Chapter 7: Propensity Evidence

This chapter outlines the common law and the provisions of the *Evidence Act 2009* as they relate to propensity evidence. Circumstantial evidence is also referred to in this chapter.

Background

Propensity evidence and the common law 'similar fact' evidence[1] are exceptions to the principle that the prosecution cannot produce evidence that an accused has allegedly committed other criminal offences. The words 'tendency', 'propensity' and 'similar fact' have come to be used interchangeably. The judgment in the case of *Makin v The Attorney General for New South Wales* embodies the approach.[2] Lord Herchell LC stated the principle of exclusion.

> 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.[3]

He then stated the exception:

> On the other hand, 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, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.[4]

Propensity evidence[5] most commonly arises in child sexual assault cases, where it is used to allege that the accused has sexually assaulted the victim on occasions other than those charged, or that the accused has sexually assaulted other children. The case of *Regina v PWD* provides a good example of the use of propensity evidence in a child sexual assault case.[6] However, propensity evidence may arise in any criminal case, and is regularly used in murder and burglary cases. The case of *R v Ellis* provides

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1 Similar fact evidence is still available in the Solomon Islands because it has not been specifically excluded. Further, s 3 of the *Evidence Act* preserves the common law where it is not inconsistent with the *Act*. The 'Objects and Reasons' attached to the Evidence Bill 2009 state:

> The Bill is not an exhaustive code. … It codifies and clarifies rules of evidence relating to competence, compellability, identification, hearsay, confessions, unfavourable witnesses and privilege.

2 [1894] AC 57.

3 Ibid 65.

4 Ibid.

5 The *Evidence Act 1995* (Cth), also called the Uniform Evidence Act, has some provisions that are significantly different to those in the Solomon Islands. In the Solomon Islands, the common law still has greater applicability.

6 [2010] NSWCCA 209.

an example of the use of propensity evidence in a burglary case.[7] The relevant provisions of the *Evidence Act*, which are discussed below, provide some assistance in determining whether or not such evidence is admissible.

Referring to criminal cases in Australia and the frequency with which propensity evidence and similar fact evidence are used, John Stratton QC made the following observation:

> There was a time when a criminal law practitioner could go through his or her career without ever being troubled by the intricacies of what used to be called similar fact evidence, so rarely was it called upon by the prosecution, let alone successfully called upon. Those days have definitely passed.[8]

There is little if any mention of propensity or similar fact evidence in the case law of the Solomon Islands. Character evidence is a type of propensity evidence that is mentioned but it should not be confused with propensity evidence referred to the *Evidence Act*.

Circumstantial Evidence

A definition of circumstantial evidence is given by Dawson J in *Shepherd v R*:

> Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved. The inference which the jury may actually be asked to make in a case turning upon circumstantial evidence may simply be that of the guilt of the accused. However, in most, if not all, cases, that ultimate inference must be drawn from some intermediate factual conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference. [9]

Justice Dawson described circumstantial evidence as taking the form of both 'links in a chain' and 'strands in a cable',[10] and noted that a warning should be given when a piece of circumstantial evidence is an essential 'link in the chain' towards an inference of guilt. However, circumstantial evidence can take many forms, and some types will instead be 'strands in a cable' that support an inference of guilt together with other evidence. For example, a bush knife used in a murder that is owned by an accused is a piece of circumstantial evidence that, when taken with other evidence, may point to the guilt of the accused.

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7 [2003] NSWCCA 319.

8 Stratton, J (Deputy Senior Public Defender), 'Tendency and Coincidence Evidence', Paper presented at the Public Defenders Conference 2008; available online at http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/vwPrint1/PDO_tendencycoincidence (retrieved 17 October 2011).

9 [1990] HCA 56 at [4]; (1990) 170 CLR 573.

10 Ibid [5] (Judgment of Dawson J).

The requirement for such evidence to be accepted to the extent that it proves the prosecution case beyond reasonable doubt is that all other reasonable explanations have been excluded. This point is made clear in *Doney v R*, which also cites a number of supporting cases:

> Circumstantial evidence is evidence which proves or tends to prove a fact or set of facts from which the fact to be proved may be inferred. Circumstantial evidence can prove a fact beyond reasonable doubt only if all other reasonable hypotheses are excluded. See *Hodge's Case* (1838) 2 Lewin 227; 168 ER 1136; *Peacock v The King* [1911] HCA 66; (1911) 13 CLR 619, at pp 634, 651–652, 661; *Martin v Osborne* [1936] HCA 23; (1936) 55 CLR 367, at pp 375, 381; *Thomas v The Queen* [1960] HCA 2; (1960) 102 CLR 584, at pp 605–606; *Plomp v The Queen* [1963] HCA 44; (1963) 110 CLR 234, at p 252; *Barca v The Queen* [1975] HCA 42; (1975) 133 CLR 82, at pp 104, 109.[11]

A conviction can be based on evidence that is partly or wholly circumstantial.

Evidence Act 2009 - Propensity Provisions

The *Evidence Act* has four sections relevant to propensity evidence that can potentially be used in criminal trials. Section 79 allows propensity evidence to be offered in civil and criminal proceeding, stating that:

> **79.** (1) A party may offer propensity evidence in civil or criminal proceedings about any person.
>
> (2) However, propensity evidence about –
>
> (a) an accused in a criminal proceeding may be offered only in accordance with section 39 or 80, whichever section is applicable; and
>
> (b) a victim of an offence against morality may be offered only in accordance with section 58.

The definition of propensity evidence is found in section 2 of the *Evidence Act*, which states:

> 'Propensity evidence' –
>
> means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events or circumstances with which a person is alleged to have been involved; but does not include evidence of an act or omission that is:
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> (a) one of the elements of the offence for which the person is being tried; or
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> (b) the cause of action in the proceedings in question[.]

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[11] [1990] HCA 51 at [8]; (1990) 171 CLR 207.

The definition of propensity evidence is very broad. The definition would certainly capture facts arising from a conviction, and alleged acts of the accused that did not result in any charge but that could otherwise be regarded as criminal offending. The facts of each case are different and therefore the propensity evidence offered will be different in each case. It is difficult for the tribunal of law to determine the admissibility of propensity and similar fact evidence, difficult for the tribunal of fact to apply such evidence, and there are many dangers implicated in the use of propensity and similar fact evidence. There is a considerable risk that the use of such evidence will be grossly unfair to an accused, and in some cases attention will be diverted from the paramount consideration of the tribunal of fact, that being, the question of whether the prosecution has proved beyond reasonable doubt each element of the offence charged and therefore the guilt of the accused.

Section 39 relates to propensity evidence being raised by one accused against another. It states:

> **39.** (1) An accused in a criminal proceeding may offer propensity evidence against a co-accused only if that evidence is relevant to the defence raised or proposed to be raised by the accused.
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> (2) An accused in a criminal proceeding who proposes to offer propensity evidence about a co-accused must give notice in writing to that co-accused and another co – accused of the proposal to offer that evidence unless the requirement to give notice is waived –
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> (a) by all of the co-accused persons; or
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> (b) by the court in the interest of justice.
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> (3) A notice must –
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> (a) include the contents of the proposed evidence; and
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> (b) be given sufficient time before the hearing to provide all the co-accused persons with a fair opportunity to prepare to meet that evidence.

This section introduces notice requirements for an accused who intends to offer propensity evidence. There is no notice requirement for the prosecution, however, disclosure should reveal whether propensity evidence is going to be offered. Adjournments should be granted where the prosecution has not revealed its intention to use such evidence. The notice should specify the evidence intended to be adduced.

Section 58 of the *Evidence Act* relates to the use of propensity evidence in cases of sexual assault. It significantly restricts questions about a complainant's prior sexual history, whilst maintaining the discretion of the

judicial officer to allow such questions if they are in the interests of justice. The section states:

> **58.** (1) In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the accused, except with the permission of the court.
>
> (2) In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with the accused unless the evidence or question –
>
> (a) relates directly to the acts, events, or circumstances which constitute the offence for which the accused is being tried; or
>
> (b) is of such direct relevance to facts in issue in the proceeding or the issue of the appropriate sentence that it would be contrary to the interest of justice to exclude it.
>
> (3) In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters –
>
> (a) for the purpose of supporting or challenging the truthfulness of the complainant; or
>
> (b) for the purpose of establishing the complainant's consent; or
>
> (c) for any other purpose except with the permission of the court.

Section 80 of the *Evidence Act* sets the standard of proof for admissibility and some of the matters that may be taken into account by the tribunal of law when determining admissibility. It states:

> **80.** (1) The prosecution may offer propensity evidence about an accused in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on an accused.
>
> (2) When assessing the probative value of propensity evidence, the court must take into account the nature of the issue in dispute.
>
> (3) When assessing the probative value of propensity evidence, the court may consider, among other matters, the following –

(a) the frequency with which the acts, omissions, events or circumstances which are the subject of the evidence have occurred;

(b) the connection in time between the acts, omissions, events or circumstances which are the subject of the evidence and the acts, omissions, events or circumstances which constitute the offence for which an accused is being tried;

(c) the extent of the similarity between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which an accused is being tried;

(d) the number of persons making allegations against an accused that are the same as, or similar to, the subject of the offence for which an accused is being tried;

(e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility;

(f) the extent to which the acts, omissions, events or circumstances which are the subject of the evidence and the acts, omissions, events or circumstances which constitute the offence for which an accused is being tried are unusual.

(4) When assessing the prejudicial effect of evidence on an accused, the court must consider, among any other matters –

(a) whether the evidence is likely to unfairly predispose the fact-finder against an accused; and

(b) whether the fact-finder will tend to give disproportionate weight, in reaching a verdict, to evidence of other acts or omissions.

(5) An accused in a criminal proceeding may offer propensity evidence about himself or herself.

(6) Notwithstanding the requirements of this section, if an accused offers propensity evidence about himself or herself, the prosecution or another party may, with the permission of the court, offer propensity evidence about that accused.

Probative Value

Section 80(1) requires that propensity evidence be admitted only where the evidence 'has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on an accused'. A useful definition for probative value is:

> ***probative value*** of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.[12]

Evidence adduced by the prosecution will most often be prejudicial to an accused. However, as section 80(1) makes clear, the evidence must be unfairly prejudicial, and in criminal trials 'unfairly prejudicial' means that adducing the evidence would create the risk of an unfair trial. In the leading propensity case of *Pfennig v The Queen*, McHugh J of the Australian High Court explains the standard of proof in the following way:

> If there is a real risk that the admission of such evidence may prejudice the fair trial of the criminal charge before the court, the interests of justice require the trial judge to make a value judgment, not a mathematical calculation. The judge must compare the probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted. Admitting the evidence will serve the interests of justice only if the judge concludes that the probative force of the evidence compared to the degree of risk of an unfair trial is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial. [13]

The common law also provides assistance with determining how the evidential factors should be viewed before the propensity evidence is allowed into evidence. The requirement is that the evidence should not be introduced if there is a rational view of the evidence which is inconsistent with the guilt of the accused. Further propensity evidence must have strong probative force. The factors listed in section 80 provide support for the common law position that propensity evidence should not be introduced if there is a rational view of the evidence which is inconsistent with the guilt of the accused, and propensity evidence must have strong probative force before it is admitted. In *Sutton v The Queen* Dawson J said with respect to the admissibility of similar fact evidence:

> Having regard to the various expressions which are used to lay down the test of admissibility, it seems to me that a trial judge may find assistance in arriving at the correct test in any particular case by applying the same standard as the jury must ultimately apply in dealing with circumstantial evidence. If in considering the admissibility of similar fact evidence the trial judge concludes that there is a rational view of that evidence which is inconsistent with the guilt of the accused, then he ought not admit it because in those circumstances the evidence cannot be said to have a sufficiently strong probative force. Prejudice may operate when neither logic nor experience necessarily require the answer that the evidence points to the guilt of the accused and that being so the probative force of the evidence will not outweigh or transcend its prejudicial effect.[14]

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12 Dictionary to the Evidence Act 1995(Cth).
13 [1995] HCA 7 at [40]; (1995) 182 CLR 461; 127 ALR 99; 69 ALJR 147.
14 [1984] HCA 5 at [10]; (1984) 152 CLR 528.

In *Hoch v The Queen* the joint judgment of Mason CJ, Wilson and Gaudron JJ said:

> In *Sutton* … Dawson J expressed the view, with which we agree, that to determine the admissibility of similar fact evidence the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence, and ask whether there is a rational view of the evidence that is inconsistent with the guilt of the accused.[15]

The reasoning in *Hoch v The Queen* was adopted and extended by the joint judgment of Mason CJ, Deane and Dawson JJ in *Pfennig v The Queen* where their Honours said:

> Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused. … Here 'rational' must be taken to mean 'reasonable' and the trial judge must ask himself or herself the question in the context of the prosecution case; that is to say, he or she must regard the evidence as a step in the proof of that case. Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect. And, unless the tension between probative force and prejudicial effect is governed by such a principle, striking the balance will continue to resemble the exercise of a discretion rather than the application of a principle.[16]

The test of 'strong probative force' has been frequently applied in many leading cases.[17]

When considering the *Evidence Act* and the common law it is useful to compare the provisions of section 80 with the position at common law. Sections 80(2) and (3) provide a basis for the court to assess whether the probative value of the evidence outweighs the risk of it being unfairly prejudicial. The comments of Mason CJ, Deane and Dawson JJ in *Pfennig* provide an approach to this assessment:

> Because propensity evidence may well have a prejudicial effect which is disproportionate to the probative force of that evidence, it is necessary to maintain an insistence on that evidence having a high level or degree of cogency in the circumstances of the particular case. In this context, the reference to prejudicial effect is a reference to the undue impact, adverse to an accused, that the evidence may have on the mind of the jury over and above the impact that it might be expected to have if consideration were confined to its probative force.

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15 [1988] HCA 50 at [9]; (1988) 165 CLR 292.

16 [1995] HCA 7 at [60]; (1995) 182 CLR 461.

17 See, eg, *R v Boardman* [1975] AC 421 at 444 quoted in *Markby v The Queen* [1978] HCA 29 at [12]; (1978) 140 CLR 108; *Perry v The Queen* [1982] HCA 75 at [7]–[8], [10] (Judgment of Murphy J), [10] (Judgment of Wilson J); (1982) 150 CLR 580,

> Propensity evidence (including evidence of bad disposition and prior criminality) has always been treated as evidence which has or is likely to have a prejudicial effect in the sense explained. That is because the ordinary person naturally (a) thinks that a person who has an established propensity whenever opportunity arises has therefore yielded to the propensity in the circumstances of the particular case and (b) may ignore the possibility that persons of like propensity may have done the act complained of. Hence, the necessity to find something in the evidence or in its connection with the events giving rise to the offences charged which endows it with a high level or degree of cogency.
>
> Often that high level or degree of cogency is found in the striking similarity, underlying unity or "signature" pattern common to the incidents disclosed by the totality of the evidence. So, in the present case, had the prosecution case been based on direct evidence of abduction of Michael for sexual purposes by means of inveigling him into a van, there would have been, in our view, no doubt about the admissibility of the H evidence. The pattern of similarity, underlying unity or "signature" common to both incidents would have resulted in such a degree of cogency that the probative force of the H evidence would have outweighed its prejudicial effect, notwithstanding that there was but one other incident of the kind alleged, that it occurred virtually 12 months later and that it did not establish that the appellant intended to kill the boy H.[18]

Sections 80(1)(a)(b)(c) and (f) deal with pattern of similarity of 'signature' that needs to be considered before tendency evidence becomes admissible.

Sections 80(1)(d) and (e) are based on the common law proposition that evidence must be excluded where there is a reasonable possibility of concoction: *Hoch v The Queen*.[19] A reasonable possibility is more than speculation: *R v Colby*.[20]

Section 80(4) provides the court with guidance about how to treat prejudicial evidence, and accepts the common sense proposition that a tribunal of fact may be prejudiced when hearing about the past discreditable activities of an accused and therefore consider the accused more likely to have committed the offence.

Section 80(5) and (6) allows an accused to offer positive propensity evidence, and also to allow the prosecution to rebut such evidence.

It has recently been held in by the High Court in Australia that propensity evidence had to be proved beyond reasonable doubt before the tribunal of fact can act on it: *HML v The Queen*.[21]

Chapter 8 considers opinion evidence and provides examples of how it can be used.

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18 [1995] HCA 7 at [71]-[73]; (1995) 182 CLR 461.
19 [1988] HCA 50; (1988) 165 CLR 292, 297.
20 [1999] NSWCCA 261.
21 [2008] HCA 16.