The Legacy of the Makin *Case 120 Years on: Legal Fictions, Circular Reasoning and Some Solutions*

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Abstract

This article begins with an analysis of the *Makin* case that, for 120 years, has represented the cornerstone for the admissibility of the most prejudicial evidence in a criminal trial — a defendant's other criminal conduct (known as 'propensity', 'similar fact' or 'bad character' evidence). By revealing how the Privy Council's famous statement of principle was based on two legal fictions, the article also reveals the impermissible reasoning at the heart of the decision, a type of reasoning still influential in similar fact evidence cases today. Although *Makin* has prompted much criticism, with courts developing stricter tests for the admissibility of a defendant's other criminal conduct, this article shows how strict or loose controls over the admission of such evidence have no effect on the type of impermissible reasoning at the heart of propensity/similar fact reasoning. By identifying the heuristic processing involved, the article demonstrates the flaws in the reasoning process in circumstantial evidence murder trials. Finally, it proposes recommendations for reform to ensure juries do not convict people on the basis of heuristic cues.

I Introduction

The *Makin* case is one of the most famous cases in legal history and has informed the common law for more than a century. The case was a moral and legal sensation at the time as it provided a snapshot of the incidence of the serial murder of infants in Sydney in the 1890s. Although John and Sarah Makin were convicted of the murder of one infant, 13 dead babies had been found in the backyards of their former residences. In rejecting their appeal, the Privy Council enunciated a principle by which evidence of a defendant's other criminal misconduct[1] could be relevant. Yet no-one at the time or since has realised that the relevance inquiry was based on two legal fictions that led to the Makins' wrongful convictions.

In identifying these legal fictions, I discuss:

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1 Usually referred to as 'propensity' or 'similar fact' evidence, as defined in Part II.

(i) the *Makin* legacy with respect to relevance and the admissibility of similar fact evidence in Australia, England and Wales;

(ii) why the Privy Council crafted a legal principle that has been described as 'valueless' and internally contradictory; and

(iii) why the principle became the catalyst for imposing a stricter relevance test in relation to a defendant's other criminal misconduct in England, Wales and Australia.

Paradoxically, neither this stricter relevance requirement nor subsequent looser controls under the *Criminal Justice Act 2003* (UK) c 1 ('CJA') (which returned to the *Makin* standard of relevance) address the circular reasoning at the heart of circumstantial murder trials in which a defendant's other misconduct has been admitted. As a result, I identify three categories into which murder cases involving a defendant's other criminal misconduct can be grouped according to the degree of connection between the defendant, the events leading to the charges and the facts in issue. This categorisation makes it possible to identify the fact situations in which this type of evidence should and should not be admitted and the reforms necessary to prevent the type of reasoning that characterised *Makin*.

II Definitions

It will be helpful to start with definitions of the evidence under discussion. A defendant's other criminal misconduct may be charged or uncharged and in the form of convictions, witnesses' accounts or mere association. It will be characterised as 'tendency/propensity' or 'similar fact/coincidence' evidence depending on what it reveals about the defendant's behaviour. Its admissibility is governed either by the common law or statute depending on the jurisdiction.[2] While different terminology is used under the Uniform Evidence Acts ('UEA'),[3] it is clear the words 'tendency' and 'coincidence' were intended to deal with the type of evidence known as 'propensity' and 'similar fact' evidence at common law.[4] The terms 'propensity' and 'tendency' evidence refer to the definition under s 97 of the UEA, which is a codification of the common law:

> evidence of the character, reputation or conduct of a person, or a tendency that a person has or had … to act in a particular way, or to have a particular state of mind.
>
> The relevance of evidence of a defendant's other criminal misconduct depends on an inference that assumes his/her repetition of that particular behaviour.[5]

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2 The common law still applies in the Northern Territory and Queensland, but see *Evidence Act 1977* (Qld) s 132A. For the admissibility of propensity evidence in Western Australia, see, *Evidence Act 1906* (WA) s 31A(2); in South Australia, *Criminal Law Consolidation Act 1935* (SA) s 278(2a).

3 Uniform evidence legislation has been enacted in six Australian jurisdictions: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); *Evidence Act 2011* (NT).

4 Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) vol 1, 219–21 [400]–[402], vol 2, 222–8 [169]–[171].

5 Ibid vol 1, 465 [813].

The common law term, 'similar fact evidence', refers to evidence that may, because of the degree of similarity in two or more events where the defendant is common to each event, show not only the identity of the offender, but also 'the improbability of coincidence if a number of similar accounts [of events] are all true'.[6] The admission of such evidence relies 'on explaining the coincidences between events by [reference to] the perpetrator's tendency'.[7] In other words, '[d]escribing the evidence as coincidence evidence ... does not make propensity disappear'.[8] Similarly, 'coincidence evidence' is defined in the UEA s 98 with reference to the similarities in the evidence in question — it refers to two or more events being used to prove the improbability of the events occurring coincidently, having regard to the similarities of the events and/or the circumstances in which they occurred. In England and Wales, propensity and similar fact evidence is now referred to as 'bad character' evidence.[9]

III Criticisms of the Privy Council's Decision in *Makin* and its Conceptual Underpinnings

In a trial involving the death of one infant, it was the admissibility of what appeared to be propensity or similar fact evidence — the discovery of 12 other dead babies in the backyards of the Makins' former residences (the 'disputed evidence') — that resulted in the Privy Council's famous decision in *Makin.*[10] This decision began the common law's long struggle with crafting stricter controls for the admission of what is always prejudicial evidence — propensity or similar fact evidence about an accused. Although *Makin* has been quoted by lawyers and judges in Australia, England and Wales for the last 120 years,[11] none have considered the two legal fictions that arose out of the trial and the assumptions behind the Privy Council's oft-quoted statement of principle, including the fact that the disputed evidence may have *appeared* to be, but was never proved to be, evidence of the Makins' propensity to kill baby-farmed children.

In a review of the original transcript and court reports of the *Makin* case, I discovered the curious decision of the jury, which returned a verdict it was not lawfully entitled to make. Although Sarah and John Makin were arraigned on two counts of murder, the first related to the death of a month-old infant known as Horace Amber Murray, but if identification failed, the jury could find the Makins guilty on the second count, which related to the death of an unknown child called Baby D. At the end of the trial, the judge withdrew the first count from the jury as there was insufficient evidence to identify Baby D as Horace Amber Murray. Left with the second count before they retired to the jury room, the jury ignored the trial

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6 *R v Best* [1998] 4 VR 603, 606 (Callaway J).

7 Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis, 5th ed, 2010) 178.

8 Mike Redmayne, 'Recognising Propensity' [2011] *Criminal Law Review* 177, 189.

9 CJA s 98, defines 'evidence of a person's "bad character" … [as] evidence of, or of a disposition towards, misconduct on his part'.

10 *R v Makin and Wife* (1893) 14 LR (NSW) 1 ('*Makin*').

11 See *HML v The Queen* [2008] HCA 16 (24 April 2008) [441]–[446] (Crennan J), [487]–[490] (Kiefel J).

judge's instructions and returned a verdict on the first count — they found the Makins guilty of the murder of Horace Amber Murray.[12]

Even more curiously, the appeal judges of the New South Wales Supreme Court ignored the jury's mistake and made a finding of fact — that Baby D was Horace Amber Murray — that they were not lawfully entitled to make. The Privy Council ignored these errors when deciding whether the disputed evidence was relevant and followed the trial judge's fictional reasoning that the Makins had raised a defence of accidental death. Thus, the Privy Council's 'celebrated formulation'[13] was based on a fictional defence and an unlawful finding of fact.

Not surprisingly, the Privy Council's hastily crafted principle has been the subject of extensive analysis and criticism over the years because of the extent to which it has been relied on as the starting point for considering the admissibility of similar fact/propensity evidence. In an area of law that has been described as a 'pitted battlefield',[14] which has given rise to considerable misunderstanding,[15] *Makin* introduced a standard of relevance that justified the admission of highly prejudicial evidence without any consideration of its weight versus its prejudicial effect, or of the reasoning processes that assumed the disputed evidence revealed the Makins' propensity.

The traditional interpretation of *Makin* is that evidence of a defendant's other criminal misconduct is subject to an exclusionary rule, with inclusionary exceptions based on relevance.[16] Various attempts have been made to interpret Lord Herschell's statement of principle since 'there is little doubt' that it is 'the most influential decision' in the evolution of the similar fact rule,[17] because it forces lawyers to focus on the relevance of a defendant's other criminal misconduct with respect to the facts in issue in the case at hand, even where there is no direct evidence of propensity. Where there is, in the form of prior convictions, difficult decisions about the degree of relevance have to be made since relevance involves an assessment of likelihood that is a subjective evaluation based on the degree of the probative value of the evidence.[18] Rather than a blanket exclusion, *Makin* controversially opened the door to admitting a defendant's other criminal misconduct in certain circumstances, thus placing the fairness of criminal

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12 See Annie Cossins, *The Babyfarmers* (Allen and Unwin, 2013).

13 Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (Oxford University Press, 9th ed, 2012) 486.

14 *DPP v Boardman* [1975] AC 421, 445 (Lord Hailsham) ('*Boardman*').

15 Redmayne, above n 8.

16 Colin Tapper, 'Criminal Justice Act 2003: Part 3: Evidence of Bad Character' [2004] *Criminal Law Review* 533; see also Keane and McKeown, above n 13, 486.

17 Kenneth J Arenson, 'Propensity Evidence in Victoria: A Triumph for Justice or an Affront to Civil Liberties?' (1999) 12 *Melbourne University Law Review* 263, 266.

18 *DPP v P* [1991] 2 AC 447, 462 (Lord MacKay); *Dao v The Queen* [2011] NSWCCA 63 (1 April 2011) [98] (Allsop P). Note that 'the statutory concept of relevance can fairly be equated with the common law concept': *Papakosmas v The Queen* (1999) 196 CLR 297, 312 [47] (Gaudron and Kirby JJ). It should also be noted that probative value is defined in the Dictionary of the UEA as being '*the extent to which* the evidence could rationally affect the assessment of the probability of the existence of a fact in issue' (emphasis added), indicating that different evidence can have different degrees of probative value.

trials in the balance. The *Makin* principle is worth repeating here in order to understand the criticisms below:

> It is ... not competent for the prosecution to adduce [the defendant's prior criminal misconduct] ... for the purpose of [concluding] ... that the accused is likely ... to have committed the offence for which he is being tried. ... [T]he mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant ... 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.[19]

The most 'troublesome aspect' of *Makin* is that over a 50-year period it encouraged subsequent cases to seize 'upon the notion of "relevance to some *other* issue" and [to develop] an elaborate system of categories ... to which evidence of similar facts could be relevant'.[20] Mirfield criticised what later became known as the 'similar fact evidence rule'[21] as 'valueless' and bemoaned the fact that 'it continues to exert a baneful influence both upon the cases and upon much of the academic commentary on them'.[22] For those reasons, the case was 'overdue for commitment to the scrapheap'.[23] In the High Court of Australia, Murphy J criticised the case on the grounds that Lord Herschell's criteria for 'excluding and admitting' propensity evidence were contradictory:

> If, despite the exclusionary rule contained in the first sentence, evidence of propensity can be admitted where it is relevant in accordance with the second sentence, the 'relevancy' standard is so broad as to render the statement meaningless.[24]

Similarly, other interpretations recognise that 'sometimes the difference between evidence showing propensity and evidence relevant to one of the [defences] identified by Lord Herschell was hard to detect'.[25] But in *Boardman*,[26] Lord Hailsham decided that the second limb of Lord Herschell's statement did not create exceptions for the first limb since the second limb was 'an independent proposition ... and the two propositions together cover the entire field. If one applies, the other does not'.[27] Mirfield disagreed on the grounds that:

> once it has been shown that *Makin* either takes away with one hand what it has given with the other (ie the exceptions in the second part of the statement

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19 *Makin v Attorney-General for New South Wales* [1894] AC 57, 65.

20 A E Acorn, 'Similar Fact Evidence and the Principle of Inductive Reasoning: Makin Sense' (1991) 11 *Oxford Journal of Legal Studies* 63, 64 (emphasis in original).

21 *Pfennig v The Queen* (1995) 182 CLR 461, 475–6 (Mason CJ, Deane and Dawson JJ).

22 Peter Mirfield, 'Similar Facts — *Makin* Out?' (1987) 46 *Cambridge Law Journal* 83, 83.

23 Ibid.

24 *Perry v The Queen* (1982) 150 CLR 580, 593 ('*Perry*'); citing D K Piragoff, *Similar Fact Evidence: Probative Value and Prejudice* (Carswell, 1981); see also Arenson, above n 17, 267.

25 Scottish Law Commission, *Discussion Paper on Similar Fact Evidence and the Moorov Doctrine* (Scot Law Com No 145, 2010) [6.24]–[6.25] <http://www.law.ox.ac.uk/published/OSCOLA_4th_edn.pdf>.

26 [1975] AC 421.

27 Ibid 452.

> swallow up the rule in the first part) and allow evidence on disposition … the case is dead, not merely comatose, and cannot be resurrected for further use.[28]

Others consider that the *Makin* principle has had far-reaching consequences such as ensuring the Crown prosecutes 'precise charges of specified prohibited acts'[29] and preventing the arbitrary admission of similar fact evidence.[30] Perhaps the confusion over the significance of *Makin* arises because the Privy Council's decision suffers 'from a dearth of conceptual underpinning'[31] and must be seen as introducing a standard of relevance which was, arguably, too low for the disputed evidence in question. In other words, the *Makin* case was characterised by the fact that no cause of death had been identified in relation to the infants named in the indictment, nor in relation to the 12 other babies found in the backyards of the Makins' previous residences. What appeared to be evidence of the Makins' prior criminal misconduct revealed no criminal conduct and had no relevance to the actus reus since there were no similarities in the way that Baby D (or Baby Horace) and the other 12 babies had died, merely similarities in the way they had been buried. The Privy Council's principle was crafted to fill this major gap in the evidence by finding a basis on which the disputed evidence would be relevant, that is, a fictional defence.

When understood in its factual context, the Privy Council decided to expand on the loose reasoning of the trial judge, Stephen J, and two of the appeal court judges, Windeyer and Foster JJ,[32] who all believed that the Makins were required to rebut a presumption of murder and assumed the Makins had done so by raising a defence of neglect or accidental death. As such, the disputed evidence could be admitted when common sense and experience dictated, that is, to rebut a (fictional) defence. In this way, an exclusionary rule of evidence sprouted some inclusionary exceptions *to suit the facts of one particular case*, with the Privy Council's first and second limbs being entirely dependent on one another.

Although the criticisms of the Privy Council's statement of principle are valid when read out of context, the only logical way to argue the relevance of the disputed evidence was by inventing a defence that could be rebutted by *admitting* the disputed evidence. Both the trial and appeal judges relied on a convenient legal fiction — a defence not raised by, and not open to, the Makins — in a social context where baby-farmers were known to purchase more children than they could afford to keep, and burial and decomposition meant that few would ever be held accountable.[33] The trial and appeal judges would have known these defences were not open to the Makins because: (i) the Makins denied any knowledge of the children named in the indictment; and (ii) even if they had raised a defence of accidental death in relation to Baby Horace, it had no relevance to the death of Baby D, the only count left to the jury. The Makins could not have been expected

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28 Mirfield, above n 22, 98.

29 Acorn, above n 20, 68.

30 Adrian S Zuckerman, 'Similar Fact Evidence — The Unobservable Rule' (1987) 104 *Law Quarterly Review* 187, 195.

31 Tapper, above n 16, 534.

32 *Makin* (1893) 14 LR (NSW) 1, 4.

33 See further Judith Allen, *Sex and Secrets* (Allen and Unwin, 1991) 26–30 for data on the low rates of conviction in relation to child abandonment and infanticide in the late 1800s in Sydney.

to offer a defence in relation to an unidentified child, other than denying knowledge of its existence.

Although Lord Herschell stated that the disputed evidence was admitted in *Makin* for a non-propensity reason (to rebut a (fictional) defence), curiously the evidence had been admitted at trial to prove a propensity to murder on the part of the Makins,[34] an issue not addressed by the Privy Council's principle. In fact, with no defence to rebut, the jury could *only* have used the disputed evidence for its propensity purpose. Despite its attempt to introduce a standard of relevance, there was a fundamental incompatibility between the Privy Council's statement that prior criminal misconduct should *not* be admitted to prove an accused's propensity (under the first limb) and then allowing such evidence to be admitted 'to negative a defence of accident or innocence conduct' which will have the *effect* of proving the accused's propensity.

While it is necessary for the admission of propensity evidence that the defendant's 'disposition forms an essential step in the process of reasoning',[35] this was impermissible in *Makin* because the evidence was incapable of showing a propensity unless the jury engaged in heuristic reasoning, as discussed in Part IV below. In failing to explore the effect of the disputed evidence on the jury's decision-making, the Privy Council did not realise that the jury had no option but to use it as propensity evidence and that it was impossible for the Makins to have received a fair trial. Nonetheless, the importance of *Makin* lies in the fact it has been the 'cornerstone'[36] for subsequent cases to consider the basis on which similar fact evidence is admissible at the same time as considering the risk of prejudice to the accused. The problem is that the risk of prejudice is more subtle and more dangerous than the Privy Council and subsequent cases have realised, as discussed below.

IV Applying the Heuristic-Systematic Processing Model to the Privy Council's Reasoning

If the *Makin* case was tried at common law in Australia today, the disputed evidence would be considered to be highly prejudicial due to the danger that the jury would simply infer that the Makins were guilty of the death of Baby D (or Baby Horace) because the disputed evidence suggested (but did not prove) they were involved in killing babies.[37] Indeed, the trial and appeal judges all concluded that the likelihood of the Makins, who were known to be 'professional' baby-farmers, being innocently associated with 13 dead babies, was low.[38]

In order to understand why the disputed evidence in *Makin* invites prejudicial reasoning, the theoretical framework proposed by Chaiken and colleagues — the heuristic-systematic processing model that has been used to

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34 *The Sydney Morning Herald* (Sydney), 4 August 1893, 3. This newspaper was the court report of the day.

35 Mirfield, above n 22, 99.

36 Acorn, above n 20, 64.

37 See the discussion of the *Pfennig* test in Part VI.

38 See Cossins, above n 12.

explain jurors' decision-making — is described and applied below.[39] What we know about jury decision-making, generally, is that:

(i) 'jurors' decisions involve a complex and nuanced set of cognitive processes that transform difficult choices into easier ones by amplifying one alternative perspective on the evidence and deflating competing perspectives';[40]

(ii) individuals, generally, hold particular beliefs and attitudes that affect their reasoning processes and 'bias reasoning performance'; and

(iii) when jurors are 'faced with complicated cognitive tasks' and lack the motivation or ability to understand and interpret the evidence, they will rely on heuristic cues to determine guilt.[41]

The heuristic-systematic processing model posits that two particular processes mediate individual decision-making. Heuristic processing involves little or no scrutiny of the evidence and low cognitive effort because the individual uses (persuasive) heuristic cues or generalisations about human behaviour, such as 'there's no smoke without fire' or 'children always lie', to arrive at a decision. Heuristic processing tends to be relied on when individuals are required to process ambiguous or incongruent evidence (which typically arises in a circumstantial evidence case) but lack the ability or motivation to engage in systematic processing which involves greater scrutiny of the evidence and higher cognitive effort. The higher a person's motivation and the less his or her emotional involvement, the more likely he or she will engage in systematic processing.[42]

A number of factors may influence jurors' interpretation, motivation and emotional involvement in the evidence and facts of a case, such as pre-trial publicity (which may establish a pro-prosecution bias), individuals' own experiences of similar crimes or events, as well as their own skills, competencies and individual differences such as gender, age and education[43] and their beliefs in

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39 S Chaiken, 'Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion' (1980) 39 *Journal of Personality & Social Psychology* 752; A H Eagly and S Chaiken, 'Process Theories of Attitude Formation and Change: The Elaboration Likelihood and Heuristic-Systematic Models' in A H Eagly and S Chaiken (eds), *The Psychology of Attitudes* (Orlando, 1993) 303; S Chen, D Shechter and S Chaiken, 'Getting at the Truth or Getting Along: Accuracy versus Impression-Motivated Heuristic and Systematic Processing' (1996) 71 *Journal of Personality and Social Psychology* 262; Shelly Chaiken and Yaacov Trope, *Dual-Process Theories in Social Psychology* (Guilford Press, 1999).

40 Ryan J Winter and Edith Greene, 'Juror Decision-Making' in F Durso et al (eds), *Handbook of Applied Cognition* (Wiley, 2nd ed, 2007) 731, 741, citing D Simon, 'A Third View of the Black Box: Cognitive Coherence in Legal Decision-Making' (2004) 71 *University of Chicago Law Review* 511.

41 Winter and Greene, above n 40; S Chen and S Chaiken, 'The Heuristic-Systematic Model in its Broader Context' in Chaiken and Trope, above n 39, 73.

42 Durairai Maheswaran and Shelly Chaiken, 'Promoting Systematic Processing in Low Motivation Settings: Effect of Incongruent Information on Processing and Judgment' (1991) 61 *Journal of Personality and Social Psychology* 13.

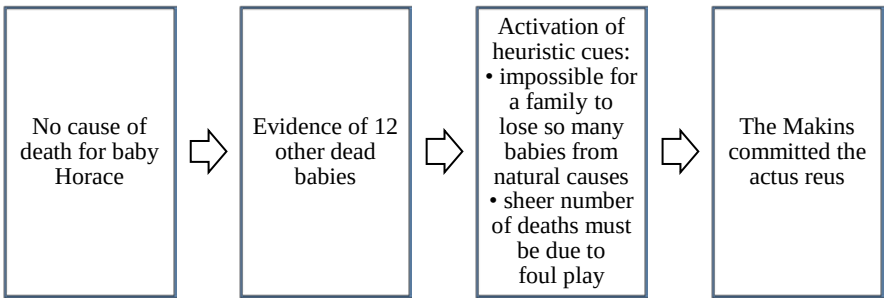
43 Vicki L Smith, 'Prototypes in the Courtroom: Lay Representations of Legal Concepts' (1991) 61 *Journal of Personality and Social Psychology 8*57; Winter and Greene, above n 39, 743; Terry M Honess and Elizabeth A Charman, 'Members of the Jury — Guilty of Incompetence?' (2002) 15 *The Psychologist* 73.

the constancy of human behaviour.[44] Heuristic cues may arise from any one of these influences or other persuasive factors to do with the trial such as the impressive reputation of an expert witness, 'the heinous character of the crime [or] the horrific nature of certain evidence'.[45]

An individual's processing style influences his or her understanding of evidence and, therefore, the quality of his or her reasoning. In a complex trial or one relying solely on circumstantial evidence, 'difficulties in comprehension may spark different processing strategies. For example, confusion may lead to a recourse to heuristics'[46] and incomplete or inadequate interpretation of the evidence. Charman, Honess and Levi have found that when jurors' comprehension difficulties trigger heuristic reasoning, this is associated with poorer evidence recall.[47] This type of reasoning may also influence jurors to make up their minds early in the trial and, once that occurs, 'they stop thinking about the evidence too hard'.[48]

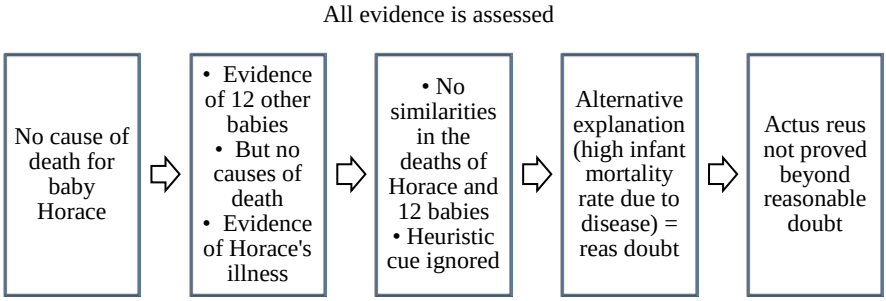
Both judges and jurors are susceptible to heuristic reasoning when gaps in the evidence give rise to confusion. As an example, the disputed evidence in *Makin* probably produced comprehension difficulties because the evidence did not reveal causes of death for the 12 babies and, therefore, similar facts to apply to the death of Baby Horace, whose cause of death was also unknown. Instead, the gaps in the evidence were likely to trigger heuristic cues, such as 'it is impossible for one family to lose so many babies from natural causes', or 'the sheer number of deaths must be due to foul play'. Heuristic reasoning explains both the verdict and the relevance inquiry by all judges involved in the trial and appeals, as demonstrated in the diagrams below.

Figure 1: The relevance of the disputed evidence using heuristic processing



44 Acorn, above n 20, 71.
45 Winter and Greene, above n 40, 746.
46 Honess and Charman, above n 43, 73.
47 E A Charman, T M Honess and M Levi, 'Juror Competence and Processing Style in Making Sense of Complex Trial Information' in R Roesch, R R Corrado and R J Dempster (eds), *Psychology in the Courts: International Advances in Knowledge* (Routledge, 2001); T Honess, M Levi and E Charman, 'Juror Competence in Processing Complex Information: Implications from a Simulation of the Maxwell Trial' [1998] *Criminal Law Review* 763.
48 Honess and Charman, above n 43, 74.

Figure 2: The relevance of the disputed evidence using systematic processing



Reliance on the heuristic cues in Figure 1 leads to the conclusion that the Makins killed the 12 other babies and, therefore, killed Baby Horace, which involves circular propensity reasoning. In other words, an assumption of murder was *necessary* for the disputed evidence to be relevant yet '[t]his *kind* of propensity reasoning is of no probative value *unless*'[49] there is evidence to support the heuristic cue. This assumption diverts individuals from more effortful systematic processing and evaluation of the evidence in Figure 2, in particular the facts that there were no similar acts of killing, that Baby Horace had been ill before his death, that it was general knowledge at the time that infants frequently died from disease, and that there was a lack of evidence to show that a crime had been committed (proof of the *corpus delicti*).

Without a cause of death or evidence of 'foul play', systematic processing says more is required before the Makins' connection to Baby Horace can be said to arise out of murder since these were desperate and diseased times. It was well known at the time that high infant mortality rates as a result of under-nourishment or common diseases, such as cholera, diphtheria, congenital syphilis, smallpox and scarlet fever, saw many babies die in their first year of life.[50] Thus, there was a rational view of the disputed evidence consistent with the innocence of the accused, particularly since there was evidence that Baby Horace had contracted thrush and had a disfiguring rash just before his death. Arguably, in *Makin* both judges and jurors relied on heuristic shortcuts that undermined their ability to reason that, with no cause of death for Baby Horace or the other 12 babies, the disputed evidence did not constitute propensity evidence of the Makins' commission of the actus reus.

Heuristic reasoning also leads to the conclusion that the point of similarity between the deaths of Baby Horace and the other 12 babies was murder. Yet whether the Makins had murdered Baby Horace was a fact up for proof in their

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49 Acorn, above n 20, 77 (emphasis in original).

50 Infant mortality rates represent the number of infant deaths in the first year of life for each 1000 live births. In New South Wales, in 1871–75, the rate was 101–10, rising to 121–30 during 1881–85 and falling to 111–20 during 1896–1900 (J C R Camm and J McQuilton, *Australians: A Historical Atlas* (Fairfax, 1987) 165). Illegitimate babies had a much higher infant mortality rate in the 1800s compared to babies born in wedlock (Shurlee Swain, 'Toward a Social Geography of Baby Farming' (2005) 10 *History of the Family* 151).

trial. The circularity of such reasoning has been described in other cases where it has been emphasised that, in considering similarities between two or more events, a judge cannot use a point of similarity which is *a fact in issue* in the trial and, therefore, up for proof:

> It is a canon of logic, rather than of law, that one cannot prove a fact by a chain of reasoning which assumes the truth of that fact … When the Crown seeks to tender similar fact evidence as the foundation for inferring a fact to be proved in a trial, it is erroneous to assume the truth of the fact to be proved in determining the cogency of the evidence.[51]

Because the *Makin* case has formed the basis for subsequent principles governing the admissibility of similar fact or bad character evidence, it is a case that calls forth questions about the *degree* of connection between a defendant and the similar fact evidence in dispute. Should similar fact evidence be admitted in cases where the relatively loose connection between the defendant and the similar fact evidence requires assumptions to fill in the gaps? This is an issue as controversial today as it was in 1893,[52] although now there is much greater awareness of the prejudicial effect of a defendant's other criminal misconduct on jurors' decision-making.

V Admission of Similar Fact Evidence in Murder Cases

Since the decision in *Makin*, the problem with admitting similar fact evidence has arisen time and time again, most commonly in murder and sexual assault trials, with the House of Lords and the High Court of Australia refining the rules for when this type of evidence should be admitted, as discussed below.

The danger with similar fact evidence is not that it may be used to infer a defendant's propensity to act in a particular way, but the heuristic reasoning processes that are encouraged when it is admitted in particular types of cases. In other words, similar fact evidence is objectionable 'not for what it proves but for the way in which it proves it'.[53] In order to discuss this issue in more detail, the key features of murder cases where similar fact evidence has been admitted are categorised in Table 1.

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[51] *Sutton v The Queen* (1984) 152 CLR 528, 552 (Brennan J) ('*Sutton*'); see also *Thompson v The Queen* (1989) 86 ALR 1, 12 (Mason CJ and Dawson J) ('*Thompson*'). In England and Wales, the JSB Bench Book directs judges that before propensity evidence can be 'utilised by the jury, it must be proved. Only if the jury is sure that the evidence of A is true can they conclude that the defendant had a propensity to commit the kind of offence alleged by complainant B': Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (Judicial Studies Board, 2010) 204 <www.judiciary.gov.uk/publications-and-reports/jsb-publications/crown-court-bench-book-directing-the-jury>.

[52] See Arenson, above n 17; Tapper, above n 16; David Hamer 'The Structure and Strength of the Propensity Inference: Singularity, Linkage and the Other Evidence' (2003) 29 *Monash University Law Review* 137; Redmayne, above n 8, 177; Rachel Tandy, 'The Admissibility of a Defendant's Previous Criminal Record: A Critical Analysis of the Criminal Justice Act 2003' (2009) 30 *Statute Law Review* 203.

[53] Law Reform Commission, *Evidence Reference: Character and Conduct*, Research Paper No 11 (1982) 47, cited in *Perry* (1982) 150 CLR 580, 592 (Murphy J).

Table 1: Murder trials and causes of death[54]

Criteria	Fact Situation 1	Fact Situation 2	Fact Situation 3
Cause of death	No cause of death. Victim(s) not identified No evidence of the D's commission of actus reus.	Identified cause of death is impossible to connect to the D *unless* other criminal misconduct is admitted. Victim(s) identified No evidence of the D's commission of actus reus.	Identified cause of death connected to the D *without* other criminal misconduct. Victim(s) identified Circumstantial evidence of D's commission of actus reus.
Similar fact evidence admitted	Other deaths circumstantially connected to D. No misconduct proving a propensity to commit a certain act or crime.	Other deaths circumstantially connected to D. No misconduct proving a propensity to commit a certain act or crime.	Other deaths strongly connected to D (eg eyewitness evidence, convictions/ admissions). Thus, misconduct proving a propensity to commit a certain act.
Examples	*Makin*	*Perry*;[55]; *Folbigg*;[56] *Smith*;[57] *R v Norris*[58]	*Thompson*;[59] *Straffen*;[60] *Pfennig*;[61] *R v Milat*[62]

[54] The cases listed in this table represent key murder/attempted murder trials in Australia with the features listed in the table. English cases have been added where they fit into the categories, although I have deliberately left out the English cases involving multiple baby deaths in one family since I believe these cases require separate analysis because of the expert opinion evidence admitted.

[55] (1982) 150 CLR 580.

[56] [2007] NSWCCA 371 (21 December 2007) ('*Folbigg*'). While there was apparent inculpatory evidence in *Folbigg* in the form of diary entries, a recent book by Emma Cunliffe, *Murder, Medicine and Motherhood* (Hart, 2011) concludes that Folbigg was wrongly convicted as a result of the expert opinion evidence admitted at her trial. Also, Cunliffe challenges the view that the diary entries constituted admissions that established tendency.

[57] (1915) 11 Cr App 229 ('*Smith*'). It is certainly arguable that there was a strong degree of connection between the defendant and the three deaths of his wives. However, unlike Fact Situation 3, there were no eyewitnesses and no admissions by the defendant. Had the jury been told 'that it had to consider the question of causation … individually in each case, Smith would no doubt have been acquitted' (Redmayne, above n 8, 197).

[58] [2009] EWCA Crim 2697 ('*Norris*').

[59] (1989) 86 ALR 1.

[60] [1952] 2 QB 911 ('*Straffen*'). *Straffen* straddles Fact Situations 2 and 3 since the accused admitted to other similar murders but it was not possible to independently connect him with the charges in question.

[61] (1995) 182 CLR 461. *Pfennig* straddles Fact Situations 1 and 3 — although there was no body and no cause of death, and the possibility that the 12-year-old victim had drowned at a nature reserve, the prosecution successfully adduced evidence of Pfennig's conviction for the abduction and sexual assault of another young boy in a white Kombi van, similar to the van seen at the nature reserve.

[62] (1996) 87 A Crim R 446.

Where the prosecution seeks to adduce similar fact evidence in a murder trial, the trial judge faces the most difficulty when the evidence is adduced to prove not only that a criminal act has occurred (murder versus natural death) but also that the defendant (and not someone else) committed the act causing death since, as stated previously, the coincidences between the events are explained by reference to the defendant's tendency.[63] Such a case is defined as Fact Situation 1, and as Table 1 shows, *Makin* is a case all on its own, able to be distinguished from other similar fact murder cases because there was no cause of death and there was insufficient evidence to identify the alleged victim.

As discussed above, in order to use the similar fact evidence in Fact Situation 1, it is necessary to assume criminal conduct because there is a lack of relevant evidence to prove the actus reus. If similar fact evidence is to be admitted to determine 'whether the acts alleged ... were designed or accidental',[64] its admission assumes there has been sufficient evidence to prove the victim's identity and that there were identifiable acts causing death, as in Fact Situations 2 and 3. Where similar fact evidence is adduced to prove identity and/or the actus reus, it appears that a more stringent relevance test is required because of the dangers of heuristic and circular reasoning to fill in gaps in evidence — something that the Privy Council's statement of principle in *Makin* did not contemplate.

In Fact Situation 2, there is an identified victim and a cause of death but no proof that the defendant caused the death so that previous similar deaths associated with the defendant are adduced in order to prove one or more counts of murder or attempted murder, with the defendant being the only common feature in the similar events. In *Perry*, discussed in Part VI, evidence of previous deaths loosely associated with the defendant was adduced to prove one count of attempted murder, while in *Smith*, *Folbigg* and *Norris*, the defendants were each tried in joint trials involving multiple counts of murder.

Fact Situation 2 involves what Redmayne refers to as the 'sequential approach'.[65] In a joint trial of murder charges (A and B), this means proof of the defendant's commission of murder A is used to prove his/her commission of murder B. However, analysis of what amounts to proof of murder A is required because it is an approach that also invites heuristic and circular reasoning — where there is insufficient proof of the defendant's commission of murder A, that count is inevitably flavoured by the existence of the other count and proof might be determined merely by reference to the defendant having been charged with murder B (the heuristic cue). A direction to the jury that it must consider each count separately may be something that is impossible for the average layperson to follow without being consciously or unconsciously influenced by the other murder count(s).[66]

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63 Ligertwood and Edmond, above n 7, 178.

64 *Makin* [1894] AC 57, 65 (Lord Herschell).

65 Redmayne, above n 8, 187, quoting Rosemary Pattenden, 'Similar Fact Evidence and Proof of Identity' (1996) 112 *Law Quarterly Review* 446, 447.

66 See Victorian Law Reform Commission, *Jury Directions: Final Report 17*, Report No 17 (2009) for the documented difficulties that juries have understanding jury directions.

Mirfield gives the useful example of a simple shoplifting case in which a defendant was accused of placing a packet of bacon in his shopping basket then hiding it in his bag before leaving a store. The propensity evidence adduced in the case came from a store detective who had witnessed a previous occasion in which the defendant had placed bacon in his shopping basket. Although the detective did not see the bacon in the basket later on, there was *no* evidence the defendant had not paid for it. The prosecution adduced the detective's evidence to show that the defendant had a particular modus operandi when it came to the question of disappearing packets of bacon. Yet, as Mirfield, observes:

> the procuring of the bacon and its [placement] in the basket were … entirely innocent. They bore a different complexion if, as it was being invited to do, the jury concluded that the bacon had, on the earlier occasion, left the store without being paid for. In other words, apparently innocent features of a person's conduct properly came to be regarded as guilty ones in the light of other, guilty features.[67]

The jury was invited to assume guilt on the previous occasion *because* the defendant was up on a charge of shoplifting. But because that was a fact up for proof in the trial, the use of the previous bacon occasion necessarily involved circular reasoning — because there was no act of shoplifting witnessed by the store detective the jury had to *assume* shoplifting in the previous case (based on the present charge for shoplifting) which then allowed the store detective's evidence to be relevant to the charge of shoplifting.[68]

The reasoning used in *Makin* was similar to the shoplifting case. The jury was invited to assume it was too much of a coincidence for one family to have lived in four different houses where dead babies were found (the heuristic cue), and to assume the Makins must have been responsible for all their deaths. The simplicity of the reasoning is akin to coin tossing: that the chance of a baby being buried in a backyard *and* dying naturally was the same for all other babies — low.[69] The jury was not informed that they could not take as a point of similarity that all the babies had been murdered by the Makins since whether the Makins had committed the actus reus causing the death of Baby D was a fact up for proof.

The influence of *Makin* can still be seen in *Norris*. Redmayne recognises that causation had to be considered separately in relation to each elderly person's death.[70] Yet expert evidence about the rarity of several deaths from hypoglycaemia in one area had been admitted, suggesting the heuristic cue that it was impossible for five elderly patients to die in close proximity from hypoglycaemia from natural causes. This gives rise to heuristic reasoning similar to that in *Makin*, which leads to the conclusion that all elderly patients of the defendant who died of hypoglycaemia were killed by the defendant.

The 'continuing attraction' of the Privy Council's decision in *Makin* is that it has been used by trial judges 'to rebut a defence which would otherwise be open

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67 Mirfield, above n 22, 86.
68 Ibid 88.
69 See also Acorn, above n 20, 80.
70 Redmayne, above n 8, 196.

to the accused'.[71] But as Innes J predicted in the Makins' first appeal, the Privy Council's decision has 'allow[ed] judges to admit or exclude [similar fact] evidence almost as they wish'.[72] Had it been known that the Privy Council's reasoning in *Makin* was based on legal fictions (that the Makins had been convicted of the death of the wrong child and that a defence of accidental death was not open to them) and that this illusory defence and the second limb of the *Makin* principle filled in the gaps in the evidence, trial judges might have been more circumspect about applying the principle and more probing about the relevance of similar fact evidence. While it may be that the continuing attraction of *Makin* also lies in its ability to focus lawyers on the relevance of a defendant's other criminal misconduct, the creation of illusory exceptions to an exclusionary rule, so as to justify the relevance of the supposed similar fact evidence in *Makin*, undermines the fair trial principle.

Several decades after *Makin*, Lord Goddard CJ noted that in a circumstantial case of murder:

> [b]efore [the defendant] can be convicted, the fact of death should be proved by such circumstances as [to] render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.[73]

This observation describes the type of cases that fall into Fact Situation 3 in Table 1, that is, cases in which there is some circumstantial evidence to prove the defendant's commission of the actus reus without resort to evidence of the defendant's other criminal misconduct. In such a situation, relevant similar fact evidence can then be admitted to remove any reasonable doubt the jury may have, as discussed in Part VII.

VI Tighter Controls on Similar Fact Evidence

Because the Privy Council's statement of principle does not envisage ways to prevent unfairness to the defendant, many judges and academics have agreed that tighter controls, other than relevance, for the admissibility of a defendant's other criminal misconduct are necessary. While there is a need for 'articulable guidelines' to determine when the probative value of such evidence outweighs its prejudicial effect,[74] it is necessary to recognise that relevance is not a scientific standard and involves subjective judgments that will vary depending on the facts of the case and the facts in issue at trial.[75]

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71 Mirfield, above n 22, 84, quoting *Straffen* [1952] 2 QB 911 (Slade J).

72 Mirfield, above n 22, 88.

73 *R v Onufrejczyk* [1955] 1 QB 388, 394. This requirement was later echoed in Australia under the *Pfennig* test, discussed below.

74 Arenson, above n 17, 270.

75 See Annie Cossins, 'The Behaviour of Serial Child Sex Offenders: Implications for the Prosecution of Child Sex Offences in Joint Trials' (2011) 35 *Melbourne University Law Review* 821 and cases cited therein.

While many subsequent cases have placed restrictions on the admission of similar fact evidence in a criminal trial, these tighter controls have been insufficient to exclude such evidence in cases where there is either no cause of death, or no proof of the defendant's commission of the actus reus. Nor have they prevented the use of circular reasoning in some of the cases listed in Table 1, such as *Perry* and *Thompson*, discussed below.

The House of Lords subsequently expanded the scope of the decision in *Makin* by holding that similar fact evidence was not confined to the categories set out by the Privy Council,[76] that is, to disprove accidental death, or to rebut any other defence raised by the accused. Although a number of other such categories had been developed in the wake of *Makin*,[77] this was an 'artificially mechanistic approach' to admissibility[78] and reflected the limits of what the principle in *Makin* was crafted to achieve, that is, to find a basis for the admission of evidence that had no direct relevance to the actus reus.

But it is *Boardman*,[79] described as 'by far the most important decision on similar fact evidence' since *Makin*,[80] which represented a clear attempt to articulate restrictions on the admission of similar fact evidence beyond mere relevance and to preserve the presumption of innocence. *Boardman* diminished the influence of *Makin* because it did not 'erect a false distinction between *kinds* of relevance but rather balances *degrees* of relevance and disproportionate prejudice'.[81] This was evident in Lord Wilberforce's judgment, which offered guidance for assessing the relevance of similar fact evidence and its prejudicial effect:

> [b]oth these elements involve questions of degree. It falls to the judge … to estimate the respective and relative weight of [probative value and prejudicial effect] and only allow the evidence to be put before the jury if satisfied that the … interests of justice clearly required that the evidence be admitted.[82]

Lord Herschell's statement of relevance in *Makin* was implicitly rejected by Lords Wilberforce and Cross since both identified the need for similar fact evidence to have sufficiently high probative value to outweigh its prejudicial effect to the accused.[83] These two criteria still determine the admissibility of similar fact evidence in 'a majority of common law jurisdictions'[84] including England, Wales and Australia, although there has been debate about their applicability under recent

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76 *Harris v DPP* [1952] AC 694, 705 (Viscount Simon).

77 *R v Ball* [1911] AC 47; *Thomson v The King* [1918] AC 221; *Smith* (1915) 11 Cr App 229.

78 Acorn, above n 20, 64.

79 [1975] AC 421.

80 L H Hoffman, 'Similar Facts after *Boardman*' (1975) 91 *Law Quarterly Review* 193; see also *R v Kilbourne* [1973] AC 729.

81 Simon Evans, 'Similar (?) Facts — *DPP v P* [1991] 3 WLR 161' (1992) 14 *Sydney Law Review* 111, 113 (emphasis in original); see also Acorn, above n 20, 64.

82 *Boardman* [1975] AC 421, 442, 456–7 (Lord Cross, who took a similar approach). Only two of the judges in *Boardman* (Lords Cross and Wilberforce) considered that a strong degree of probative force was necessary for similar fact or propensity evidence to be admissible, the reasoning that the Australian High Court in *Pfennig* adopted 20 years later.

83 Ibid 442 (Lord Wilberforce), 456–7 (Lord Cross). Lords Morris (at 438), Hailsham (at 453) and Salmon (at 461) cited Lord Herschell's statement with approval.

84 Scottish Law Commission, above n 25, [6.19].

statutory formulations: UEA s 101(2) in Australia and CJA ss 101 and 103 in the United Kingdom, discussed below.

Nonetheless, courts continued 'to view *Makin* as the cornerstone of the law of similar fact evidence after *Boardman*'[85] because *Boardman* did not entirely discard the Privy Council's (arguably flawed) reasoning in *Makin*. In *Boardman*, a case involving allegations of sexual abuse by three adolescent boys against their male teacher, Lord Wilberforce recognised that the reasoning to be engaged in when admitting and using similar fact evidence was coincidence reasoning which was derived from the striking similarities of the events in question:

> [t]his [strong degree of] probative force is derived ... from the circumstances [in] that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence.[86]

Lord Salmon also considered that this high degree of probative force was to be measured by reference to striking similarities: 'The similarity [in the evidence] would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence.'[87]

As an apparent tighter control for admissibility, the striking similarities test was adopted in countless subsequent cases in Australia and England and Wales.[88] This formulation appeared to provide a higher standard of relevance, particularly in relation to allegations of sexual abuse where concoction was considered to be an issue (although the *Makin* approach was still used from time to time).[89] If satisfied, the 'striking similarities' test increases the probability that the defendant committed the acts complained of. Nonetheless, questions of degree have resulted in a patchwork of decisions in which similar fact evidence has been held to be admissible or not, as the case may be. Differences in reasoning are not necessarily explicable on any grounds other than judicial subjectivity; that is, different perceptions of the *degree* of similarities necessary which is, in essence, a subjective evaluation.[90]

A higher relevance standard is also necessary where identification is in issue because the similar fact evidence is adduced to prove that the actus reus was committed by the defendant and not someone else. Nonetheless, the striking similarities standard has been considered too restrictive in fact situations where identity is not in issue. In *DPP v P*, Lord Mackay held that striking similarities were not required for the cross-admissibility of the two complainants' evidence on the counts of incestuous rape in a joint trial since restricting admissibility to cases

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85 Acorn, above n 20, 64.
86 [1975] AC 421, 444.
87 Ibid 461; see also 441 (Lord Morris).
88 See, eg, *Harris v DPP* [1952] AC 694; *DPP v P* [1991] 2 AC 447; *R v Roy* [1992] Crim LR 185; *R v Scarrott* [1978] QB 1016; *R v Wilmot* (1988) 89 Cr App R 341; *Pfennig* (1995) 182 CLR 461; *Phillips v The Queen* (2006) 225 CLR 303 ('*Phillips*').
89 Mirfield, above n 22, 102–3.
90 See Cossins, above n 75 and cases cited therein.

where there were 'striking similarities' could not be 'justified in principle'.[91] His Lordship (with whom the other Law Lords agreed) adjusted the relevance standard by proposing that the probative force of the similar fact evidence should be 'sufficiently great to make it just to admit the evidence, notwithstanding it is prejudicial to the accused in tending to show that he was guilty of another crime'.[92] In cases such as *DPP v P*, where judges have decided that the similarities in the similar fact evidence do not need to be striking or arise from unusual or unique circumstances, judges have 'necessarily lowered the standard for admissibility',[93] although they may be more likely to do so when identity is not contested. Where identity is in issue, Lord Mackay observed that 'obviously something in the nature of ... a signature or other special feature will be necessary'.[94]

Nonetheless, Lord Mackay's statement in *DPP v P* provides no better solution for determining the relevance of similar fact evidence: when will it be *just* to admit this type of evidence? Such a formulation leaves it to the trial judge to make a judgment on a case-by-case basis, leaving us in the realm of the 'loose application' of common sense predicted by Innes J 120 years ago[95] and much closer to the relevance standard in *Makin*. Although judicial experience will be important in relation to relevance assessments, recent case law has acknowledged the subjectivity involved.[96]

One hundred and twenty years after the decision in *Makin*, the enactment of s 101(1)(d) of the CJA 'lowered the standard even further',[97] returning to relevance as the only criterion of admissibility and overturning previous views that the admission of similar fact evidence was exceptional.[98] Evidence that would probably not have been admitted under *Boardman* or even under *DPP v P* is now likely to be admissible under s 101(1)(d),[99] since no higher standard of relevance is

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91 [1991] 2 AC 447.

92 Ibid 460. The decision in *DPP v P* was affirmed in *R v H* [1995] 2 AC 596. The prejudice referred to is the jury's misuse of the evidence in reasoning towards guilt.

93 Keane and McKeown, above n 13, 489; see also Hamer, above n 52, 183. Redmayne notes that 'in practice, the move to a different test of admissibility in *P*. has probably made little difference': M Redmayne, 'The Relevance of Bad Character' (2002) *Cambridge Law Journal* 684, 712, fn 88.

94 *DPP v P* [1991] 1 AC 447, 462 (Lord Mackay).

95 *Makin* (1893) 14 LR (NSW) 1, 36.

96 As Lord Mackay observed in *DPP v P* [1991] 2 AC 447, 463, the issues of relevance, sufficient probative force and whether it is just to admit the evidence are all 'matters of degree'. In *Dao* [2011] NSWCCA 63 [98] (1 April 2011), Allsop P acknowledged that '[t]he question of probative value is a question of relevance' which is a 'judgment or evaluation'. Although applied according to a legal standard, this is clearly not a scientific standard but a subjective standard based on judicial experience.

97 Keane and McKeown, above n 13, 489.

98 *Boardman* [1975] AC 421, 444 (Lord Wilberforce).

99 As noted, this type of evidence is now defined as 'bad character evidence' and its admissibility in criminal trials is governed by *CJA 2003* (UK) c 1 ss 98–113. Section 99 abolished the pre-2003 common law rules. The Act is designed to be inclusionary, compared to the common law, with relevant bad character evidence admissible unless the judge exercises a discretion to exclude. Under ss 98 and 112(1), 'misconduct' means 'the commission of an offence or other reprehensible conduct', which can be proved by way of prior convictions or evidence of charged or uncharged offences. Under s 101(1), bad character evidence may be admissible under seven different 'gateways', potentially allowing a defendant's similar convictions to be revealed in every type of criminal trial (Tapper, above n 16, 538). Once admitted, bad character evidence 'can be used ... to

required.[100] The only criteria — that the evidence must be relevant to an important matter in issue between the defendant and the prosecution — is similar to the Privy Council's reasoning in *Makin*. As a result of reforms under the CJA, such evidence may be admitted even if it is consistent with an innocent explanation.

Since the original Law Commission safeguards for admitting prior criminal misconduct of an accused have 'either been abandoned or diluted by the Act',[101] s 101(1)(d) has been described as a 'markedly ... less sophisticated' approach compared to the common law[102] as it ignores the potential for similar fact evidence 'to distort the morality of the criminal trial'[103] and reduce the standard of proof.[104] Unlike Australian evidence law, there is no requirement that:

(i) the probative value of the bad character evidence substantially outweigh its prejudicial effect (UEA s 101(2)); or

(ii) there be no rational view of the evidence consistent with the innocence of the accused (*Pfennig*) before it is admissible.

Palmer considers that judges:

> 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'; and then go on to consider the amount of probative value possessed by the evidence.[105]

That is no doubt true in relation to the approach of the High Court of Australia. Rather than weakening the relevance standard, as in England and Wales under the CJA, the opposite has been the case in Australia. Not only has the High Court insisted that similar fact evidence demonstrate striking similarities with the charges in question before it can be admitted,[106] a majority of the High Court in *Pfennig* went one step further. Their Honours enunciated an additional test for admissibility based on assessing probative value against prejudicial effect.[107] Representing a higher standard of relevance, this strict test states that similar fact evidence should not be admitted in a criminal trial if 'there is a rational view of the evidence that is *inconsistent* with the guilt of the accused'.[108] Only if there is *no* such rational view

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decide *any* of the issues in the case, regardless of the gateway issue to which it is related' (Tandy, above n 51, 204 (emphasis in original)).

100 See Tapper, above n 16, 536–8 and S Parsons, 'The Criminal Justice Act 2003 — Do the Bad Character Provisions Represent a Move Towards an Authoritarian Model of Criminal Justice?' in *Mountbatten Yearbook of Legal Studies* (Southhampton Solent University, 2007) 181 for the rationale for the reforms under the CJA.

101 Tapper, above n 16, 541.

102 Keane and McKeown, above n 13, 477.

103 Evans, above n 81, 119.

104 Parsons, above n 100, 195.

105 Andrew Palmer, 'The Scope of the Similar Fact Rule' (1994) 16 *Adelaide Law Review* 167 (citations omitted).

106 *Pfennig* (1995) 182 CLR 461. Recently the striking similarities test was re-affirmed in *Phillips* (2006) 225 CLR 303.

107 *Pfennig* (1995) 182 CLR 461, 482–3 (Mason CJ, Deane and Dawson JJ).

108 Ibid 533 (McHugh J). This test represents an even more restrictive approach. Cf *Boardman* [1975] AC 421 and *DPP v P* [1991] 2 AC 447, discussed below. It was first enunciated in *Sutton* (1984) 152 CLR 528, 564 (Dawson J) and subsequently adopted by a majority of the High Court in *Hoch v*

'can one safely conclude that the probative force of the evidence outweighs its prejudicial effect'.[109] Because the test does not require a judge to balance probative force against prejudicial effect, all discretion to exclude the evidence is removed. In other words, there is nothing to balance if there is no rational view[110] with the test assuming that the prejudice from similar fact evidence is inevitable.

By preventing the exercise of judicial discretion,[111] the *Pfennig* test is 'an excessively strict standard for the admission of "similar fact evidence"'[112] and has been described as 'very favourable to the interests of the accused and very restrictive of the prosecution's capacity to use similar fact evidence'.[113] So much so, it 'has proved to be unpopular with legislatures', with several abolishing the test[114] while the Supreme Court of Canada described the *Pfennig* test as 'tak[ing] the trial judge's "gatekeeper" function too far into the domain of the [jury]'.[115]

Because of the need to assess whether there *is* a rational view consistent with the accused's innocence, the probative value of the evidence must be assessed together with any other evidence adduced by the prosecution,[116] all of which requires higher order, systematic processing. This means that:

> if it first be assumed that all the other evidence in the case left the jury with a reasonable doubt about the guilt of the accused, the propensity evidence must be such that, when it is considered along with the other evidence, there will then be no reasonable view that is consistent with the innocence of the accused. That is, the propensity evidence must be such that, when it is added to the other evidence, it would eliminate any reasonable doubt which might be left by the other evidence.[117]

VII What a High or Low Relevance Standard Cannot Cure

This comparative overview of the different relevance controls over similar fact evidence in Australia, England and Wales invites the question: does the relevance standard first enunciated in *Makin*, and re-introduced as a looser control over the

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The Queen (1988) 165 CLR 292, 296 (Mason CJ, Wilson and Gaudron JJ) and in *Pfennig* (1995) 182 CLR 461, 482–3 (Mason CJ, Deane and Dawson JJ).

109 *Pfennig* (1995) 182 CLR 461, 482–3 (Mason CJ, Deane and Dawson JJ). The 'no rational view of the evidence' principle has a long history: *Martin v Osborne* (1936) 55 CLR 367, 375 (Dixon J); *Perry* (1982) 150 CLR 580, 596 (Murphy J); *Hoch* (1988) 165 CLR 292, 296, where Mason CJ, Wilson and Gaudron JJ expressed agreement with the remarks of Dawson J in *Sutton* (1984) 152 CLR 528, 564. See also *Harriman v The Queen* (1989) 167 CLR 590, 602 (Dawson J), 614 (Gaudron J), 506 (Toohey J). The *Pfennig* test was recently re-affirmed at common law in *Phillips* (2006) 225 CLR 303 and *Roach v The Queen* (2011) 242 CLR 610, 622 [35] (French CJ, Hayne, Crennan and Kiefel JJ) ('*Roach*').

110 See *R v Ellis* [2003] NSWCCA 319 (5 November 2003) (Spigelman CJ) [94]–[95].

111 *Roach* (2011) 242 CLR 610, 622 [35] (French CJ, Hayne, Crennan and Kiefel JJ).

112 Arenson, above n 17, 271–2.

113 *Roach* (2011) 242 CLR 610, 630 [64] (Heydon J).

114 Ibid 627 [56] (Heydon JA).

115 *R v Handy* [2002] 2 SCR 908 [97] (Binnie J).

116 *R v Joiner* [2002] NSWCCA 354 (28 August 2002) [37] (Hodgson JA) (with whom Simpson J and Smart AJA agreed); *R v WRC* [2002] NSWCCA 210 (7 June 2002) [25]–[29] (Hodgson JA) ('*WRC*').

117 *WRC* [2002] NSWCCA 210 (7 June 2002) [27]–[29] (Hodgson JA).

admission of bad character evidence under the CJA, matter that much in practice? Do the stricter controls in Australia ensure a higher standard for protecting an accused from prejudicial evidence? To many, loose or strict controls do matter in terms of defendants receiving a fair trial.[118] Others have assumed that 'where there is a legally relevant basis' for the admission of similar fact evidence under the more stringent *Pfennig* test, 'a jury, properly directed, will not employ forbidden reasoning'.[119] This article argues, however, that neither a loose *nor* a tight relevance connection between similar fact evidence and the charges in question will prevent wrongful convictions based on circular or heuristic reasoning. This means that I take a different approach to academics such as Redmayne who, while concluding that there is no distinction between propensity and coincidence reasoning,[120] did not investigate the dangers inherent in the reasoning processes involved in propensity/coincidence reasoning, nor the dangers associated with propensity reasoning when the defendant's conduct is a fact up for proof in the trial.

The risk of circular reasoning arises because the use of similar fact evidence requires inferential reasoning; that is, it raises:

> the *objective improbability* of some event having occurred other than that asserted by the prosecution … [by] establish[ing] a step in the proof of the prosecution case, namely, that it is to be *inferred* [from the evidence] … that the accused is guilty of the offence charged.[121]

Similar fact evidence is particularly dangerous when adduced to establish the identity of the offender since it may do no more than prove 'that the same person committed [the] offences' without showing that that person was the defendant.[122] Although identity was not considered to be a fact in issue in *Makin*, the similar fact evidence only proved that 12 babies had been found buried in a similar fashion and in a similar locality (a previous residence of the Makins) but it did not prove who, out of Sarah and John, had killed the babies. The evidence was being asked to prove much more than it was capable of proving because the similar facts only went to show that the same person committed various illegal burials, but not that either defendant had caused the infants' deaths. There was no independent evidence 'to make the jury sure that on at least one offence the defendant was that man'.[123]

It may be that similar fact evidence is more likely to invite circular reasoning because of the type of conduct a defendant is accused of, such as baby-killing, poisoning or sexual assault. In these cases, 'the jury may decide that it does not really matter whether or not the accused committed the acts charged' because, via circular reasoning, the jury decides the accused has 'committed other acts

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118 See, eg, Redmayne, above n 8; Tapper, above n 16; Parsons, above n 100.

119 *HML v The Queen* (2008) 235 CLR 334, 493 [488] (Kiefel J); see also Redmayne, above n 93.

120 Redmayne, above n 8, 197.

121 *Pfennig* (1995) 182 CLR 461, 484 [62] (Mason CJ, Deane and Dawson JJ) (emphasis added).

122 Keane and McKeown, above n 13, 492.

123 *R v McGranaghan* [1995] 1 Cr App R 559, 572 (Glidewell LJ). See, for example, the instructions given to the jury in *Norris* [2009] EWCA Crim 2697.

worthy of punishment'.[124] Thus, circular reasoning necessarily involves propensity reasoning because the jury assumes the defendant is guilty in relation to the similar fact evidence,[125] thereby concluding that if the defendant has done it before, he or she probably did it this time. Terms such as 'striking similarities' or an 'underlying unity' capture the idea that past criminal misconduct must have a higher degree of, or exceptional, relevance to the facts in issue in a criminal trial. However, these formulations cannot prevent juries from engaging in heuristic or circular reasoning since they do not investigate the effect of gaps in the evidence on creating juror confusion and reliance on heuristic cues.

To illustrate this, let us look more closely at the impermissible reasoning that has been used in cases that fall into Fact Situations 1 and 2 in Table 1. These two fact situations were distinguished on the grounds that there was no cause of death in Fact Situation 1, as illustrated by *Makin*. In Fact Situation 2, the identified cause of death could not be directly linked to the defendant, as illustrated by *Perry* and *Norris*. As a result, in both Fact Situations 1 and 2, there are no similarities between the defendant's supposed prior misconduct and the misconduct the subject of the charges and no probative value of the similar fact evidence *without* making certain assumptions. Fact Situations 1 and 2 are distinguished from Fact Situation 3 where there is some evidence of the commission of the actus reus by the defendant which allows the relevance of the similar fact evidence to be argued on the grounds of either striking similarities[126] — because it is just to admit the evidence[127] — or because the evidence is logically 'relevant to an important matter in issue between the defendant and prosecution'[128] and is 'sufficiently similar'.[129]

If each of the deaths in the cases listed in Fact Situations 1 and 2 are considered in isolation, arguably there is insufficient evidence to prove beyond reasonable doubt that the defendant committed the act causing death.[130] The most useful example for illustrating these issues is *Perry*, in which the prosecution relied on the 'cumulative effect' of evidence relating to three poisoning deaths in Mrs Perry's family *and* the charge of attempted murder by arsenic of her husband to argue that:

> the only rational explanation for the deaths of Haag [her former husband] and Montgomerie [her brother], the sickness of Duncan [her de facto husband] and the poisoning of [Mr] Perry is that the applicant deliberately poisoned all of them with arsenic.[131]

Writing 20 years ago, Murphy J was disturbed by the unsatisfactory nature of 'the supposed rigid division between the prohibited use of previous criminality to show

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124 Palmer, above n 105, 171.
125 Hoffman, above n 80, 199.
126 *Boardman* [1975] AC 21; *Pfennig* (1995) 182 CLR 461; UEA ss 97, 98.
127 *DPP v P* [1991] 2 AC 447; *Evidence Act 1906* (WA) s 31A.
128 CJA s 101(1)(d).
129 *Norris* [2009] EWCA 2697 [81].
130 The one exception might be the death of Mrs Hall in *Norris* [2009] EWCA Crim 2697, since there was, possibly, sufficient circumstantial evidence to prove that Norris had injected her with insulin while he was on duty at the hospital in which she died.
131 *Perry* (1982) 150 CLR 580, 591 (Murphy J).

propensity and its use to establish a chain of coincidences so remarkable that it excludes the accused's innocence'.[132]

If Mr Perry's arsenic poisoning is considered in isolation, there was 'an obvious explanation consistent with [Mrs Perry's] innocence — the abundance of arsenic in [Mr Perry's] work environment and his evidence that he unwittingly exposed himself to arsenic in the course of his work'.[133] While Murphy J acknowledged that 'proof of guilt by association' with other deaths was 'theoretically acceptable' through coincidence reasoning, he considered this was 'an extremely dangerous method of determining criminal guilt', because, like the *Makin* case, there was 'a very great temptation [when] weighing the evidence ... to ignore the presumption of innocence and to replace it with a presumption of guilt'.[134]

The allegation that 'a number of the accused's relatives died or suffered from arsenic poisoning immediately conjures up a highly suspicious prejudicial atmosphere in which the presumption of innocence tends to be replaced with a presumption of guilt'.[135] As well, the criminal standard of proof is 'subtly undermined from the outset by reference to a sequence of events which according to common human experience would not occur unless the accused were guilty'.[136] At the core of the reasoning process in a case like *Perry* (where there was no evidence that Mrs Perry had administered poison to any of her relatives or her husband) are heuristic cues that divert individuals from systematic processing of all the evidence and from realising that there was a lack of evidence to prove the actus reus:

> It is very easy to assume that in common experience a person is hardly ever associated with poisonings of four close relatives, and that if such an association occurs it is so remarkable that it is unlikely to be innocent. Common assumptions about improbability of sequences are often wrong.[137]

This leads to the second danger identified by Murphy J — assessing relevance via circular reasoning. According to the prosecution's theory, the assumption that Mrs Perry's former de facto husband Duncan was poisoned 'depended on acceptance that Haag, Montgomerie and [Mr] Perry were poisoned' by Mrs Perry, 'but the proof of these poisonings depended on the acceptance that she poisoned Duncan'.[138] Whether or not Mrs Perry had poisoned Mr Perry was a fact up for proof in the trial.

The use of circular reasoning and the relaxation of the presumption of innocence leads to another danger: improper prejudice.[139] In a criminal trial, an accused is only required to defend the charges against him or her, but in a case where similar fact evidence is adduced, the accused is made to answer 'for a good

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132 Ibid 592.
133 Ibid.
134 Ibid 593–4.
135 Ibid 594.
136 Ibid.
137 Ibid.
138 Ibid 595.
139 Ibid.

part of [his or] her life'; in *Perry* this may have occurred because of the heuristic belief that 'poison is the murder weapon of choice for women', meaning that Mrs Perry was 'in effect ... tried on charges of murder of Haag and Montgomerie, and ... Duncan' as well as the charges concerning Mr Perry.[140] The same may be said of the Makins, who were, effectively, on trial for the deaths of all the babies found in their previous houses.

The cumulative effect of the similar fact evidence was damning for Mrs Perry. So much so, it obscured other rational explanations for the deaths of each of her relatives. Mr Duncan, who suffered severe depression, 'held himself responsible for the death of his best friend in a car accident; lost his job through alcoholism; was refused a war pension and was bankrupt'.[141] His immediate cause of death was barbiturate poisoning and possible arsenic poisoning, although this was later refuted by a pathologist's report. Crucially, there was no evidence of Mrs Perry's administration of either arsenic or barbiturates.

Was there a rational explanation for the deaths of Haag and Montgomerie? Montgomerie, had a long history of illness, chronic alcoholism and self-destructive behaviour, had spent time in mental hospitals and suffered from delirium, depression and outbursts of extreme violence. He had previously attempted suicide by taking ant poison and was in a state of severe depression after his wife left him. His body was found with an empty wine bottle containing an arsenic compound. There was no evidence of Mrs Perry's administration of arsenic.

Finally, there was evidence that Mrs Perry's ex-husband, Haag, had used arsenic weed-killer on the weekend of his death with no evidence that he had been progressively poisoned with arsenic given the low arsenic concentrations in his hair, which were within normal limits. Haag's use of arsenic weed-killer *just before* he died amounted to an alternative, rational explanation that was consistent with the innocence of Mrs Perry.

The detailed facts in *Perry* reveal the need for a robust test or set of criteria for assessing relevance based on the degree of connection between a defendant and the similar fact evidence, in order to break the chain of assumptions or heuristic cues which underpin circular reasoning. The supposed similarities in similar fact evidence can be far too easily manipulated through heuristic assumptions, such as the belief that the murder weapon of choice for women is poison, or that it is impossible for a person to be coincidentally associated with four poisonings, beliefs that increase the strength of the connection between a defendant and the similar fact evidence.

Another problem with similar fact evidence is that it will be asked to do different things in different cases. For example, in *Makin* and *Perry*, the similar fact evidence constituted almost all of the evidence on which the prosecution built its case that the murder, or attempted murder, had been committed by the accused. This was possible because of the heuristic belief that:

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140 Ibid.
141 Ibid.

> [i]n some cases the frequency with which a particular set of circumstances has occurred may, having regard to ordinary human experience, make it unreasonable to suppose that they have occurred other than by design. *Makin* ... and *R v Smith* ... (the case of the brides in the bath) are cases of this kind.[142]

The admissibility of similar fact evidence in Fact Situations 1 and 2 is only possible using 'experience of life' heuristic cues compared to systematic processing which recognises that similarities require actual evidence of an accused's commission of previous crimes[143] (such as convictions, eyewitness testimony or forensic evidence). In Fact Situations 1 and 2, relevance cannot be founded on propensity reasoning because the similar fact evidence is not capable of proving the defendant has a propensity to act in a particular (criminal) way. Thus, coincidence reasoning must be relied upon. But coincidence or probability theory can markedly confuse the relevance issue, since the likelihood of a family being associated with the burial of 13 babies in their previous houses, or of a nurse being associated with the deaths of five elderly patients (*Norris*), or of a woman being associated with the poisoning of four close relatives (*Perry*) is not able to be measured. Without undertaking empirical research, these probabilities are unknowable and sometimes such research will be impossible to implement.

In order to test whether circular reasoning is involved in the relevance inquiry, it is necessary to ask: (i) what *actual* act or conduct by the defendant does the similar fact evidence reveal? If no conduct is revealed, then (ii) does the evidence invite, via heuristic cues, the assumption that all the people with whom the defendant is associated and who died in a particular way were murdered by the defendant? If the defendant is merely associated with similar, apparently criminal events and no particular type of conduct by the defendant is revealed, then heuristic assumptions and circular reasoning are likely to fill in the gaps.

Hamer notes that various commentators 'disagree as to whether *Makin* involved coincidence reasoning or propensity reasoning',[144] even though in Fact Situations 1 and 2 propensity reasoning is not possible. Yet it is inevitable that juries will make a propensity inference in cases like *Perry* and *Makin* since coincidence evidence relies 'on explaining the coincidences between events *by [reference to] the perpetrator's tendency*':[145] that is, the assumed similarities in his/her prior and present conduct. In asking the above question in relation to the disputed evidence in *Makin* and *Perry*, it revealed no act or conduct on the part of the Makins or Mrs Perry. By contrast, in *Smith*, the similar fact evidence revealed various acts by Smith: his recent marriages to each wife before their deaths, his financial gain from each wife's death and his explanation that each death was due to epileptic fits, all of which permitted coincidence reasoning. But as Lord Reading CJ also recognised,[146] coincidence reasoning necessarily involved an assumption that Smith had a tendency to drown his wives.

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142 Ibid 587 (Gibbs CJ).
143 *Sutton* (1984) 152 CLR 528, 565 (Dawson J).
144 Hamer, above n 52, 161.
145 Ligertwood and Edmond, above n 7, 178 (emphasis added).
146 *Smith* (1915) 11 Cr App 229, 233.

In Fact Situation 3, however, both propensity and coincidence reasoning may be employed. For example, in *Thompson*, the defendant was convicted of the murder of two sisters by gunshot wounds to the head.[147] The bodies of the sisters were found in a burned-out motor car which had collided with a tree. Thompson explained that he was dazzled by the lights of an oncoming car, his car struck a tree and burst into flames. While he managed to escape, he was unable to save the two sisters who burned to death. The car crash was only investigated after Thompson, a few years later, was convicted of the murders of the eldest sister, her de facto husband and their two children who were all shot in the head with a .22 calibre rifle. Their house was then set alight, using petrol. After examining the exhumed bodies of the two younger sisters, a forensic medical officer testified that a hole in the skull of one sister was caused by a .22 calibre bullet 'fired at very close range'. Because of the 'absence of carbon particles and soot deposits' in her trachea and lungs, her death had probably occurred before incineration. Severe head fractures in the other sister's skull or a firearm injury were likely to have caused her death. Another expert witness found petroleum residues on the body and burned clothes of the sisters. Eyewitness evidence supported the Crown case that Thompson's car had been deliberately set alight.

In *Thompson*, there was a clear cause of death for each of the two sisters and the four other people murdered by Thompson. The Crown was able to identify several similarities between Thompson's later criminal misconduct and the events giving rise to the two sisters' deaths, including that:

(i) the six victims were from the same family;

(ii) five of the six victims died from gunshots, while the sixth may have died in that fashion;

(iii) these five victims were shot with a similar calibre rifle;

(iv) five victims were shot through the head, with the sixth also sustaining head wounds;

(v) attempts had been made to destroy evidence by fire;

(vi) in both instances the fire had been started with petrol;

(vii) the accused was present at each set of killings and was the last person to see the victims alive.[148]

The differences between *Perry*, *Makin* and *Thompson* could not be clearer in relation to the relevance inquiry and the task the similar fact evidence in each case was asked to do. In *Makin* and *Perry*, it was being used to provide a cause of death (murder by unknown means and murder by poisoning, respectively, using circular reasoning) while in Thompson it was being used to remove a reasonable doubt that the two sisters had died as a result of incineration after a car crash.

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147 The following facts are taken from *Thompson* (1989) 169 CLR 1, 4–6 (Mason CJ and Dawson J).

148 Ibid 7–8 (Mason CJ and Dawson J).

VIII Solutions: Recommendations for Reform

Because of the fundamental problems with the relevance inquiry in Fact Situations 1 and 2, the importance of preserving the presumption of innocence and preventing wrongful convictions, it is necessary to consider recommendations for reform. First, evidence of a defendant's other criminal misconduct should not be admitted in murder trials where there is no cause of death *and* no proof of the defendant's commission of the actus reus (Fact Situation 1). This is to prevent the similar fact evidence being used to fill in the evidentiary gaps via heuristic reasoning, as demonstrated in relation to *Makin.*

Second, in murder cases where there *is* a cause of death but one that cannot be connected to the defendant unless similar fact evidence is admitted and there is no proof of the defendant's commission of the actus reus (Fact Situation 2), other criminal misconduct only acquires relevance if there is sufficient circumstantial evidence (such as unequivocal evidence of the defendant's motive and opportunity to commit the act causing death) to prevent circular reasoning based on heuristic assumptions, as per *Perry*. It will help to ask the following question: what *actual* act or conduct does the supposed similar fact evidence reveal? If no particular type of conduct on the part of the defendant is revealed, then there is a risk that heuristic reasoning will be used to fill in the evidentiary gaps, particularly in the atmosphere of guilt created when the charges in question are used to interpret former conduct, such as a murder by poison charge which recasts previous family deaths involving poison.

Finally, relevant similar fact evidence can be admitted in murder trials where there is a cause of death and some proof of the commission of the actus reus by the defendant (Fact Situation 3). This would ensure that the similar fact evidence only fulfils the role of removing a reasonable doubt in the minds of the jury, as per *Thompson*.

Clearly the *Pfennig*-type inquiry also has a role to play in the above three categories, since other rational explanations are important to the relevance inquiry. While the *Pfennig* (no rational view of the evidence) test can prevent the admission of similar fact evidence where there *is* an explanation consistent with the defendant's innocence, this safeguard will be insufficient where there is no proof of the defendant's commission of the actus reus and no alternative, rational explanation. In other words, the test cannot prevent the inference that, ipso facto, the only other possible explanation is murder.

IX Conclusion

This article has concentrated on the first but, arguably, most difficult step in determining the admissibility of a defendant's other criminal misconduct (or similar fact evidence) in murder trials: relevance. Although the Privy Council's statement of principle in *Makin* is the common starting point for this relevance inquiry, strong criticisms have been made about its inadequacies. Yet for several

decades, it remained the 'cornerstone of the law of similar fact evidence'[149] and led to the development of categories of exceptions whereby similar fact evidence could be admitted despite prejudice to the defendant.

Nonetheless, there are other, more important reasons for saying that 'the case is dead ... and cannot be resurrected for further use'.[150] Not only is the statement of principle in *Makin* internally inconsistent, it has been given far too much weight and consequence with little interrogation of the facts of the *Makin* case, the legal fictions on which it was based, and the gaps in the evidence that the principle was crafted to overcome.

Seen in this factual context, the Privy Council's principle as to when a defendant's other criminal misconduct will be relevant is nonsensical, since the principle was created to bridge a gap in the evidence by proposing an illusory defence that applied to the death of the wrong child and invited propensity reasoning via heuristic reasoning by the jury. By contrast, the use of systematic processing and alternative explanations shows that the prosecution had failed to prove the Makins' commission of the actus reus beyond reasonable doubt.

This background formed the foundation for categorising murder trials involving similar fact evidence as set out in Table 1. In light of these three categories, this article discussed the more onerous relevance tests that developed throughout the 20th century in England, Wales and Australia in response to *Makin*. It also discussed England's and Wales' return to a lower standard of relevance for admitting bad character evidence under the CJA: a standard similar to that in *Makin*. But neither a high nor a low relevance standard deals with the problems associated with heuristic processing in relation to the cases falling within Fact Situations 1 and 2. Where there is no cause of death (Fact Situation 1), or a cause of death that cannot be connected to the defendant *without* the admission of his or her other criminal misconduct (Fact Situation 2), it is not possible to identify any propensity on the part of a defendant *without* engaging in heuristic assumptions and circular reasoning.

When it comes to controversial similar fact evidence, relevance is the key gateway that guards against wrongful convictions, but it will have shaky foundations if the relevance standard is based on heuristic reasoning. Even with the imposition of a higher relevance standard, via striking similarities, a defendant is still vulnerable to the matters identified by Murphy J in *Perry* when similar fact evidence is admitted:

(i) the creation of a highly prejudicial atmosphere;
(ii) replacement of the presumption of innocence with a presumption of guilt;
(iii) erosion of the beyond reasonable doubt standard in order to render the similar fact evidence relevant;
(iv) common, heuristic assumptions about improbability sequences; and
(v) circular reasoning.

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149 Acorn, above n 20, 64.
150 Mirfield, above n 22, 98.

In order to address these problems, this article made three recommendations for reform and concluded that similar fact evidence should only be admitted in murder trials where there is a cause of death and some proof of the commission of the actus reus by the defendant (Fact Situation 3). This recommendation means that similar fact evidence would be inadmissible where there is no cause of death *and* no proof of the defendant's commission of the actus reus (Fact Situation 1) and where there is a cause of death but insufficient other evidence to prevent circular reasoning based on heuristic assumptions. These recommendations would ensure protection of the fair trial principle in a way that the relevance inquiry, on its own, cannot.