*Andrew Palmer**

THE SCOPE OF THE SIMILAR FACT RULE

INTRODUCTION

WHAT is 'similar fact evidence'? There are two ways of answering this question. The first answer is easy. Similar fact evidence is evidence of facts similar to those which are in issue at trial. The central example is when the prosecution adduces evidence of other similar crimes committed, or alleged to have been committed, by the accused, for the purpose of showing that the accused is guilty of the offence charged. There is no doubt that this is evidence to which the similar fact rule applies. But equally there is no doubt that the rule is not restricted in its application to this kind of evidence. This points to the second way of answering the question. 'Similar fact evidence' is the term rather loosely used to describe evidence to which the similar fact rule applies. Here, both phrases - 'similar fact evidence' and 'similar fact rule' - are misleading, because it is clear that the similar fact rule both excludes and allows the admission of evidence of non-similar facts.[1] To exactly what evidence, then, does the rule apply?

It is surprising how difficult it is to answer this question given the amount of judicial and academic attention which has been lavished upon the similar fact rule in the one hundred years since *Makin*[2] was decided. The reason for the difficulty is that nearly all of the attention has focused on the inclusionary aspect of the rule: the question of when, and under what conditions, 'similar fact evidence' can be admitted. As a result of all this

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* BA (VUW), LLB (Hons) (Mon), BCL (Oxon); Lecturer, Law School, University of Melbourne. I am grateful to Professor CR Williams of Monash University for his encouraging comments on a draft of this article; the usual disclaimers apply.

1 See *B v R* (1993) 67 ALJR 181 at 191.

2 *Makin v Attorney-General (NSW)* [1894] AC 57; For a discussion of the background to *Makin* see Palmer, "Digging Up the Dirt on Makin" (1993) 67 *LIJ* 1171.

attention, that test for admission is, at last, and despite the manifest contradictions in Lord Herschell LC's seminal judgment in *Makin*, rational, clear and relatively easy to state. There are numerous different ways in which the test has been stated, but they all essentially come down to this: In order to be admissible similar fact evidence must possess a very high degree of probative value.[3] That test is by no means easy to apply and there will always be room for disagreement about whether or not the evidence in a particular case was sufficiently probative to warrant admission: this explains the number of High Court appeals to which the rule has given rise in recent years.[4] But at least judges now know what they should be looking for.

The exact scope of the exclusionary aspect of the rule, on the other hand, has usually been neglected, and remains obscure. The core of the rule is well understood: no judge will be in any doubt, when confronted by our central example above, that the law requires them to apply the test for admission laid down in *Makin* and the numerous cases which have followed

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3 I am not here concerned to argue that this is in fact the approach taken by the courts. The argument that there is no 'forbidden reasoning' appears to have been conclusively won: see *Perry v R* (1982) 150 CLR 580 at 592-593, 44 ALR 449 at 459 per Murphy J; CLR at 604, ALR at 468-469 per Wilson J; *Harriman v R* (1989) 167 CLR 590 at 600, 88 ALR 161 at 168 per Dawson J; CLR at 613, ALR at 177-178 per Gaudron J; and *S v R* (1989) 168 CLR 266 at 275, 89 ALR 321 at 328 per Dawson J. Except where expressly stated, subsequent case references throughout the article are to the authorised CLR reports.
Speaking extra-judicially, see Murphy, "Similar Facts" (1984) 16 *Aust J of For Sci*131. These views are in accordance with the overwhelming body of academic opinion: see, *inter alia*, Cowen & Carter, "The Admissibility of Evidence of Similar Facts: A Re-examination" in Cowen & Carter, *Essays on the Laws of Evidence* (OUP, Oxford 1956); Hoffman, "Similar Facts After Boardman" (1975) 91 *LQR* 193; Williams, "The Problem of Similar Fact Evidence" (1979) 5 *Dalhousie LJ* 281; Sklar, "Similar Fact Evidence: Catchwords and Cartwheels" (1977) 23 *McGill LJ* 60; Piragoff, *Similar Fact Evidence* (Carswell, Toronto 1981); Tapper, "Proof and Prejudice" in Campbell & Waller (eds), *Well and Truly Tried* (Law Book Co, Sydney 1982) p177; Byers, "Similar Facts" (1984) 16 *Aust J of For Sci* 138; Carter, "Forbidden Reasoning Permissible: Similar Fact Evidence a Decade After Boardman" (1985) 48 *MLR* 29 at 35-36; Allan, "Similar Fact Evidence and Disposition: Law, Discretion and Admissibility" (1985) 48 *MLR* 253; Forbes, *Similar Facts* (Law Book Co, Sydney 1987); Smith & Odgers, "Propensity Evidence - The Continuing Debate" (1987) 3 *Aust Bar Rev* 77 at 81; Mirfield, "Similar Facts - *Makin* Out?" (1987) 46 *Cambridge LJ* 83; Byrne & Heydon, *Cross on Evidence* (Butterworths, Sydney, 4th Aust ed 1991) p564.

4 Including *Markby v R* (1978) 140 CLR 108, 21 ALR 448; *Perry v R*; *Sutton v R*; *Hoch v R* (1988) 165 CLR 292, 81 ALR 225; *Harriman v R*; *S v R*; *Thompson v R* (1989) 169 CLR 1, 86 ALR 1; and *B v R* (1993) 67 ALJR 181.

it. But as we move out from the core of the rule towards its periphery it is by no means clear whether the admission of the evidence is to be determined by an application of the similar fact rule or in the exercise of the discretion to exclude evidence where its prejudicial effect outweighs its probative value. Some things we do know. The rule is concerned with protecting an accused person from prejudice. For that reason it does not apply in civil proceedings,[5] although arguably a related rule does.[6] Nor does it apply to evidence led by an accused person, whether the evidence is of a prosecution witness',[7] or a co-accused's,[8] or indeed the accused's own[9] propensities.

The rule then only applies to evidence led by the prosecution against an accused person in criminal proceedings. But, other than our central example, exactly which evidence does it apply to? Does the rule apply to evidence of non-criminal conduct from which a criminal propensity can be inferred? Does it apply to evidence from which a non-criminal but discreditable propensity can be inferred? Does it only apply when the evidence is used as propensity evidence; when, in other words, an inference that the accused possesses the propensity in question is an essential step in the reasoning process from evidence to guilt? If a definite answer can be given to these questions, then the scope of the rule is well-defined and the transition from rule to discretion clearly marked. If these questions cannot be answered then it is impossible to say when the rule actually applies, and therefore difficult to describe it as a rule at all. It is these questions, then, which form the main focus of this article, but they can only be answered by asking whether the rule is concerned with a particular kind of evidence, or with a particular kind of inference. In other words, whether the rule is concerned with the nature of the evidence covered by the rule, or with the way in which that evidence is used.

If it does not matter, however, whether the admission of evidence is determined by an application of the similar fact rule or in the exercise of the

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5 *Mister Figgins v Centrepoint Freeholds* (1981) 36 ALR 23.

6 See Bates, "Similar Facts in Civil Cases" (1992) 108 *LQR* 200.

7 For example, where defence counsel wishes to cross-examine the complainant in a sexual case about her sexual history, or, as in *R v Edwards* [1991] 2 All ER 266, where the accused claimed to have been the victim of a police 'verbal' and wished to cross-examine the police officers who had interviewed him about other cases in which their evidence of an accused person's confession had been rejected by the jury.

8 See *Lowery v R* [1974] AC 85; *R v Darrington & McGauley* [1980] VR 353; *R v Gibb & McKenzie* [1983] 2 VR 155.

9 *B v R* (1992) 175 CLR 599.

general discretion, then the scope of the rule is of theoretical importance only. The first section of the article attempts to show why it does matter, suggesting that a fundamental distinction between the rule and the discretion is that the court is relieved, where evidence falls within the scope of the rule, of any need to consider the prejudicial effect of the evidence in question. This represents a modification of the way in which the inclusionary aspect of the rule is generally understood. The second section of the article discusses in greater detail the rationale of the exclusionary rule and the scope for the rule which that rationale suggests. The third section attempts to delineate the scope of the rule more precisely in light of authority.

THE RULE AND THE DISCRETION

This article argues that it does matter whether the admission of evidence is determined by an application of the similar fact rule or in the exercise of the general discretion. The difficulty is that the rule has been stated in terms that appear to be identical to the discretion: that similar fact evidence is inadmissible unless its probative value outweighs its prejudicial effect. There are, of course, practical differences between the two. First, appellate courts are more likely to be willing to interfere with a judge's application of a rule of law than with the exercise of their discretion.[10] Secondly, there is a difference in the allocation of the onus of proving that the probative force of the evidence is greater or less than its prejudicial effect. If the evidence falls within the rule then it is prima facie inadmissible and it will be for the prosecution to show that it possesses sufficient probative value to make it admissible. If it falls outside the rule, then it will be admissible if relevant, and it will be for the defence to show that it ought not to be admitted.

But in this author's view there is a far more fundamental distinction between the two, a distinction obscured by the similar language used to describe them both. Both are described in terms of weighing, suggesting that both are balancing exercises. In fact, only the discretion is a true balancing exercise. In exercising the discretion, the judge begins with an empty set of scales. The judge must then determine the weight of two different things - probative value and prejudicial effect - placing each on one side of the scales. The judge then sees where the balance lies. If the likely prejudicial effect of the evidence is low, then only a small amount of probative value will be required to outweigh it. If prejudicial effect is high, then a large amount of probative value will be required to outweigh it.

10 See *Perry v R* at 585 per Gibbs CJ.

Applying the similar fact rule is a very different exercise. If the evidence falls within the scope of the rule, then the judge need not analyse its prejudicial effect. A high degree of prejudice can and must be assumed. The judge does not, therefore, begin with an empty set of scales. Rather, the prejudicial effect side of the scales are already full, the scales tipped towards exclusion. The judge need only determine the probative value of the evidence. Because the prejudicial effect is pre-determined, the amount of probative value required to outweigh it can also be known in advance. The scales are actually unnecessary: if evidence falls within the scope of the similar fact rule, the judge need only determine whether the required amount of probative value is present.[11]

This approach appears, however, to be inconsistent with one of the two judgments which are usually regarded as the foundation of the modern approach to similar fact evidence, that of Lord Wilberforce in *DPP v Boardman*:

> In each case it is necessary to estimate (i) whether, and if so how strongly, the evidence as to other facts tends to support ie to make more credible, the evidence given as to the fact in question, (ii) whether such evidence, if given, is likely to be prejudicial to the accused. Both these elements involve questions of degree. It falls to the judge ... to estimate the respective and relative weight of these two factors and only to allow the evidence to be put before the jury if satisfied that the answer to the first question is clearly positive, and, on the assumption, which is likely, that the second question must be similarly answered, that on a combination of the two the interests of justice clearly required that the evidence be admitted.[12]

One should note, however, that Lord Wilberforce does suggest that the judge is entitled to *assume* that the evidence will be highly prejudicial. In any case, it will be shown that the approach suggested in this article is more

11 The fact that different exercises are required by the rule and the discretion helps make sense of the repeated assertions by the High Court that the discretion applies to similar fact evidence: see *Perry v R* at 585 per Gibbs CJ; *Sutton v R* at 534 per Gibbs CJ; at 558 per Deane J; at 565 per Dawson J; *Harriman v R* at 594-595 per Brennan J.

12 *DPP v Boardman* [1975] AC 421 at 442. The suggested approach is not inconsistent with the other foundational judgment, that of Lord Cross in the same case.

consistent both with the way in which post-*Boardman* courts have articulated the test to be applied, and with the way in which they have applied that test. There are two strands to the argument. The first is that the judge is relieved of any need to consider the prejudicial effect of similar fact evidence. The second, which is in part a corollary of the first, is that the criterion of admissibility is a pre-determined quantity of probative value.

Prejudicial Effect

The similar fact rule is a rule of exclusion: it renders relevant evidence inadmissible. It therefore constitutes a departure from the fundamental principle that all relevant evidence should be admitted. What justifies this departure is not a mere possibility that certain evidence may be unfairly prejudicial to the accused: the discretion is adequate safeguard against that possibility. Rather it is the certainty of prejudice, the fact that centuries of judicial experience have shown that prejudice inevitably flows from the admission of similar fact evidence. The rule of exclusion exists to give effect to that experience by relieving the individual judge of any need to consider whether the danger posed by similar fact evidence in general is posed by the similar fact evidence in particular.

The whole point of having a rule of exclusion is defeated if the judge is required in each case to consider whether the rationale for the rule applies to the facts of the case before them. And it is apparent from the cases that judges do not feel it incumbent upon them to determine the extent, if any, of prejudice likely to be caused by the evidence in the case before them. It is, for instance, difficult to find in any of the recent High Court judgments on similar fact evidence anything other than assertions about the dangers posed by similar fact evidence in general. At first sight the judgment of Murphy J in *Perry v R*[13] appears to be an exception to this pattern; on closer inspection, he turns out to be using the evidence in that case to exemplify the dangers posed by similar fact evidence in general. A true exception, although the analysis is exceedingly brief, is the judgment of Toohey J in *Harriman v R.*[14] But Toohey J appears to have regarded the evidence in that case as falling outside the rule. His discussion of prejudicial effect therefore seems to have taken place in the context of a consideration of how the discretion ought to have been exercised.

13 *Perry* at 593-595.
14 *Harriman* at 609.

The courts do not, therefore, carry out the exercise suggested by Lord Wilberforce because they never actually attempt to measure the degree of prejudice likely to be caused to the accused by the evidence in question. Instead, they simply assert that prejudice is 'inevitable';[15] and then go on to consider the amount of probative value possessed by the evidence.

Probative Value

If Lord Wilberforce's approach was right, then as a matter of logic the amount of probative value required of similar fact evidence in order for it to be admissible should depend on the amount of prejudice likely to be caused by the evidence. If only a small amount of prejudice is likely to be caused, then it should follow that only a small amount of probative value should be necessary to justify admission. In fact, the amount of probative value required is a constant. The High Court has repeatedly stated that the criterion of admissibility for similar fact evidence is the strength of its probative force, not the amount of probative force relative to the degree of prejudicial effect.[16] For instance in *Sutton v R*, Gibbs CJ said:

> The law now affords a double safeguard against the injustice that may be caused by evidence of this kind. First, there is a rule of admissibility which excludes, as a matter of law, evidence unless it is probative, and strongly probative, of the offence charged ... Further the trial judge has a discretion to exclude evidence which is admissible as a matter of law but whose prejudicial effect may be so great as to outweigh its probative value.[17]

It is true that there are also frequent statements that the probative value of the evidence must "clearly transcend" or "outweigh" its prejudicial effect.[18] But when prejudicial effect represents a given quantity in the scales, the amount of probative value required must be a constant as well. There are

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15 See, for instance, *Perry v R* at 596 per Murphy J; at 604 per Wilson J; *Hoch v R* at 301; at 231 per Brennan and Dawson JJ; *B v R* at 608 per Brennan J.

16 *Markby v R* (1978) 140 CLR 108 at 117 per Gibbs CJ; *Perry v R* at 586 per Gibbs CJ; *Sutton v R* at 533 per Gibbs CJ; at 548, per Brennan J; *Hoch v R* at 294 per Mason CJ, Wilson and Gaudron JJ; *Harriman v R* at 598 at 167 per Dawson J; *Thompson v R* at 39 per Gaudron J; see also *DPP v P* [1991] 2 AC 447 at 460; 3 WLR 161 at 170 per Lord Mackay of Clashfern.

17 *Sutton* at 534.

18 *Perry v R* at 609 per Brennan J; *Harriman v R* at 593-594 per Brennan J; *Thompson v R* at 16 per Mason CJ and Dawson J.

numerous ways of describing the requisite amount. For instance, it has been said that the evidence should only be admitted if it possesses such a high degree of probative value that it would be an affront to common sense not to admit it.[19] Perhaps the most useful, though, is to say that the evidence only possesses sufficient probative value if it bears no rational explanation consistent with innocence.[20] This is to set the standard very high indeed.

Why such a high standard? The answer can only be that such a high degree of probative value is necessary because the amount of prejudicial effect assumed to flow from the admission of similar fact evidence is also very high. Indeed the requirement that similar fact evidence not be admitted unless there be no rational explanation of it consistent with innocence makes perfect sense if one assumes that the prejudicial effect of similar fact evidence is so great as to render almost certain the accused's conviction. If there is no rational explanation for the evidence consistent with innocence, then a rational jury hearing the evidence would convict the accused. In such a case there can be no prejudice to the accused in admitting the evidence, despite the fact that an irrational jury hearing the evidence might convict the accused on the basis of prejudice. This is because, in doing so, the irrational jury would only be doing, for the wrong reasons, what a rational jury would do for the right reasons. If there is, on the other hand, a rational explanation of the evidence inconsistent with guilt then the evidence does not necessarily justify conviction. It should then be excluded as unduly prejudicial: a rational jury would not necessarily convict on the basis of the similar fact evidence; an irrational jury almost certainly would.

But the requirement of a very high degree of probative value only makes sense if the assumption of a high degree of prejudice is in fact justified. If the rule is extended to evidence about which that assumption cannot be made then the requirement of such a high degree of probative value is not warranted. This is why it is important to delineate the scope of the rule, and to try and ensure that the rule only extends to evidence which will have an inevitable prejudicial effect. If the assumption of a high degree of prejudice is not warranted then the judge should be required to actually consider the

19 *DPP v Boardman* at 456 per Lord Cross; *Markby v R* at 117 per Gibbs CJ; *Perry v R* at 600 per Murphy J; *Harriman v R* at 593 per Brennan J.

20 *Martin v Osborne* (1936) 55 CLR 367 at 375 per Dixon J; *Perry v R* at 596 per Murphy J; *Sutton v R* at 564 per Dawson J; *Hoch v R* at 296 per Mason CJ, Wilson and Gaudron JJ; *Harriman v R* at 602 per Dawson J; at 614 per Gaudron J.

extent of prejudice which the admission of the evidence is likely to cause, and to balance that against the degree of probative value which the evidence possesses. In other words, the admission of the evidence should be determined by an exercise of the exclusionary discretion, rather than by an application of the similar fact rule. The task of the next section is to ask what it is about similar fact evidence that makes its prejudicial effect inevitable, and so to consider when the assumption of a high degree of prejudice is warranted.

THE PURPOSE OF THE EXCLUSIONARY RULE

Let us assume, for the moment, that the similar fact rule applies to evidence of, or revealing, the accused's bad character. The phrase is deliberately vague. Evidence of bad character is not excluded because it is irrelevant.[21] It is excluded because it "is likely to be unfairly prejudicial to the accused".[22] This risk of prejudice arises for two main reasons. The first relates to the manner in which the evidence may be used. The second is inherent in the nature of the evidence. While our central example raises both risks, the two risks are not co-extensive. Some evidence will give rise to one risk but not the other.

Reasoning Prejudice

According to Dixon J:

> It is the thesis of English law that the ingredients of a crime are to be proved by direct or circumstantial evidence of the events, that is to say, the parts and details of the transaction amounting to the crime, and are not inferred from the character and tendencies of the accused.[23]

Dixon J was here using the word "character" in a non-technical sense to mean the true nature of a person. The thesis identified by Dixon J is not concerned with a particular kind of evidence, but with the way in which evidence is used. The objection is not to allowing the jury to hear evidence which may suggest that the accused has a bad character, but to allowing the jury to reason that the accused is, because of that character, likely to have

21 See, for instance, *Perry v R* at 585 per Gibbs CJ; and *Harriman v R* at 597 per Dawson J.

22 *Perry v R* at 585 per Gibbs CJ.

23 *Dawson v R* (1961) 106 CLR 1 at 16.

committed the crime charged. The thesis is upheld by the similar fact rule; when similar fact evidence is admitted, it is admitted as an exception to this thesis.

The thesis is not based on logic. Indeed, it flies in the face of both logic and ordinary experience, because the accused's character can, and often will be relevant to their guilt. The law recognises this by allowing an accused person to lead evidence of their good character for the purpose of showing that they are not the sort of person to have committed the crime charged. Bad character is just as relevant to guilt as good character; one need go no further than recidivism statistics to prove this.[24] There is, however, a risk that "[the] jury might attach too much importance" to the evidence.[25] That is, they may commit a kind of logical error by which they over-estimate the strength of the inference which can be drawn from evidence of propensity. The error is to over-estimate the constancy of human nature, to assume that because a person has behaved in a particular way on one or more occasions in the past they must have done so on the occasion which is the subject of the charge. I will call this form of prejudice 'reasoning prejudice'.

The risk of reasoning prejudice neither depends on the nature of the evidence from which that propensity is inferred, nor on the nature of the propensity which the evidence establishes. Reasoning prejudice will always arise when the jury are actually invited by the prosecution to reason from propensity to guilt; it may arise when there is a realistic prospect that the jury may do so. The extension of the similar fact rule to all such evidence is in accordance with Dixon J's thesis that a person's character cannot be used to prove their guilt. Theoretically, however, it should be possible to reduce the possibility of error by appropriate judicial direction. This is done, for instance, with identification evidence, which poses the exact same danger of the jury over-estimating the true probative value of the evidence. The reason why it is not possible to do this with similar fact evidence is that the prejudicial effect of the evidence goes beyond the possibility that the jury may, in innocent error, over-estimate the true value of the evidence.[26]

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24 Cf *R v Kilbourne* [1973] AC 729 at 756-757 per Lord Simon of Glaisdale, quoted approvingly in *Sutton v R* at 545 per Brennan J.

25 *Perry v R* at 585 per Gibbs CJ.

26 A related danger is that in cases where the similar fact evidence is denied, the jury might become so distracted by the similar fact evidence that after deciding whether or not the similar facts occurred they simply, and without really realising what they are doing, transfer their 'verdict' on the similar facts to the facts charged: see *Perry v R* at 587 per Gibbs CJ; *Sutton v R* at 547 per Brennan J; Byrne & Heydon, *Cross on Evidence* p583. This can not be

Moral Prejudice

As Murphy J said in *Perry v R*, the admission of similar fact evidence "immediately conjures up a highly suspicious prejudicial atmosphere in which the presumption of innocence tends to be replaced with a presumption of guilt".[27] When the evidence reveals - as in our central example above - that the accused has committed other crimes, it may engender such 'antipathy' towards the accused that the jury is unwilling to give them the benefit of any reasonable doubt. This second form of prejudice is distinct from the first: a jury succumbing to this form of prejudice is not committing an error of logic which can be cured by appropriate direction. Rather, it is refusing to accept some of the most fundamental principles of our criminal justice system: the presumption of innocence, the requirement of proof beyond reasonable doubt and the principle that the verdict should be confined to the charge.[28] Where similar fact evidence is admitted the accused may be "'put to answer' for a good part of her life".[29] Where the similar facts are admitted by the accused, or once the jury is satisfied that they occurred, the jury may decide that it does not really matter whether or not the accused committed the acts charged, because they have in any case committed other acts worthy of punishment.

The risk of such prejudice has been described by Brennan J as the "chief reason" for the exclusionary rule,[30] and by Deane J as its "present-day rationale".[31] I will refer to it as 'moral prejudice'. Moral prejudice only arises when the evidence suggests that the accused has been guilty of morally repugnant conduct. The clearest example of such conduct is the commission of other crimes. Arguably - although this can certainly not be taken for granted - evidence of non-criminal but otherwise discreditable conduct will have a similar effect on the jury. More importantly, the evidence may have this effect on the jury even when the prosecution is not inviting the jury to reason from propensity to guilt. In other words, this prejudice arises from the nature of the evidence rather than from the way in

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considered sufficient justification for an exclusionary rule: the risk of confusion is created by a great deal of evidence, and can adequately be dealt with by judicial direction or discretionary exclusion.

27 *Perry* at 593-594.

28 Cf Zuckerman, *Principles of Criminal Evidence* (Clarendon Press, Oxford 1989) p223.

29 *Perry v R* at 595 per Murphy J.

30 *Sutton v R* at 545.

31 At 558.

which the evidence is used. Evidence which does not contravene Dixon J's thesis may, therefore, give rise to moral prejudice.

It is the argument of this article that it is the unique combination of these two distinct forms of prejudice which justifies the existence of an exclusionary rule for similar fact evidence. It follows from this that the similar fact rule should not apply when the evidence cannot be assumed to give rise to both forms of prejudice. This suggests that the rule should apply to categories of evidence about which that assumption can be made, so that the risk of prejudice from the particular evidence in the case before the judge is never a threshold question to the application of the rule. The next section of the article aims to identify those categories of evidence about which the assumption of a high degree of prejudice is warranted.

THE CASES

When the evidence conforms to our central example above - evidence of the accused's past criminal (or arguably discreditable) conduct, when used to establish the possession by the accused of a propensity which makes their guilt more likely - it can safely be assumed to give rise to both forms of prejudice. But if the evidence is not being used for the purpose of establishing the accused's propensity, and there is no realistic prospect that the jury will use it for that purpose, then reasoning prejudice will not be present. If the accused's propensity is established by the accused's non-criminal conduct or by expert testimony, then moral prejudice may not arise.

In the first part of this section I look at cases where the evidence invariably gives rise to moral prejudice, but where the risk of reasoning prejudice is either completely absent, or cannot be assumed. In the second part I look at the opposite situation: where the evidence, because it is used as propensity evidence, inevitably generates the risk of reasoning prejudice, but does not necessarily generate the risk of moral prejudice. In both parts I argue that the similar fact rule should only apply to easily identified categories of evidence which it can safely be assumed would generate both risks of prejudice.

When Reasoning Prejudice Cannot Be Assumed

This part of the article argues that evidence which does not inevitably give rise to reasoning prejudice falls outside the scope of the similar fact rule. What this means is that the application of the similar fact rule depends on the purpose for, or manner in which, the evidence is used. In particular, the

rule should not apply simply because the evidence suggests that the accused possesses a criminal propensity of some sort, but should only apply when the existence of that propensity is essential to the evidence having relevance to the issue in proof of which it is adduced. I will call such evidence 'propensity evidence'. The view suggested here is consistent with that taken by both the English and Australian editions of *Cross on Evidence,*[32] and with *Makin* itself where Lord Herschell LC stated that:

> 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.[33]

This approach is consistent with the fact that courts do not usually consider the similar fact rule in cases when the evidence only incidentally discloses past criminal conduct. Numerous examples can be given. For instance, in *Straffen*,[34] the accused's presence in the vicinity of the crime could only be established by reference to his escape from Broadmoor, an institution for the criminally insane; the admission of this evidence was not objected to. Similarly, in *R v Evans and Gardiner (No 2)*[35] the accused were prison inmates charged with the murder of another prison inmate; the fact that they were in prison showed that they had committed other crimes, but this evidence was not subject to the similar fact rule.

However, the conclusion that such evidence falls outside the scope of the similar fact rule is challenged by the following observation of Dawson J in *Harriman*:

> Of course, evidence of previous criminal behaviour may exhibit a high level of cogency for reasons other than that it

32 Tapper, *Cross on Evidence* (Butterworths, London, 7th ed 1990) p344; Byrne & Heydon, *Cross on Evidence* p562. See also Allan, "Similar Fact Evidence and Disposition: Law, Discretion and Admissibility" (1985) 48 *MLR* 253 at 262-263; "Some Favourite Fallacies About Similar Facts" (1988) 8 *Legal Studies* 35 at 38.

33 *Makin* at 65 (emphasis added); see also *R v Straffen* [1952] 2 QB 911 at 914 per Slade J and *R v Von Einem* (1985) 38 SASR 207 at 212 per King CJ.

34 [1952] 2 QB 911.

35 [1976] VR 523.

> shows a criminal disposition on the part of the accused. For example, evidence that the accused was committing another offence at the scene of the crime with which he is charged may go to rebut a defence of alibi regardless of any criminal disposition on the part of the accused. And it is the circumstances of each case which will determine whether the propensity evidence, whether tendered as such or for some other reason, is of sufficient probative value to warrant its admission.[36]

What this passage seems to suggest is that the similar fact rule applies to all evidence from which a criminal propensity can be inferred regardless of whether that inference is being relied on. It directly contradicts the approach suggested in this article. It is, however, consistent with the approach of the Victorian Court of Criminal Appeal in the recent decision of *R v Woolley, Woolley, Whitney and Rayment.*[37] In *Woolley* the four accused were charged with the murder of a man who had been a prisoner at Sale Gaol with Clive Woolley, one of the accused. The alleged motive was that the deceased had said, while both he and the accused were still in prison, that Woolley was an informer. Woolley appealed on the grounds that as this evidence revealed his criminality, it should not have been admitted unless it was strongly probative of his guilt. He cited *Vaitos*[38] - a similar facts case - in support of this submission. The court held that the evidence was admissible in what seems to have been an application of the similar fact rule.[39]

This is the wrong approach, because there is no reason to make the admission of such evidence depend upon whether it possesses the very high degree of probative value required of evidence by the similar fact rule: it is very unlikely to give rise to a sufficient degree of prejudice to warrant this. It is true that the evidence in the above cases would have suggested that the accused had committed criminal offences in the past, but it would not necessarily have revealed what those offences were. In the absence of those

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36 *Harriman v R* at 601. However, the New South Wales Court of Criminal Appeal has specifically denied that *Harriman* is authority for the propostition that the similar fact rule applies to all evidence which "tends to disclose criminality other than that charged, claiming - as argued in this article - that the rule only applies when the evidence is used as propensity evidence: see *Rogerson and Paltos* (1992) 65 A Crim R 530 at 543.

37 *R v Woolley, Woolley, Whitney & Rayment* (1989) 42 A Crim R 418.

38 (1981) 4 A Crim R 238 at 272 (Victorian Court of Criminal Appeal).

39 *Woolley* at 421.

details it is unlikely to have raised more than the most insignificant amount of moral prejudice. But it is also unlikely to have raised any real risk of reasoning prejudice. If the criminal conduct is only incidentally revealed then the jury is unlikely to have its attention drawn to any propensity which the evidence might establish, and unlikely to reason from propensity at all, let alone overestimate the probative value of that reasoning.

The situation is far more difficult where the evidence possesses dual relevance; that is, it is relevant both via propensity, and other than via propensity. Such cases are very rare; an example is provided by *Mackie*.[40] The accused was charged with the manslaughter of the 3 year old son of the woman with whom he was living. The child died after falling down the stairs and dislocating his neck. The prosecution case was that the accused had disciplined the child so excessively in the past that the child was frightened of him and had fallen down the stairs while running from him in fear of ill-treatment. In order to succeed the prosecution had to prove both that this fear was well-founded, and that the accused's conduct on the occasion in question was unlawful. The judge admitted evidence from neighbours that the accused had excessively punished the child and his older brother in the past, and that the children were afraid of him. The judge also admitted evidence that the child's body was covered in bruises many of which were only consistent with him having been subjected to varying degrees of violence.

This evidence clearly tended to establish that the accused had unlawfully punished the child in the past and that he had a propensity to do so. It was thus relevant - via propensity - to the question of whether the accused's conduct on the occasion in question was unlawful. It was not, however, admitted on those grounds. Instead it was admitted because of its relevance to the state of the child's mind: it tended to establish that the child would have been in fear of punishment and that this fear was well-founded. Although the judge specifically directed the jury that they could not use the evidence on the issue of whether the accused's conduct on the occasion in question was unlawful, it seems almost inconceivable that the jury would have obeyed this direction. The Court of Appeal agreed that "the prejudicial effect of the evidence was enormous and far outweighed its value in proving that the child was frightened [of the accused]",[41] but nevertheless held that the judge was entitled to admit the evidence. The decision is only explicable

40 (1973) 57 Cr App R 453; *R v Romeo* (1991) 62 CCC (3d) 1 possibly provides another example.

41 *Mackie* at 464.

on the basis that the evidence fell outside the scope of the similar fact rule, and could only therefore be dealt with by an exercise of the discretion to exclude admissible evidence.

Mirfield has argued, on the basis of this case, that the exclusionary rule should apply whenever there is a realistic prospect that the trier of fact may rely on propensity reasoning, notwithstanding that the prosecution is, ostensibly at least, adducing the evidence for some other purpose.[42] However Mirfield's suggested test for the scope of the rule - that there is a realistic prospect that the jury may reason from propensity - simply amounts to a requirement that the evidence gives rise to a risk of reasoning prejudice. The whole approach of this article is to argue that the rule should only be applied when that risk can be assumed, and that the question of whether the evidence is in fact prejudicial should never be a threshold question to the application of the rule. No category of evidence which would include *Mackie* but exclude the other cases discussed in this section can be defined in terms which do not amount to a requirement that the evidence be prejudicial. The risk of reasoning prejudice can only be *assumed* when the evidence is used as propensity evidence. If the evidence is not being used as propensity evidence then it falls outside the scope of the exclusionary rule and should either be admitted subject to a judicial warning to avoid the propensity chain of reasoning or excluded in the exercise of the general discretion.[43]

Unfortunately, the simplicity of this position could be undermined if the High Court's most recent similar fact decision is misunderstood. In *B v R*[44] the accused was charged with committing acts of indecency upon, and having sexual intercourse with, his daughter. The offences allegedly occurred between 1985 and 1987. The similar fact evidence was of previous acts of indecency against this same daughter; the accused had been charged with these in 1984, and had pleaded guilty. The unusual feature of the case was that this evidence was not led by the prosecution but by the accused, as part of his defence was that the daughter was taking advantage of these past offences to make false allegations against him now. But the evidence clearly possessed dual relevance: it was relevant via propensity to incriminate the accused, and relevant other than via propensity to exculpate the accused.

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42 Mirfield, "Similar Facts - *Makin* Out?" (1987) 46 *Cambridge LJ* 83 at 100-101.
43 Cf *DPP v Boardman* at 453 per Lord Hailsham.
44 (1992) 175 CLR 599.

According to the approach suggested above, the judge should only have admitted the evidence subject to a warning to the jury that they should avoid reasoning from propensity. Instead, the judge instructed the jury that the evidence was strongly corroborative of the daughter's testimony. It could only be corroborative of the daughter's testimony because of the propensity which it revealed. A majority of the High Court - Mason CJ, Brennan and Deane JJ - held that the judge had not erred in so instructing the jury. Stated thus, the decision could be understood as saying that where evidence possesses dual relevance, the evidence can be used as propensity evidence without the application of the similar fact rule. Applied to *Mackie*,[45] for instance, this would mean that because the evidence was relevant, other than via propensity, to the victim's state of mind, it would also be admissible to prove, via propensity, the unlawfulness of the accused's conduct. The similar fact rule would be by-passed.

Fortunately, this would be a misunderstanding of the case. Brennan, Dawson and Gaudron JJ were at pains to stress that the evidence could only be used for both purposes if it was independently admissible for both purposes. That is to say, the evidence could only be used to corroborate the daughter's testimony if it met the requirements of the similar fact rule.[46] The judgment of Mason CJ is less explicit on the point, but seems to be to the same effect.[47] The issue over which the minority and majority disagreed was whether the evidence was in fact admissible under the similar fact rule, given that the judge had not actually considered this. The similar fact rule cannot, therefore, be by-passed.

When Moral Prejudice Cannot Be Assumed

The risk of moral prejudice, has, it will be remembered, been described by Brennan J as the "chief reason" for the exclusionary rule,[48] and by Deane J as its "present-day rationale".[49] This suggests that the rule should not apply when the risk of moral prejudice cannot be assumed. Although that assumption can be made where a propensity to commit crime, or criminal propensity, is inferred from past criminal conduct, it cannot, as I show in this section, be made in respect of all propensity evidence. I consider, first, cases where a criminal propensity is inferred from past non-criminal

45 (1973) 57 Cr App R 453.
46 *B v R* at 608 per Brennan J, at 618-619 per Dawson and Gaudron JJ.
47 At 601.
48 *Sutton v R* at 545.
49 *Sutton v R* at 558.

conduct; second, cases where a propensity other than a propensity to commit crime is inferred from past non-criminal conduct; and third, cases where the accused's propensity is established by expert testimony rather than by the accused's past conduct.

Criminal Propensity Inferred From Non-Criminal Conduct

Does the similar fact rule apply to all evidence of past conduct by the accused from which their criminal propensity can be inferred, or only when that propensity is inferred from the commission by the accused of other criminal acts? Judicial statements of the scope of the rule are not particularly helpful, as they divide almost equally into opposite camps. The rule has often been stated as applying to evidence which tends to show the criminal propensity of the accused.[50] This is a broad statement of the rule because the accused's criminal propensity can sometimes be inferred from evidence of their non-criminal conduct. Equally often, however, the rule has been stated as applying to evidence of, or revealing, other criminal acts of the accused.[51] In *Makin*, for instance, Lord Herschell referred to "evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment".[52] Provided that such evidence is being used as propensity evidence, this is a narrower statement of the rule, because such evidence will inevitably give rise to both reasoning and moral prejudice. The cases clearly show, however, that the narrower statement of the rule is too narrow.

In *R v Ball*,[53] the evidence was that the two accused, brother and sister, had lived together as man and wife previously and had had a child together, at a time when incest was not illegal. From this it could be inferred that their sexual passion continued and continued to be acted on after the passage of

50 Including, inter alia, *DPP v Boardman* at 451 per Lord Hailsham, at 461 per Lord Salmon; *Markby v R* at 116 per Gibbs ACJ; *Perry v R* at 609 per Brennan J; *Harriman v R* at 597 per Dawson J; at 613 per Gaudron J.

51 Including, inter alia, *DPP v Boardman* at 438 per Lord Morris; *Perry v R* at 585 per Gibbs CJ; *Sutton v R* at 545 per Brennan J; at 556-557 per Deane J; at 562 per Dawson J; *Harriman v R* at 593 per Brennan J; at 607 per Toohey J; at 627 per McHugh J; *B v R* at 608 per Brennan J, at 618-619 per Dawson and Gaudron JJ. This phrase has been designed to encompass cases such as *R v Smith* (1915) 11 Cr App R 229 (the 'brides in the bath' case) where the accused's past conduct - taking out insurance, installing a bath in an unlockable room etc - though not itself criminal clearly tended to suggest the commission by the accused of other crimes.

52 *Makin* at 65.

53 [1911] AC 47.

the *Punishment of Incest Act* 1908 (UK).[54] Past non-criminal conduct established the existence of a propensity which the passage of the legislation made criminal. In *Thompson v R*[55] the evidence from which the accused's propensity was inferred was his possession of powder puffs and photographs of naked boys in various indecent attitudes. The House of Lords considered that this evidence established that the accused "had abnormal propensities of the same kind" as the person who indecently assaulted the boys,[56] and that he actually "harboured on that day an intent to commit an act of indecency with these boys should occasion offer".[57] Criminal propensity was again inferred from non-criminal conduct without the intermediate inference that any other crimes had been committed.

Criminal propensity can also be inferred from conduct which shows criminal intent without actually amounting to the commission of a crime. In *Barrington*[58] the accused was charged with committing various sexual offences, including indecent assault, against three school girls who had been employed as baby-sitters. Prior to the assaults on the first complainant, the accused had shown her pornographic pictures; subsequently he had offered her money if he could take photographs of her. Prior to the assaults on the third complainant, the accused had taken indecent photographs of her for which he said she would receive money. To support the testimony of the three complainants the prosecution called three other girls to give evidence. None of them had been indecently assaulted. The accused had, however, shown them pornographic pictures, photographed them and offered them money if they would allow him to photograph them in the nude. According to the prosecution, this evidence showed that the accused *intended* to commit indecent assaults against these girls once the moment was right.[59]

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54 Although this inference - which the House of Lords undoubtedly made - ignores the normative effect that the legislation may have had on the behaviour of the two accused.

55 [1918] AC 221.

56 At 225 per Lord Finlay LC.

57 *Thompson* at 230 per Lord Atkinson.

58 (1981) 72 Cr App R 280.

59 Although that inference may only have arisen when the evidence from the girls was considered together with the evidence of the three complainants: the case may thus be an example of the circular reasoning condemned by members of the High Court: see *Perry v R* at 594-595 per Murphy J; at 612 per Brennan J; and *Sutton v R* at 552 per Brennan J.

Defence counsel argued that the evidence was not admissible under the similar fact rule because, not disclosing an offence similar to that charged, it was not probative of the commission of such an offence.[60] The Court of Appeal held that the evidence was of sufficient probative value to be admissible under the similar fact rule despite this.[61] It should be noted, however, that the court's decision was that the evidence was *admissible* under the similar fact rule despite the fact that it disclosed no offence. The question we are here considering was not directly raised. That would have required the prosecution to argue that, not disclosing an offence, the evidence was not actually caught by the similar fact rule, and was therefore simply admissible if relevant. Nevertheless, the fact that both counsel and court assumed that the evidence was caught by the exclusionary rule is significant.[62]

What the above cases show, then, is that the rule against similar fact evidence does extend to evidence of non-criminal conduct from which the accused's criminal propensity can be inferred. Such evidence inevitably gives rise to reasoning prejudice. Although it is not a matter of logical necessity that such evidence will give rise to moral prejudice as well, it is difficult to imagine circumstances in which it would not do so. Certainly, none of the above are such cases. It is unlikely to have made any real difference to the amount of moral prejudice generated by the past acts of incest in *Ball* that those acts were not actually criminal; and a reading of the judgments in *Thompson* suggests that in 1918 a high degree of moral prejudice would have been generated by the mere fact of homosexuality, even if there was no evidence to suggest this preference had been acted upon. Similarly, the intent to commit crime - as in *Barrington* - seems likely to create almost as much moral prejudice as the actual commission of crime. This suggests that the assumption of moral prejudice will generally be justified where the accused's past conduct provides the basis for an inference that the accused possesses a criminal propensity, notwithstanding that the conduct may not itself amount to a crime.

60 *Barrington* at 289.

61 At 290. Cf *Griffith v R* (1937) 58 CLR 185.

62 See also *Seaman* (1987) 67 Cr App R 234, where the accused was charged with the theft of some bacon, and previous conduct suggesting only an intent to steal bacon was treated as within the rule.

Non-Criminal Propensity Inferred From Past Conduct.

As will be seen from the cases discussed below, the possession by the accused of a non-criminal propensity can be just as relevant to guilt as possession of a criminal propensity. To modify an example given by Lord Hailsham in *Boardman*,[63] the complainant in a rape case might give evidence that the rapist was wearing the ceremonial head-dress of a Red Indian chief. The accused's girlfriend might give evidence that the accused always wore such a head-dress during consensual intercourse with her. The girlfriend's evidence establishes that the accused has a particular, non-criminal, propensity. The complainant's evidence establishes that the rapist has the same propensity. The question, then, is whether evidence establishing non-criminal propensity must, like evidence establishing criminal propensity, be filtered through the similar fact rule.

The answer to this question depends upon whether the risk of reasoning prejudice is sufficient on its own to justify the application of an exclusionary rule. It will be argued that it is not. The argument will rely on the contention made above: that it is absurd to require such a high degree of probative value for admission if a high degree of prejudicial effect cannot be taken for granted. And with the cases discussed in this section moral prejudice cannot be taken for granted. Nevertheless, there is a reasonable amount of authority for the proposition that the similar fact rule does extend to evidence from which a merely discreditable propensity can be inferred. Most compelling is the statement of the similar fact rule by the Supreme Court of Canada in the recent decision of *R v Robertson*.[64] The accused was charged with rape. The defence was one of consent, or alternatively honest belief in consent. The trial judge admitted evidence from the complainant's room-mate that the accused had made a physical approach to her and indicated that he wished to sleep with her. This evidence did not reveal a criminal propensity. There being no dispute as to the relevance of the evidence, the issue was whether it fell within the scope of the similar fact rule, and if so, whether it met the criteria for admission contained in that rule. The Supreme Court of Canada stated the rule as follows:

> A general statement of the exclusionary rule is that evidence of the accused's *discreditable conduct* on past occasions tendered, to show his *bad disposition*, is inadmissible unless

63 *Boardman* at 454.
64 (1987) 39 DLR (4th) 321.

> it is so probative of an issue or issues in the case as to outweigh the prejudice caused.[65]

As the accused's conduct towards the room-mate, although not criminal, was discreditable, it fell within the scope of the similar fact rule.[66] The court cited *Barrington*[67] for this proposition, although that case - as we have seen - is really only authority for the view that the similar fact rule extends to evidence of non-criminal conduct from which the existence of a criminal propensity can be inferred.

Some superficial support for the Canadian view comes from the following statement of Gibbs CJ:

> If this evidence did show that the applicant was a person of criminal propensities or *bad character*, and was likely to have committed the murder for that reason, its admission would have offended against a fundamental rule of the criminal law. If however the Court of Criminal Appeal was right in thinking that the evidence was insufficient to show that the applicant had criminal propensities, *or was of bad character*, the evidence was nevertheless quite irrelevant, for, as I have said, it did not in any way tend to establish the identity of the applicant as the murderer.[68]

The evidence in question was, then, inadmissible because irrelevant. But Gibbs CJ seems to have considered that the "fundamental rule of the criminal law" to which he referred - presumably the similar fact rule - applied not only to evidence disclosing the accused's criminal propensity but also to evidence disclosing their bad character. The view expressed by Gibbs CJ is clearly obiter.

There are, however, several cases where the admissibility of non-criminal propensity evidence was determined by an application of the similar fact rule. None of the decisions inspire confidence, though, because in none of them did the court have to consider an argument that because the evidence disclosed no criminal propensity it was outside the scope of the similar fact rule. Furthermore, it is likely that the same results would have been

65 At 338 (emphasis added).
66 At 339.
67 (1981) 72 Cr App R 280.
68 *Driscoll v R* (1977) 137 CLR 517 at 532 (emphasis added).

achieved if the admission of the evidence had depended on an exercise of the discretion. Perhaps the least satisfactory case is that of *Tricoglus*,[69] where the accused was charged with the rape of a young woman. The complainant had, late at night in the Newcastle city centre, reluctantly accepted a lift from a bearded man driving a Mini. She was later raped by the man. Two other women had, some three nights before also in the city centre, been offered a lift by a bearded man in a Mini. They had both refused, but one of the women had taken the number of the car, which, apart from one figure, was the number of a Mini owned by the accused. The evidence was relevant to identity as it suggested that the accused and the rapist shared "a propensity towards approaching women who were strangers to him and trying to get them into his motorcar for the purposes of sexual intercourse", or, more colloquially, kerb-crawling.[70] The Court of Appeal held that the evidence was inadmissible, in what seems to have been an application of the similar fact rule.[71]

A much stronger case is *Butler*.[72] The accused was charged with rape and indecent assault against two young women. Both had been picked up from a bus stop in Oxford and offered a lift home in return for directions. In both cases the assailant had forced the complainant's head towards his lap, forced the complainant to take out his penis and fellate him while the car was in motion, and ejaculated into her mouth and forced her to swallow the semen. The assailant had also inserted a finger into the second complainant's vagina and one into her anus during the fellatio. The defence was one of identity. The trial judge admitted evidence from a former girlfriend of the accused who testified that she had sometimes performed fellatio while the accused was driving; that during this fellatio he would usually keep his hand over the back of her neck and force her to swallow the semen; that sometimes he would insert one finger into her vagina and one into her anus during fellatio; and that she had had sex with the accused, in his car, at both of the isolated locations at which the rapes had been committed. The girlfriend's evidence showed that the accused had the same distinctive sexual tastes as the rapist. The Court of Appeal applied the similar fact rule, holding that the evidence was admissible. It is possible that the court missed the point, though, as it merely decided, following *Barrington*,[73] that the evidence was admissible as similar fact evidence

69 (1976) 65 Cr App R 16. See also *R v Horry* [1949] NZLR 791.
70 *Tricoglus* at 20.
71 As above.
72 (1987) 84 Cr App R 12.
73 (1981) 72 Cr App R 280.

despite the fact that it disclosed no offences. But in *Barrington* the evidence did provide the basis for an inference that the accused possessed a criminal propensity; in *Butler* it did not.[74]

So there is authority for extending the rule to discreditable propensities. But if the thesis of Dixon J in *Dawson* is to be given full effect, then the similar fact rule should extend to all propensity evidence: even to propensity evidence which is not in any way discreditable to the accused. The similar fact rule should, for instance, apply to Mirfield's example of proving that the accused was in the vicinity of the crime at the time it was committed by establishing his propensity to visit his grandmother, who lived nearby, at about that time each week.[75] As it happens there is some authority for so extending the rule. In *Mustafa*[76] the accused was charged, inter alia, with two counts of obtaining property by deception. The property in each case was about £20 worth of frozen meat and nothing else. The defence was one of identity. The trial judge admitted evidence from an employee of one of the stores who had seen the accused in the store some three months earlier, with a trolley loaded with about £20 worth of frozen meat and nothing else. The accused had abandoned the trolley and left the store on realising that he was being watched. As the court pointed out the "similarity was the very odd shopping errand that was being carried out: the acquisition of a comparatively large amount of meat and nothing else".[77] But loving meat - even in large quantities - is hardly discreditable. Nevertheless, counsel for the accused conceded - and rightly conceded in the view of the Court of Appeal - that the evidence was admissible as similar fact evidence to support the direct identification evidence, arguing only that it should have been excluded by the trial judge in the exercise of his discretion. The court held that the evidence was rightly admitted.

What is wrong with extending the scope of the rule so far is that it cannot be taken for granted that this kind of evidence will generate any moral prejudice. It is hard to see how any moral prejudice could have been raised by the evidence in *Mustafa*. On the other hand, it is very difficult to say whether any prejudice, and if so how much, would be aroused by an accused person's propensity towards propositioning women, being fellated

74 See also *R v Wright* (1990) 56 CCC (3d) 503 where the Ontario Court of Appeal held that evidence which showed that the accused and a murderer shared a propensity towards anal intercourse and choking his sexual partner during intercourse came within the rule.

75 See Mirfield, "Similar Facts - *Makin* Out?" (1987) 46 *Cambridge LJ* 83 at 84.

76 (1976) 65 Cr App R 26.

77 At 30.

in a moving car, kerb-crawling, or choking his sexual partner during intercourse. Whether the particular evidence would in fact generate the risk of moral prejudice is not really the point though; the point is that that risk is not inevitable, so that it cannot be *assumed* that the admission of the evidence will generate a high degree of prejudicial effect. This means that it may be inappropriate to make admissibility depend on whether the evidence possesses the very high degree of probative value required under the similar fact rule. Indeed, it is highly doubtful that the evidence in any of the above cases - *Butler* aside - would meet that standard. This does not mean that it should have been excluded; but that it should have been held to be admissible subject only to the exclusionary discretion.

There is authority for this view, in the form of two judgments of the Supreme Court of South Australia. In *R v von Einem*[78] the accused was charged with murdering a 15 year old youth. The prosecution case was that the youth had been abducted by the accused, drugged, held captive for 5 weeks during which he was subjected to homosexual abuse, and then murdered. The prosecution was allowed to lead evidence to establish that the accused was a homosexual, this evidence pointing to the motive for the abduction. King CJ, in a judgment with which Jacobs and Olsen JJ agreed, held that the evidence was relevant to motive, but fell outside the similar fact rule because, homosexuality having been de-criminalised in South Australia, this was not a propensity which would "necessarily involve criminal conduct".[79]

King CJ took the same view in *R v Turney*,[80] where the accused was charged with three counts of unlawful sexual intercourse and one count of attempted unlawful sexual intercourse with his step-daughter. At the trial, the complainant gave evidence of numerous occasions on which the accused had engaged in oral sexual intercourse with her, one occasion of anal sexual intercourse, and two incidents when anal penetration was attempted. The trial judge admitted evidence from the complainant's mother that the accused had requested her also to take part in oral and anal sexual intercourse. This was admitted on the basis that the accused's sexual preferences were sufficiently distinctive to be properly admissible as similar fact evidence. King CJ, in a judgment with which Cox J agreed, held that the mother's evidence was inadmissible as the accused's preferences were insufficiently

78 (1985) 38 SASR 207.
79 At 212-213.
80 (1990) 52 SASR 438.

distinctive to have any real probative force.[81] But King CJ emphasised that this outcome had nothing to do with the similar fact rule, which he stressed did not extend beyond evidence disclosing the commission of other offences or a disposition to commit a criminal offence.

The South Australian view is greatly to be preferred. Aside from the reasons given above - that the exercise required of the judge where the evidence falls within the similar fact rule is inappropriate in these cases because a high degree of prejudicial effect cannot be assumed - there are great practical objections to applying the rule to such evidence. In *R v Turney* King CJ gave the following reason for not extending the rule to "discreditable" conduct and propensities:

> In our plural society, what is discreditable may be a matter upon which opinions differ. This is particularly true in sexual matters. If the rule were so extended, I think that the blurring of the criteria for exclusion, and therefore for admissibility, which presents such a problem to trial judges under the present rule, would become even more pronounced.[82]

The judgment of the Supreme Court of Canada in *Robertson* provides an example of this very difficulty. Before deciding whether or not the similar fact rule applied, the court had first to decide whether the accused's conduct was discreditable. The court analysed the accused's conduct in the following way:

> [I]t might be argued that the accused's conduct was not discreditable and hence not prejudicial at all. He propositioned a woman. When she indicated that she was not interested, he desisted. He did not force himself upon her. However, there are elements of the incident which could be characterised as discreditable. After Eileen indicated that she would not sleep with the accused he put his arms around her. She asked him to leave repeatedly and he repeatedly refused. She finally felt she had to leave and go to the outside porch. When they were walking to the bus-stop, he pinned her against the wall. He said he could never love her, he could only hurt her ... The evidence

81 At 439.
82 At 441.

> causes prejudice but it causes very little prejudice because the accused desisted.[83]

The evidence was therefore properly admitted. But can it really be said that the evidence in *Robertson* bore no rational explanation consistent with the accused's innocence? And if the prejudicial effect of the evidence was so low, why apply the similar fact rule at all? To say that the rule applies to 'discreditable conduct' is simply to say that it applies to evidence which raises some risk of moral prejudice, no matter how small. The rule should only apply when the risk of prejudice is great; and, in any case, as has repeatedly been asserted in this article, it defeats the whole point of having the exclusionary rule, if the court is required to determine, as a threshold question, whether the evidence is in fact prejudicial to the accused.

It seems, then, that there is insufficient justification for extending the exclusionary rule to evidence of discreditable conduct which provides no basis for an inference that the accused possesses a criminal propensity. The risk of any injustice to the accused is mitigated by the existence of the general judicial discretion to exclude evidence where its prejudicial effect exceeds its probative force.[84]

Where the Propensity Is Established By Expert Testimony

Does the rule also extend to cases where the accused's propensity is established by expert testimony, rather than being inferred from their past conduct? The numerous statements of the rule which refer to proof of the commission of other offences suggest that it does not. On the other hand, the thesis of Dixon J in *Dawson* suggests that it should, and in *Lowery v R*[85] the Privy Council seemed to think that it did. The point was not directly in issue, however, because it was not the prosecution but Lowery's co-accused King who was allowed to call psychological evidence that Lowery possessed an aggressive, callous, impulsive and sadistic personality, making it more likely that he, rather than King, was the murderer. Nevertheless, the Privy Council cited *Makin* for the proposition that the prosecution could not have adduced such evidence.[86]

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83 (1987) 39 DLR (4th) 321 at 340.
84 See *R v Turney* at 441 per King CJ.
85 [1974] AC 85.
86 At 102. The Full Court of the Supreme Court of Victoria did the same: *R v Lowery & King (No 3)* [1972] VR 939 at 945.

In the Canadian case of *R v Morin*[87] the issue was squarely raised for decision. The accused had been charged with the sexual assault, and murder by repeated stabbing of a nine year old girl. The prosecution had elicited psychiatric evidence that the accused had a mental illness which placed him in a small percentage of the population capable of committing such a crime. The Supreme Court of Canada held that the trial judge had been right in refusing to allow this evidence to go to the issue of identity. Dickson CJ, McIntyre, La Forest and Sopinka JJ stated that:

> It is illogical to treat evidence tending to show the accused's propensity to commit the crime differently because such propensity is introduced by expert evidence rather than by means of past similar conduct. If in the latter case the evidence is admitted provided its probative value exceeds its prejudicial effect, then the same test of admissibility should apply in the former case.[88]

There does seem to be something objectionable about allowing the prosecution to prove the guilt of the accused by such means, and it may be that bringing such evidence within the scope of the similar fact rule is the most convenient method of preventing them from doing so. Certainly, if such evidence is within the scope of the rule then it is difficult to imagine circumstances in which it could ever possess sufficient probative value for it to be admitted.

But it is not necessarily "illogical" to distinguish between the case where propensity is inferred from evidence of past conduct and the case where it is established by expert testimony. First, it is questionable whether a jury is likely to over-estimate the strength of the inference which can be drawn from a psychiatrist or psychologist's diagnosis of an accused's personality, especially as that diagnosis is likely to be contested by defence experts. In other words, the risk of reasoning prejudice may not be not as great as where the propensity is established by past conduct. Secondly, if such evidence does fall within the rule, then it may not be possible to distinguish, as was suggested should be done with evidence of past conduct, between evidence establishing criminal propensity and evidence establishing non-criminal propensity. In *Morin*, for instance, the evidence suggested that the accused was psychologically capable of committing the callous crime charged. Does this amount to a propensity to commit crime?

87 [1988] 2 SCR 345.
88 At 370.

Thirdly, and most fundamentally, it is very unlikely that any significant amount of moral prejudice will be generated by expert evidence about the character of the accused. Take the evidence in *Lowery*, for instance. The psychologist testified about the results of the Weschler Adult Intelligence Scale Test, the Rorschach Test and the Thematic Apperception Test. How much moral prejudice is going to be generated by the accused's reaction to ink blots? Certainly, a high degree of prejudice cannot be assumed. It is therefore submitted that the similar fact rule should not be applied when the accused's propensity is not established by their past conduct, but by expert opinion. This is not to suggest that such evidence should ordinarily be admitted, but that its admissibility should depend on an exercise of the exclusionary discretion.

CONCLUSION

This article has attempted to define the scope of the similar fact rule with more precision than has been done before. It was suggested that it is the unique combination of two distinct forms of prejudice - which I called, respectively, reasoning prejudice and moral prejudice - which justifies the existence of an exclusionary rule. I argued that the rule should only be applied when the evidence belongs to a class of evidence which can be assumed to give rise to both of these forms of prejudice. I concluded that that assumption can only be made when the following conditions are met, and that these conditions therefore define the scope of the rule. First, the evidence must be used as propensity evidence, that is, the inference that the accused possesses a particular propensity must be an essential step in the process of reasoning from the evidence to guilt. If this condition is not met then reasoning prejudice cannot be assumed. Secondly, the evidence must suggest that the accused possesses a propensity to commit crime. Thirdly, that propensity must be established by the accused's conduct, although not necessarily their criminal conduct, rather than by expert opinion. If, and only if, the evidence meets these last two conditions then it can be assumed that it will give rise to a high degree of moral prejudice. The application of the similar fact rule therefore depends both on the manner in which particular evidence is used, and on the nature of the evidence itself.