at 155.
51 Above n1 at 147, 148.
52 From *R v Christie* [1914] AC 545.
53 Forbes, JR, "Extent of the Discretion to Reject Prejudicial Evidence in Civil Cases" (1988) 62 *ALJ* 211.
54 *Noor Mohamed v R* [1949] AC 188 at 192.
55 *Taylor v Harvey* [1986] 2 Qd R 137 at 140; relying again on the dictum of Lord Denning in *Mood Music*, above n41.
56 *Ibrahim v R* [1914] AC 559 at 610; *Hurst v Evans* [1917] 1 KB 352 at 358; *Manenti v Melbourne and Metropolitan Tramways Board* [1954] VLR 115; *David Syme & Co Ltd v Mather* [1977] VR 516 at 531.
57 See Forbes, above n55. In *Berger v Raymond Sun Ltd* (above n42) Warner J referred to a Lord Denning MR's dictum (above n41) as authority for a discretion to exclude evidence based on consideration of its "probable provative value" and whether its introduction would unduly prolong the proceedings.
58 Above n3 at 247, citing *Mazinski v Bakka* (1979) 20 SASR 350 at 361; *Cleland v R* (1982) 151 CLR 1; *Pearce v Button* (1985) 8 FCR 388 at 401-3.
59 For example, see Forbes, above n55 at 212.
60 Above n1 at 148; see n41.

Conclusion

It would have been an "affront to common sense"[61] were the "similar facts" in *Sheldon* not admitted. Neither the criminal rule nor the *Christie* discretion justified excluding such highly probative evidence. Instead, the gravity of the conspiracy allegation was sensibly incorporated as an element going to the sufficiency of proof needed to satisfy the balance of probabilities.[62] This approach means that more evidence of "similar facts" will reach a civil jury than its criminal counterpart. But it is submitted that this is appropriate in a context where "prejudice" to an accused is not in issue. *Sheldon* shows that criminal principles may nevertheless provide a useful reference in a civil case. Hopefully the strong statement of Bollen J in favour of a simple test of relevance for the admission of "similar facts" will be adopted and bring uniformity to a presently confused area of law.

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61 Above n1 per Bollen J at 142.
62 Cf *Aroutsidis v Illawarra Nominees Pty Ltd* (1990) 21 FCR 500 at 508-9.