SUPREME COURT OF QUEENSLAND

CITATION:	*R v McNeish* [2019] QCA 191
PARTIES:	**R** **v** **McNEISH, Zaine Steven** (appellant)
FILE NO/S:	CA No 197 of 2018 DC No 262 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 22 June 2018 (Lynham DCJ)
DELIVERED ON:	17 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2019
JUDGES:	Sofronoff P and McMurdo JA and Henry J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION – CONTROL OF PROCEEDINGS – SEPARATE TRIALS AND ELECTIONS – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – JOINDER OF COUNTS AND DEFENDANTS – JOINT TRIAL – where the appellant was convicted at trial of 22 counts of sexual offending against children including maintaining sexual relationships, rape and indecent treatment – where the complainants were three young sisters aged between two and 10 during the period of offending – where the appellant lived next door to the sisters and befriended the girls and their family – where the counts concerning the younger two sisters involved the appellant maintaining a sexual relationship with each, committing penetrative acts on each, and at times procuring both to perform penetrative acts on the other – where the counts concerning the eldest sister involved the appellant touching her vagina outside her underpants – where the appellant accepts that the evidence relating to the counts concerning the younger two sisters was cross-admissible – where the appellant applied at first instance for a separate trial of the counts concerning the eldest sister on the ground that the evidence in her case was not admissible in the cases concerning the younger sisters – where the pre-trial hearing judge at first instance refused the application for a separate

trial – whether the counts involving the eldest sister formed part of a series of offences of the same or similar character as those involving the younger two sisters – whether there were sufficient similarities between the offences against the eldest sister and those against the younger two sisters as to make them admissible in the proof of the other – whether the pre-trial hearing judge erred in refusing the application for a separate trial of the counts concerning the eldest sister

HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, applied
Hughes v The Queen (2017) 263 CLR 338; [2017] HCA 20, applied
IMM v The Queen (2016) 257 CLR 300; [2016] HCA 14, cited
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, explained
Phillips v The Queen (2006) 225 CLR 303; [2006] HCA 4, distinguished
R v Bauer (2018) 92 ALJR 846; [2018] HCA 40, explained
R v Ford (2009) 201 A Crim R 451; [2009] NSWCCA 306, cited
R v PWD (2010) 205 A Crim R 75; [2010] NSWCCA 209, cited
R v Straffen [1952] 2 QB 911, cited
Sutton v The Queen (1984) 152 CLR 528; [1984] HCA 5, explained
Velkoski v The Queen (2014) 45 VR 680; [2014] VSCA 121, disapproved

COUNSEL: J Trevino for the appellant
N W Crane for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P AND HENRY J:** The appellant was convicted on 22 counts that alleged sexual offending against three young sisters, L, M and E.[1] He appeals on the ground that there should have been a separate trial of the counts involving E.[2]

[2] L was aged between four and 10 during the period of offending. The appellant was charged with one count of maintaining a sexual relationship with her, four counts of rape, and six counts of indecent treatment. The jury convicted the appellant on all of these counts except for three counts of rape and two counts of indecent treatment upon which they were unable to agree.

[3] M was aged between two and seven years of age during the period of offending. The appellant was charged with one count of maintaining a sexual relationship with her, five counts of rape and nine counts of indecent treatment. He was convicted on the maintaining count, on three of the rape counts and on all but one of the counts of

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1 He was also acquitted on eight counts but nothing turns upon those acquittals.

2 A second ground about misdirections is merely another way of putting the argument about cross-admissibility and need not be considered separately. The remaining grounds were abandoned.

indecent treatment. The jury was unable to agree on the counts upon which they did not return a guilty verdict.

[4] E was the oldest of the three sisters. She was aged between seven and ten during the period of offending. The appellant was charged with three counts of indecent treatment of her and the jury found him guilty on all three counts.

[5] The three sisters lived with their parents in a small town in North Queensland. In the middle of 2009 the appellant came to live in the house next door to theirs. He was then 20 years of age and lived with his mother and siblings. He soon befriended the girls and began spending time with them and with their family. He came to involve himself with the girls' family to the extent of helping to cook meals, mowing grass and taking on other family chores. He occasionally stayed at the family house overnight from time to time. He would babysit the girls and they would frequently spend time with him in his own home. For a period, he lived with the family. Finally, he came to be regarded as part of the family.

[6] In late 2012 M told members of staff at her school that the appellant had kissed her on the lips and had touched her "rude" parts. The sisters were interviewed by police on three occasions in October and December 2012. M repeated her allegation but otherwise the girls made no other disclosures. M later told her mother that her allegation was untrue and that police had told her to say it. The girls were then placed into foster care.

[7] Then, in April 2015, E told her foster mother that the appellant had touched her "privates". On the following morning, the foster mother spoke to all three girls together. L told her that the appellant had inserted a dildo into her vagina. M told her that the appellant had put his private part into her private part. In late April police interviewed the girls again.

[8] The following is a summary of the girls' evidence at the trial.

[9] On multiple occasions the appellant raped L by inserting either his finger or his penis into her vagina. He also told her to rub her vagina with a vibrating device, with her hand or fingers. He told her to insert a vibrating device into her vagina. He would kiss her on the mouth. On some occasions he told her to insert her fingers into M's vagina or he would tell M to insert her fingers into L's vagina. On some occasions, L was present when the appellant inserted his finger into M's vagina or used a vibrator to touch M's vagina. L gave evidence of an occasion when the appellant made her watch a pornographic video.

[10] M said that the appellant began touching her "rude parts" when she was three or four years old. He repeated his assaults many times at her home and also in his own home. He put his penis into M's vagina a couple of times. He would touch her vagina with a vibrating device, which he called "the toy", and would insert it into her vagina regularly. Often this happened in the presence of M's sister L. M was present on occasions when the appellant told L to use the vibrating device. The appellant slept in her bed and, on these occasions, he would touch her on the vagina and bottom.

[11] He lay behind her and rubbed her vagina over her clothing many times. She recalled two specific occasions when he did this. On one of these occasions, the appellant lay behind M on her bed and touched her inside her pants but outside her underpants on the vagina. She told him to stop but he carried on. Eventually she

pulled his hand away and left the room. On the other specific occasion, the appellant touched her vagina on the outside of her clothing and followed by rubbing a vibrating device on her vagina. M also recalled an occasion on which the appellant showed her a pornographic video.

[12] E was the oldest of the three sisters. She gave evidence about three specific events. On one occasion she was lying on her side on a mattress in M's room while watching a movie on a computer screen. The appellant lay on his side behind her. He put his arms around her and put a hand inside her shorts but over her underwear on her vagina. He continued to touch her until she stood up and left the room. The other members of the family were in other rooms of the house at the time. Another incident happened when she and the appellant were alone in E's home. As she lay on her side on the floor, once again watching a movie, the appellant lay behind her and repeated what he had done on the previous occasion. On the third occasion the appellant was babysitting the three girls. E was lying on her bed. Her sisters were in the lounge room watching cartoons. The appellant came into E's room and put his hand up her shorts and touched her vagina over her underwear. He then got up and left.

[13] The appellant applied for a separate trial of the counts concerning E on the ground that the evidence in her case was not admissible in the cases concerning M and L. The appellant accepts that the evidence relating to M and L was cross-admissible. The application was refused. The appellant now submits that the refusal to order separate trials was an error of law.

[14] The substance of the appellant's point is this. E's account was of a much less serious and invasive offending and this meant that any other similarities in the offending concerning the three sisters were not sufficient to raise E's evidence to the level of cogency required for its admissibility. The appellant submitted that the difference in offending in E's case, touching her vagina outside her underwear on three occasions, and L's and M's cases, penile, digital and instrumental rape on frequent occasions and exposure to pornography, meant that:

> "[i]t cannot be said that any underlying unity existed as between the offending against [E] and the offending against the other two complainants that would bear no reasonable explanation other than the inculpation of the appellant in the offences against [L and M]."

[15] The offending against E, it was submitted, was "consistent with the appellant being prepared to indecently touch an older child on the outside of her underwear but not being prepared to take the conduct further than that".

[16] These submissions are contrary to authority and must be rejected.

[17] Consideration of the applicable principles begins with *Pfennig v The Queen*.[3] Pfennig was convicted of the murder of a 10 year old boy, Michael Black, who was last seen at Sturt Reserve, on the banks of the Murray River in Noarlunga in South Australia, at about 2.25 pm on 18 January 1989. His bicycle, fishing rod, bag and thongs were found neatly stacked at nearby Thiele Reserve. His shirt was found in willows on the bank of the river. A piece of twine was found tied to a tree stump. Possibly it had been used to restrain Michael's dog which had accompanied him

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3 (1995) 182 CLR 461.

that day. The river and surrounding land were searched extensively. The search continued for three years. No trace of Michael was ever found.

[18] The Crown had to prove two things. First, that somebody had murdered Michael. Second, that Pfennig was the murderer. The Crown case was that there were only two possible explanations for Michael's disappearance. Either Michael had drowned or he had been abducted and murdered by somebody. The Crown led evidence from which the jury could conclude that Michael had not drowned. It followed that he had been murdered. If the jury accepted that Michael had been murdered, the Crown invited the jury to conclude that the appellant was the killer. It was evidence about identity that was in issue in the High Court.

[19] It was common ground that Pfennig had left his home on 17 January 1989 in his white Kombi-van and had driven to Sturt Reserve. The appellant gave evidence. He admitted that he had seen Michael and had spoken with him at Sturt Reserve on the day of his disappearance. He said that Michael was fishing and that he had lent him a knife to deal with a fish that Michael had caught. They discussed bait and hook size. Later Michael returned the knife to the appellant in his van. Pfennig said that he told Michael to "put it in the back of the van". Soon afterwards, he said, he drove alone into town.

[20] A witness said that on 17 January Pfennig had asked him whether there was a place nearby where he could go nude swimming. The witness gave him directions to Thiele Reserve. Late on the afternoon of that day Pfennig spoke to two children who were swimming in the river at Sturt Reserve. He asked them if they knew of any interesting places to visit. He invited them into his van to accompany him. They declined his invitation.

[21] On 18 January a witness at the Reserve saw a Kombi-van of the same colour as Pfennig's leaving the area "at an unsafe speed". Another witness heard a vehicle with a loud engine at about the same time. It was spinning its wheels in gravel and the witness also heard a dog barking in an excited manner. Yet another witness saw a Kombi-van near the place where Michael's property was later found.

[22] On 30 December 1989, that is to say, later in the same year as Michael's disappearance, Pfennig lured a 13 year old boy riding his bicycle, referred to as "H" in the proceedings, into his van and then abducted him. Pfennig bound, gagged and blindfolded his victim and held him prisoner in his van and later at his house where he committed sexual offences against him. The boy escaped. Pfennig was arrested and charged. After his arrest his wife asked why he had done it. Pfennig said that he was lonely and that he was thinking of "it" on and off for the previous 12 months. He said that he had driven around, found somebody and threw "them" into the van. Pfennig pleaded guilty to charges of abduction and rape of H.

[23] Afterwards, Pfennig was charged with the murder of Michael Black. The trial judge admitted the evidence of Pfennig's offences against H. His Honour directed the jury that if they found that Michael had been murdered by somebody, then it would be open for them to take into account the evidence concerning H in deciding whether Pfennig had murdered Michael.

[24] On appeal to the High Court, Mason CJ, Deane and Dawson JJ held that the evidence concerning Pfennig's offences against H was admissible for the reasons given by the trial judge. The Crown case pointed to an abduction by someone for sexual purposes. That required the presence in the area of a person with the

requisite disposition and who was equipped with the means of effecting an abduction. The appellant was in the area at the relevant time and the evidence of his later offences proved that he had the requisite disposition. He also had a van that was not only suitable but which he had actually used for just that purpose. There was, in addition, evidence that he had spoken to Michael on two occasions, had patted his dog, had lent him his knife and had told him to put it into the van. On the previous day he had asked two children to enter his van. His wife's evidence that Pfennig said that he had felt lonely and that he had been thinking of "it" for the past 12 months and had, for those reasons, driven around and picked upon somebody and thrown that person into his van, was also relevant. The reference to "it" must have been a reference to the abduction of a boy for sexual purposes. The reference to the 12 month period extended to the day on which Michael had disappeared. The evidence of the later offences proved that the appellant was willing to put his fantasies about "it" into action. This evidence was therefore relevant to prove the identity of Michael's killer.

[25] As Slade J had said in *R v Straffen*,[4] as long ago as 1952, abnormal propensity can be a means of identification.

[26] Their Honours emphasised that, to be admissible for that purpose such evidence had to possess a high degree of cogency to overcome its prejudicial effect.[5] In this context, "prejudicial effect" refers to the possible adverse effect that such evidence might have upon a jury beyond its true probative force.[6] The necessary cogency was found in the unity between the later offences, carried out for sexual purposes involving a boy, and the charged offences, which involved the same purposes and the same kind of victim. If the Crown had been able to prove directly that somebody had abducted Michael for sexual purposes by being inveigled into entering a van, there would have been a "striking similarity" between the evidence about H's abduction and the charged offence. However, "striking similarity" is not a necessary condition for admissibility. Despite the evidence "falling short of that level of precision",[7] other evidence gave it the required cogency. This included Pfennig's presence at the scene with his van, his contact with Michael, the evidence of the behaviour of the van, and the absence of any evidence of anyone else with a vehicle who could have committed the offences.[8]

[27] In these circumstances, the fact that the evidence about the other offending did not involve murder while the present offence did involve murder, might weaken the propensity evidence because it was equivocal on the issue of murder, but that did not render it inadmissible. Nor did it matter that the acts the subject of propensity evidence took place after the charged offences.[9]

[28] *Pfennig* was, therefore, a circumstantial case of murder and the evidence of the accused's propensity was tendered to raise the inference that the accused was the murderer. The issue to which the evidence of propensity was directed was identity.

[29] The relationship between the contested evidence and the issue to which it is directed may take many forms and the relationship cannot be confined to "striking

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4 [1952] 2 QB 911, at 916-917.
5 *ibid*, at 487.
6 *ibid*, at 486-487.
7 *ibid*, at 489.
8 *ibid*, at 489.
9 *ibid*, at 490.

similarity".[10] It would also be a mistake to draw up a closed list of the sorts of cases in which the principle operates. Labels and definitive descriptions, while useful, are neither comprehensive nor restrictive.[11]

[30] In such cases, this kind of evidence may be led for a number of purposes, including, but not limited, to these:[12]

1. To remove the implausibility that might otherwise be attributed to the complainant's account of the offence if the offending were thought to be an isolated incident;[13] (sometimes called "relationship evidence").

2. To demonstrate the sexual attraction felt by the accused so as to show a motive to commit the offence; ("motivation evidence" and sometimes also called "relationship evidence").

3. To demonstrate that the accused not only had a motive to commit the offence but that he was a person who was prepared to act on his motivation to commit the charged offence because he had committed similar offences against the complainant or others previously. (sometimes called "tendency" or "propensity" evidence)

4. To identify the offender, as in *Pfennig* itself.

[31] The first three categories are cases in which the evidence is led to supplement other evidence that an offence has been committed by the accused. The fourth category involves cases in which the fact that an offence has been committed is proved by other evidence and the disputed evidence is tendered to identify the accused as the offender. To these categories, one can add a fifth category for completeness. As in *Makin v Attorney-General for New South Wales*,[14] sometimes similar factual evidence is led as circumstantial evidence that an offence has been committed and that the accused is the offender. It is not necessary to consider the fourth and fifth categories further in this appeal.

[32] Sometimes, evidence of this kind is called propensity evidence. Sometimes it is called similar fact evidence. Legal jargon may be useful as shorthand to convey a complicated idea in a single word or phrase but it is essential not to permit jargon to obscure principle.

[33] The first of these purposes might be thought to be associated with the complainant's credibility. However, evidence cannot be led by a party merely to bolster the credit of a witness called by the party unless certain preconditions have been satisfied.[15] The reason such evidence is admitted is that an allegation by a child only about an isolated sexual assault by an adult is not the same as an allegation about an assault that is just one instance of a longer series of assaults or that is an assault that has been committed after the adult has, by some other conduct, evidenced a sexual desire for the child. Such evidence is admitted because the interests of justice

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10 *Director of Public Prosecutions v P* [1991] 2 AC 447, at 460 per Lord Mackay of Clashfern LC.

11 per Lord Morris in *R v Boardman* [1975] AC 421, at 439.

12 *Leonard v The Queen* (2006) 67 NSWLR 545, at [49] per Hodgson JA, cited with approval by Heydon J in *HML v The Queen* (2008) 235 CLR 334, at [273].

13 see for example the description of such a case by Gleeson CJ in *HML*, *supra*, at [6]; see also *R v Nieterink* (1999) 76 SASR 56, at [43].

14 [1894] AC 57.

15 *Palmer v The Queen* (1998) 193 CLR 1, at [49] per McHugh J.

require that the jury be able to understand the Crown case by seeing the case in its true factual context and not within an unrealistically truncated form. If such evidence were to be excluded, the jury would be denied the real factual basis upon which to understand aspects of the case that the complainant's and the accused's actual history might explain, such as the existence in the appellant of peculiar sexual urges that are not shared by most of the population, the possible reasons for a complainant's particular reactions or lack of reactions, the explanation for a complainant's failure or delay in complaining or for an offender's apparent risk taking and brazenness in offending. The evidence is relevant simply because, if it is believed, the facts proved by that evidence render the commission of the charged offence more probable.

[34] The second of these possible purposes is no different in principle from any case in which the prosecution leads evidence of motive as a circumstance to strengthen its case. Motive has always been relevant as a circumstance to make a fact in issue more probable. Motive is usually constituted by facts that prove an accused's disposition to commit a particular crime, such as the murder of a spouse.[16] In cases involving sexual offences against children a more accurate term than "motive" might be "urge" or "desire". Many motives in circumstantial cases are really constituted by emotional urges rather than by well-considered reasons, whether the motive is greed or lust or something else of that kind. Sexual offending against children may be the product of an offender's lust for a particular child or it may be the result of a lust for children generally.

[35] The third of these purposes is to render the commission of the offence more probable because the evidence of uncharged acts shows not only that the accused has the particular sexual urges but that he is prepared to satisfy them by action.[17]

[36] Whatever might be the purpose of leading the evidence, before it is admitted it must satisfy the "Pfennig test". Because evidence of uncharged acts is circumstantial evidence, it is not surprising that the test is expressed in terms that are so similar to the test for the admission of circumstantial evidence generally.[18] As Hayne J said in *HML v The Queen*,[19] a relevant question to be asked when applying the test is whether there is a rational view of the evidence that is consistent with the innocence of the accused.

[37] When the Pfennig test is applied to evidence that the accused has committed uncharged sexual offences against a single complainant, the test will usually, if not invariably, be satisfied because there can be no rational explanation for the accused's uncharged acts, which for this purpose the judge must assume the jury will accept happened, other than guilt.[20] In short, their tendency as proof, if accepted, is unequivocal. That is why, as McHugh J pointed out in *Pfennig,* "day after day in the criminal courts" evidence of propensity is led to prove other acts between the accused and the complainant.[21]

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16 see eg. *Plomp v The Queen* (1963) 110 CLR 234, at 243 per Dixon CJ.
17 *cf. R v Bauer* (2018) 92 ALJR 846, at [59].
18 *Peacock v The King* (1911) 13 CLR 619.
19 *supra*, at [108].
20 *ibid*, at [171].
21 *supra*, at 524.

[38] In *R v Bauer*,[22] a unanimous High Court decided that, in cases decided under the propensity evidence provisions in the *Evidence Act* 2008 (Vic) and its analogues in other States, there is no requirement that there be "some special feature" of the evidence of uncharged acts involving a single complainant. In Queensland, despite the test for admissibility requiring a higher threshold under the applicable common law, the same reasoning applies.[23]

[39] In cases about uncharged acts against persons other than the complainant the position is different. In multiple complainant cases the evidence must have "a really material bearing on the issues to be decided"[24] or have a "sufficient nexus" with the evidence on the charged offence.[25] As the Court put it in *Bauer*, the logic of probability reasoning dictates that there must ordinarily be some feature that links the two sets of evidence together.[26] This is because usually the fact that an accused has committed an offence against A proves nothing about whether the accused committed the same offence against B.

[40] However, in sexual offence cases, it is not necessary that the *particular acts* that constitute the uncharged offences and the particular acts that constitute the charged offence be of the same kind. Evidence of uncharged sexual offences may be relevant and highly cogent even if the acts that constitute those offences are different from the charged offence.

[41] In *Hughes v The Queen*[27] the appellant had been convicted of 11 counts of sexual offences against five underage girls. The complainants were variously aged between six and 15 years at the time of the offences. The acts constituting the offences were also various. They included procuring a girl aged between six and eight to masturbate the appellant, the appellant's indecently rubbing his erect penis against a nine year old girl, his encouraging a 15 year old girl to touch his penis and his indecent exposure to girls aged nine and 12 or 13 years old. The offences also included digital penetration of the vagina of a 14 year old girl. Consequently, the offences were all sexual offences against female children. Otherwise, the acts that constituted the offences ranged from exposure involving no touching to acts of sexual penetration.

[42] *Hughes* was concerned with s 97 of the *Evidence Act* 1995 (NSW), which prescribes a test for the admissibility of tendency evidence different from that which applies under the common law in Queensland.[28] Nevertheless the case is useful in illuminating the applicable logic, which is the same in this present respect under the *Evidence Act* 1977 (Qld) and under the common law.

[43] Until *Hughes*, there had been a conflict between appellate authorities in Victoria and in New South Wales about whether, under similar statutes, the acts constituting the uncharged offences and the charged offence had to be the same or similar in

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22 *supra*, at [48].
23 *cf. Bauer*, *supra*, at [52].
24 *Director of Public Prosecutions v Boardman* [1975] AC 421, at 439 cited with approval by Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ in *Phillips v The Queen* (2006) 225 CLR 303, at [54].
25 *Hoch v The Queen* (1988) 165 CLR 292, at 301 per Brennan and Dawson JJ.
26 *Bauer*, *supra*, at [58].
27 (2017) 263 CLR 338, at [57].
28 *cf. Bauer*, *supra*, at [52].

order for evidence of uncharged acts to be admissible. In *Velkoski v The Queen*,[29] a decision of the Victorian Court of Appeal, the accused had been convicted of numerous offences of committing indecent acts against three complainants, all of whom were aged under 16 years. The children all attended the accused's wife's day-care centre where the appellant exploited his access to them in order to commit the offences. All of the children were of a similar age. Each of counts 3, 4, 5, 6, 8 and 16 involved the appellant either procuring a child to touch or fondle the appellant's own penis, or exposing his penis to a child. The remaining counts did not involve the appellant's own penis. Count 2 charged the appellant with touching a complainant child's penis. Counts 7, 9, 12 and 13 charged him with touching the vagina of a complainant. Counts 10, 11 and 15 charged him with touching the same complainant's bottom. Count 2 charged him with touching another complainant's penis. Stressing that there must be a similarity of "operative features" as an essential requirement to guard against the risk of an unfair trial, the Court held that the evidence on counts 2, 7, 9, 10, 11, 12, 13 and 15 was not admissible in proof of counts 3, 4, 5, 6, 8 and 16 because there were insufficient features of similarity in the offending acts. The Court said that it was necessary to assess whether there was "underlying unity", a "pattern of conduct", "modus operandi" or such similarity as logically and cogently implies that the *particular features of those acts* constituting the uncharged offences rendered the occurrence of the charged act more likely.[30] That approach confined the admissible tendency evidence only to those occasions upon which the accused solicited a child to touch the appellant's penis.

[44] In *Hughes*, the majority[31] rejected this reasoning because it was founded upon a false assumption that, regardless of the fact in issue, the probative value of tendency evidence lies in the degree of similarity of "operative features" of the acts that prove the tendency.[32] The tendency advanced by the Crown was a tendency on the part of the applicant to "act in a particular way" and "with a particular state of mind", namely that the appellant "had a sexual interest in young children attending the day-care centre run by his wife" and "that the [appellant] was willing to act on that sexual interest by engaging in sexual acts with the complainants".[33] The majority held that the approach taken by the Victorian Court of Appeal wrongly denied the tendency evidence its true relative strength because there was no reason to think that the accused was more likely to act on his sexual interest in young children in one particular manner rather than in another. Since the relevant issue to be proved was whether the accused had committed the offence, proof of the tendency identified by the prosecution itself had significant probative value.[34]

[45] The Court approved the approach that had been applied in two cases decided by the Court of Appeal of New South Wales which rejected the need, in cases of this kind, to prove a tendency to show acts that were closely similar to the acts constituting the charged offence.[35]

[46] In *Hughes* itself, the majority regarded an inclination on the part of an adult to engage in sexual conduct with underage girls, coupled with his willingness to act upon that inclination, as itself an unusual disposition according to ordinary human

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29 (2014) 45 VR 680.
30 *ibid*, at [171].
31 Kiefel CJ, Bell, Keane and Edelman JJ.
32 *Hughes*, *supra*, at [37].
33 *Velkoski*, *supra*, at [22].
34 *ibid*, at [38].
35 *R v Ford* (2009) 201 A Crim R 451, at [38]; *R v PWD* (2010) 205 A Crim R 75, at [79].

experience. These unusual sexual interactions with children were pursued by the appellant in circumstances involving a substantial risk of discovery and his "disinhibited disregard of the risk" was itself an unusual feature proved by the evidence. The evidence may not have revealed a strict pattern of conduct because the appellant's acts were opportunistic. However, that did not mean that the evidence was inadmissible.[36] The force of the evidence was that it rendered each complainant's account of misconduct by the appellant less liable to be rejected as unworthy of belief as an isolated incident.[37] Consequently, the differences in the evidence on one count, which involved the appellant encouraging a 15 year old complainant to commit acts of indecency in a park and in a driveway, and the evidence concerning another complainant, which involved intrusive sexual acts in a darkened bedroom, in the complainant's bed and when the complainant was aged six, seven or eight, did not matter. The probative value of the evidence lay in proof of the appellant's tendency to act on the sexual attraction he felt towards underage girls, notwithstanding the risks of discovery. The fact that he acted out his sexual interest in a variety of different ways did not deprive the proof of its significant probative effect.

[47] This logic is equally applicable under the common law. It requires a judge who is considering evidence of uncharged acts against multiple complainants to consider the following.

[48] *First*, what is the factual issue that the Crown seeks to prove by the evidence?[38] In *Hughes* the Crown's statutory notice stated that the Crown intended to prove the following about the accused:[39]

1. To having a sexual interest in female children under 16 years of age;

2. To use of his social and familial relationships with the families to obtain access to female children under 16 years of age so that he could engage in sexual activities with them;

3. To use of his daughter's relationship with female children to obtain access to them so that he could engage in sexual activities with them;

4. To use of his working relationship with females to utilise an opportunity to engage in sexual activities;

5. To engage in sexual conduct with females aged under 16 years of age by either:

   (a) Touching in an inappropriate sexual way and then maintaining that the contact had been inadvertent or accidental;

   (b) By exposing his naked penis/genitalia to them;

   (c) By making a child come into contact with his penis/genitalia;

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36 *Hughes*, *supra*, at [57].

37 *ibid*, at [60].

38 *ibid*, at [16].

39 *ibid*, at [107]; in Queensland there is no requirement for the Crown to deliver a written pleading of that kind; but the use of such a document in every case would serve to concentrate a prosecutor's mind upon the essentials and it would ensure against any misunderstanding by the Crown, the defence and the trial judge when such evidence is tendered and then relied upon. It would be of signal assistance to a trial judge.

(d) By touching a child's vaginal area;

(e) By carrying out sexual acts upon the complainants even when they were within the vicinity of another adult.

[49] As Gageler J has observed, this boiled down to an assertion that Hughes had a tendency to have a sexual interest in girls under 16 years of age and to engage in sexual activities with them using his social, familial or working relationships to obtain access to them.[40]

[50] *Second*, having identified the tendency, it is necessary to decide whether the evidence, if accepted, would prove that tendency.

[51] *Third*, it is necessary to consider whether the evidence of the uncharged acts, if accepted, contains some feature which links the doing of the uncharged acts with the charged offence by reference to a particular issue in the case, whether that is identity, the issue of the commission of the offence or some other issue.[41] That feature may demonstrate a tendency to act in a particular way, proof of which increases the likelihood that the account of the offence under consideration is true.[42] That was the case in *Hughes*, in which proof that the accused was an adult of mature years who had a sexual interest in girls under 16 years of age and a willingness to act upon that interest by committing uncharged sexual offences against such girls opportunistically, in circumstances involving a high risk of detection, tended to make the commission of that particular offence more probable.[43]

[52] *Fourth*, and finally, it is necessary to consider whether the probative force of the evidence, upon the assumption that the jury will accept it, is sufficient to overcome its prejudicial effect. In this context, "prejudicial effect" is constituted by the use of the evidence, by the jury, for an impermissible purpose. It would be impermissible for a jury to use evidence of uncharged acts to reason that, because the accused is a discreditable person, the accused is guilty or is deserving of conviction irrespective of guilt. It would be impermissible for a jury to reason that, because the accused is guilty of one offence then the accused must be guilty of the charged offence. Other cases will present the potential for other kinds of impermissible reasoning. In every case it is the risk of such impermissible reasoning that is the relevant "risk of prejudicial effect" that must be considered against the probative value of the evidence.[44]

[53] The evidence does not have to be so strong that it demonstrates guilt on its own.[45] The evidence must be excluded if there is a reasonable view of it that is consistent with innocence.[46] *Hughes* itself is an example of a case involving multiple complainants in which the tendency was first identified and then related, step by step, to the rest of the Crown case. By way of further example, *Sutton v The Queen*[47] was also a case involving multiple complainants. The appellant was charged with one count of attempted rape and seven counts of rape against three different teenaged complainants.

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40 *ibid*, at [108].
41 *Bauer*, *supra*, at [58].
42 *ibid.*
43 *ibid*, at [59].
44 *cf. Pfennig*, *supra*, at 529-530 per McHugh J.
45 *Phillips*, *supra*, at [63].
46 *ibid*.
47 (1984) 152 CLR 528.

Two of the complainants were teenaged schoolgirls and the third was a young student nurse. In each case the attacker grabbed his victim from behind or from the side as she was walking. In each case he put his hand over her mouth. In each case he threated his victim with death if she screamed. In each case the attacker walked his victim to a nearby place where the offences were committed. Two of the girls identified the appellant as her attacker. The third could not do so but in her case there was evidence of a confession. The features that were common to all offences, and which rendered the evidence cross-admissible, were that all the victims were girls in their teens who lived near the location of the attacks, each was grabbed and silenced in the same way, and each was attacked in a similar kind of location and taken to a similar place, namely a nearby school. However, the physical acts of rape were variously oral, vaginal or anal. The attacker's manner of speech was in each case similar and there was some evidence that he was a smoker. The offences were all committed in August, September and October of the same year. The issue was, of course, identification, as in *Pfennig*, and not whether an offence had been committed at all, as in *Hughes*.

[54] On the other hand, in *Phillips v The Queen*[48] the evidence was held to lack the necessary *nexus*. As it emerged in the course of the appeal, little attention was paid at the trial to the issues to which the contested evidence was directed. Phillips had been charged with six counts of rape against six different women known to him so identification was not in issue. The central issue as to whether the offences had been committed was not the same in every case. For three of the complainants, the issue was consent. In relation to two of these, there was a further issue of the appellant's mistake about consent. For the other three the issue was whether the appellant had done the offending acts at all.

[55] In those cases in which consent was in issue, it was held that proof of the offence depended upon the state of mind of the complainants and not upon the state of mind of the accused. Yet tendency evidence is led to prove the acts or the state of mind of the accused. A lack of consent on the part of one of the complainants could not prove the state of mind of another complainant. Further, it was held that the similarities in the conduct of the appellant that were relied upon by the prosecution were no more than the unremarkable behaviours of a male teenager: seeking sexual activity with girls he knows and who are about his own age, seeking oral sex from such girls and approaching them when they were intoxicated and looking for ways to be alone with them. None of these features could prove a propensity or disposition that could be probative of the commission of the particular offences.[49] In particular, although it is not necessary to show, in order for such evidence to be admitted, striking similarity, unusual features, underlying unity, system, pattern or signature, there must be *some* basis shown to demonstrate sufficient probative value to overcome the prejudicial effect of the evidence.[50] None of the features of the evidence gave it probative value to overcome its prejudice.

[56] Probative force is another way to refer to the weight of evidence. Evidence is relevant if it makes a fact in issue either more or less probable. Weight of evidence, or probative value, is the degree of probability generated by the evidence. Evidence will have a prejudicial effect if there is a risk that the jury might use the evidence against the accused in a logically irrational manner. In *Pfennig*, McHugh J

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48 (2005) 225 CLR 303.

49 *Phillips*, *supra*, at [56].

50 *ibid*, at [58].

remarked that probative value and prejudicial effect are incommensurables.[51] That is to say, they have no common standard of comparison. McHugh J observed that the real question that is posed is not whether probative value "outweighs" prejudicial effect but whether the interests of justice require the evidence to be admitted despite the risk of its misuse. Whether it is called a weighing of probative value against the risk of prejudice to the accused or whether it is called a consideration of the interests of justice, the task remains the same. The need to decide this issue is one of the many familiar, if difficult, tasks that trial judges have to perform by considering relevance to particular identified issues, cogency, the nature of the risk of an impermissible path of reasoning to guilt and whether directions can alleviate or remove such risks. The decision is not a discretionary decision; it is a decision about a matter of law.[52] In fact, few cases have actually been decided on appeal upon the basis that such a judgment has miscarried. Rather, appeals have turned upon errors of principle,[53] or errors in the application of settled principle.[54]

[57] In this case, if the jury accepted E's evidence then it showed:

1. The appellant had formed a relationship with E's family that gave him private access to a very young girl and that access was only available to him because he had become a trusted friend and was treated as a member of the family;

2. E was a pre-pubescent girl;

3. The appellant was sexually attracted to her as such;

4. The appellant was prepared to use the opportunity afforded him by the private access that he had won in order to act upon his sexual proclivities;

5. In exploiting his opportunities, the appellant was prepared to use his position of trust as E's carer to gratify his perverted sexual needs;

6. The appellant felt secure enough in his position of trust in the family and in his relationship with E to offend even when others were present in the home and there was a real risk of discovery.

[58] The predisposition proved by the evidence of E is directly related to the accounts of M and L. The appellant's preparedness to commit the offences against E made it more probable that the appellant had behaved towards them in a similar way and for the same reasons. Their accounts evidenced exactly the same sexual proclivity, the same exploitation of a position of trust and authority and, if it matters at all, the same focus upon the girls' vaginas. The age and gender of the complainants was itself significant. To that feature could be added the fact that, together, the three sisters constituted a single captive pool of pre-pubescent victims, every one of whom the appellant came to exploit sexually. In these circumstances, the fact that the appellant's offending against E did not progress to actual rape does not matter for the same reason that differences in "operative facts"[55] generally do not matter in such cases. The appellant's submission that E's evidence was consistent with preparedness on the appellant's part to go only so far and was, as a consequence,

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51 *Pfennig*, *supra*, at 528.
52 *Pfennig*, *supra*, per McHugh J at 513, 515.
53 *Velkoski*, *supra*.
54 *Phillips*, *supra*.
55 The error in *Velkoski* identified by the High Court in *Hughes*.

consistent with a reasonable hypothesis consistent with innocence, is mistaken. The reference in the cases to evidence being consistent with a reasonable hypothesis consistent with innocence is a reference to tendency evidence that itself is equivocal. That was the point of the decision in *IMM v The Queen*[56] in which the uncharged act of touching was equivocal in its nature. It might have been a sexual act but it might equally have been an act that had no sexual significance at all.[57] E's account on the other hand, if accepted, is utterly inconsistent with innocence. After all, the alleged acts were themselves sexual offences.

[59] The evidence adduced in the case about E was sought to be led in the cases of M and L in order to prove a particular tendency and action by the appellant to give vent to his tendency. The evidence was capable of proving that tendency. The evidence bore a strong relationship to the allegations in M's and L's respective cases. That relationship means that the evidence was sufficiently probative of the facts in those two cases as to justify its admission. Impermissible reasoning to guilt could be guarded against by appropriate directions, which were given.

[60] The significant probative force of the evidence stems from the objective improbability that three pre-pubescent sisters from the same household would, without colluding,[58] each falsely allege that the appellant repeatedly engaged in sexual activity towards them in similar surrounding circumstances. The appellant seeks to avoid this significant probative force by focussing instead upon the differences, particularly in degree, in the specific offending acts.

[61] The appellant's argument is, in effect, that it cannot be said that E's evidence, of having been touched on her vagina outside her underpants on three occasions by the appellant, could permit of no other explanation than guilt. In particular it is argued it could not compel the conclusion that L was telling the truth in complaining of the appellant maintaining a sexual relationship with her for years, committing penetrative acts, including with a vibrator, and at times procuring the mutual participation of M. The same argument may be made in respect of E's evidence vis-a-vis M.

[62] The flaw in the argument is that it misconceives what is meant in the Pfennig test by its reference to there being no reasonable view of the similar fact evidence other than the accused's guilt of the charge or charges it is led in aid of proving. The misconception arises because the probative force of the similar fact evidence is assessed in isolation when its force should actually be assessed in conjunction with the whole of the evidence.

[63] Similar fact evidence (including evidence that demonstrates propensity), will fall for use as circumstantial evidence. It is in the nature of circumstantial evidence that an accused's guilt will not be demonstrated by only one item of circumstantial evidence standing alone. If it were required by the Pfennig test that propensity or similar fact evidence must be capable of demonstrating an accused's guilt on its own, the Pfennig test would never be met.

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56 (2016) 257 CLR 300.

57 *ibid*, at [60], although the case was decided under statute and, consequently, the relevant question was whether the evidence had "significant probative value" rather than whether it was consistent with an innocent explanation, in terms of the Pfennig test.

58 Which is irrelevant to the question of admissibility, both by reason of s 597A of the *Criminal Code* (Qld) and the assumption, to be applied in the present exercise, that the evidence is true.

[64] In *Phillips* the High Court explained that is not what the Pfennig test required, observing:

> "*Pfennig v The Queen* does not require the judge to conclude that the similar fact evidence, standing alone, would demonstrate the guilt of the accused of the offence or offences with which he or she is charged. But it does require the judge to exclude the evidence if, viewed in the context and way just described, there is a reasonable view of the similar fact evidence which is consistent with innocence."[59]

[65] That passage's reference to "viewed in the context and way just described" was a reference to the Court's view that, in determining admissibility, the trial judge must view the similar fact evidence in the context of the prosecution case and assume the similar fact evidence would be accepted as true and that the prosecution case may be accepted by the jury.[60]

[66] The two points made in the above quoted passage, are therefore that:

1. the similar fact evidence standing alone does not have to compel the conclusion the accused is guilty of the charge it is led to prove; but
2. the similar fact evidence must be excluded if, assuming it is true and that the prosecution case may be accepted by the jury, there is a reasonable view of the similar fact evidence, considered in the context of that prosecution case, which is consistent with the accused's innocence of the charge.

[67] Here the similar fact evidence was unequivocal in adding to the overall force of the evidence proving each charge. That is true even of the repetitious sexual offending constituting the offence of maintaining a sexual relationship. In respect of every charge, the evidence about E compellingly increased the probability of the other complaints being true, a probability of which the jury would otherwise have been unaware. The similar fact evidence did not specifically aid in proof of the details of the sex offending but other relevant prosecution evidence did that. If it matters, the kind of acts that E alleged had been done to her were also some of the acts that M alleged he had committed against her.[61] The determinative point is that the significant probative value of the similar fact evidence so enhanced the collective force of the relevant prosecution evidence as to leave no reasonable view of the similar fact evidence consistent with innocence.

[68] Durward SC DCJ, who refused the application to sever the indictment, concluded that, despite the offending alleged by E not being as "gross as that alleged against L and M", the similarities in the offending justified the cross-admissibility of the evidence. His Honour held that the similarities were that the three sets of offending happened while the appellant lived next door to the complainants, the complainants were sisters of a similar age and all three were pre-pubescent. They were all easily accessible to the appellant and under a degree of control by him as part of a "parental environment" of which he was a part. In relation to each of the children, at least one of them was in the room where the offending took place against another, or in the same house or nearby. There was also a congruence of time and place and a similarity in the nature of the offending.

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59 *supra*, at 323-324 [63].
60 *ibid*, at 323 [63].
61 See paragraph [11] above.

[69] We respectfully agree with that summary and with the correctness of his Honour's decision to refuse severance.

[70] For these reasons, the appeal should be dismissed.

[71] **McMURDO JA:** The facts are set out in the judgment of the President and Henry J and I need not repeat them.

[72] The question in this appeal is whether there should have been a trial of the counts involving the complainant E, separately from the counts involving the complaints by her sisters, L and M. Unless the evidence of L and M was admissible on the counts involving E, and vice versa, separate trials should have been ordered: *Hoch v The Queen*;[62] *De Jesus v The Queen*.[63]

[73] In a pre-trial ruling, Durward SC DCJ refused to order a separate trial for the counts involving E because, in his view, there were sufficient similarities between the complaints by the three sisters to provide the evidence of one complainant such a probative force that it should be admitted as similar fact evidence on the counts related to the other complainants.

[74] In Queensland, with one qualification,[64] it is the common law which is applied to determine the admissibility of similar fact evidence. The common law rule of admissibility is that propounded in *Hoch v The Queen* and confirmed in *Pfennig v The Queen*.[65]

[75] The common law rule is stated in *Cross on Evidence* Australian Edition at [21010] as follows:

> "The prosecution may not adduce evidence of the character or of the misconduct of the accused on other occasions (including the possession of discreditable material) if that evidence shows that the accused had a propensity to commit crime, or crime of a particular kind, or was the sort of person likely to have committed the crime charged, unless the evidence is sufficiently highly probative of a fact in issue to outweigh the prejudice it may cause."

[76] The common law rule is one which, subject to certain exceptions, requires the exclusion of evidence, not because it is irrelevant, but because it is likely to be unfairly prejudicial to the accused.[66] In *Pfennig v The Queen*, McHugh J observed that "one of the fundamental theses of the common law has been that on a criminal charge guilt is not to be "inferred from the character and tendencies of the accused"."[67] McHugh J there discussed the many reasons by which this exclusionary rule has been justified, which include the risks that a jury might make too much of evidence of this kind and that it might undermine the presumption of innocence by creating an undue suspicion against an accused.

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62 (1988) 165 CLR 292 at 294; [1988] HCA 50.
63 (1986) 61 ALJR 1; [1986] HCA 65.
64 s 132A of the *Evidence Act* 1977 (Qld).
65 (1995) 182 CLR 461; [1995] HCA 7. See *R v Bauer* (2018) 92 ALJR 846 at 861-2 [52]; [2018] HCA 40 at [52].
66 *Perry v The Queen* (1982) 150 CLR 580 at 585; [1982] HCA 75 per Gibbs CJ.
67 (1995) 182 CLR 461 at 512; [1995] HCA 7, citing *Dawson v The Queen* (1961) 106 CLR 1 at 16; [1961] HCA 74 per Dixon CJ.

[77] In an exceptional case, evidence may be admitted although it is relevant only because it demonstrates a relevant propensity or tendency of the accused to commit a crime of the type with which they are charged.[68] However that was not the way in which, in this case, the prosecution argued to the jury that the evidence was relevant, and the trial judge directed the jury not to use the evidence in that way.

[78] Evidence of discreditable conduct of an accused person, towards someone other than the complainant the subject of the charge,[69] may be relevant in other ways, of which two were discussed in *Hoch v The Queen*, where Mason CJ, Wilson and Gaudron JJ said:[70]

> "Where the happening of the matters said to constitute similar facts is not in dispute and there is evidence to connect the accused person with one or more of the happenings evidence of those similar facts may render it objectively improbable that a person other than the accused committed the act in question, that the relevant act was unintended, or that it occurred innocently or fortuitously. The similar fact evidence is then admissible as evidence relevant to that issue.
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> Where, as here, an accused person disputes the happenings which are said to bear a sufficient similarity to each other as to make evidence on one happening admissible in proof of the others, similar fact evidence bears a different complexion for the issue is whether the acts which are said to be similar occurred at all. In such a case the evidence has variously been said to be relevant to negative innocent association (*R. v. Sims* [1946] K.B. 531) or as corroboration (*Reg. v. Kilbourne* [1973] A.C. 729, at pp. 749, 751 and 758) but the better view would seem to be that it is relevant to prove the commission of the disputed acts: see *Boardman*, per Lord Hailsham at p. 452 and Lord Cross at p. 458; *Sutton*, per Deane J. at pp. 556-557. Certainly that is the thrust of its probative value. *That value lies in the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the happenings occurred*. So much is clear from the well-known passage in the speech of Lord Wilberforce in *Boardman*, at p. 444:
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> > "This probative force is derived, if at all, from the circumstance 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."
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> Similar fact evidence which does not raise a question of improbability lacks the requisite probative value that renders it

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68 *Boardman v DPP* [1975] AC 421 at 456-8 per Lord Cross of Chelsea; *Harriman v The Queen* (1989) 167 CLR 590 at 600-1; [1989] HCA 50 per Dawson J and *Pfennig v The Queen* (1995) 182 CLR 461 at 484; [1995] HCA 7 per Mason CJ, Deane and Dawson JJ.

69 Other discreditable conduct against the same complainant would usually have the necessary high probative value because it is evidence of a sexual interest by the accused in that person upon which the accused was prepared to act: *R v Bauer* (2018) 92 ALJR 846 at 860 [49]; [2018] HCA 40 at [49]; *HML v The Queen* (2008) 235 CLR 334; [2008] HCA 16.

70 (1988) 165 CLR 292 at 295-6; [1988] HCA 50.

> admissible. When the happenings which are said to bear to each other the requisite degree of similarity are themselves in issue the central question is that of the improbability of similar lies: see *Sims*, at p. 540; *Boardman*, at pp. 439 and 459-460. See also Rupert Cross, "*R. v. Sims* in England and the Commonwealth", *Law Quarterly Review*, vol. 75 (1959), p. 333; Piragoff, *Similar Fact Evidence* (1981), pp. 38-47."
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> (Emphasis added, footnotes omitted.)

The first type of case referred to in that passage was subsequently illustrated in *Pfennig*; *Hoch* was a case of the second type, as is the present case.

[79] The different ways in which evidence of the accused's discreditable conduct might be relevant are illustrated by the distinct provisions of s 97 and s 98 of the *Evidence Acts* in most other Australian jurisdictions.[71] In the terms of those provisions, the suggested relevance of the evidence in the present case placed it within the coincidence rule of s 98, rather than the tendency rule of s 97. The High Court has said that this legislation has made substantial changes to the common law rule, resulting in a test of admissibility which is less demanding.[72] Nevertheless these provisions are illustrative. Where evidence is admitted under s 97, this is done to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind. Where evidence is admitted under s 98, this is done to prove that the accused person did a particular act, or had a particular state of mind, on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and circumstances in which they occurred, it is improbable that the events occurred coincidentally.

[80] In the present case, the prosecution argued that they could use the evidence of one complainant in the proof of an alleged offence against another complainant, because of the improbability of what were said to be such similar complaints being made unless they were true. The prosecutor addressed the jury as follows:

> "The final matter I want to talk to you about, ladies and gentlemen, is the similarities in the defendant's conduct towards all three of the … girls. You will be told that you must consider the evidence in relation to each of the 30 charges separately, and that is quite true. But in this case, the evidence of each of the girls here does not stand alone, ladies and gentlemen. … we say that the evidence of each girl is supported by what the other said has happened to them. We say there is such similarity between the acts and the circumstances in which they occur[ed] that it is highly improbabl[e] that the acts occurred by chance.
>
> I should say this, you cannot reason this way. "Well, he's the sort of person who would commit these type of offences," or, "He's a bad person, therefore, yep, he's guilty," nor can you say, "Yeah, look, we're satisfied that he offended against [M], so he must've offended

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71 *Evidence Act* 1995 (Cth); *Evidence Act* 1995 (NSW); *Evidence Act* 2008 (Vic); *Evidence Act* 2001 (Tas); *Evidence Act* 2011 (ACT) and *Evidence (National Uniform Legislation) Act* 2011 (NT).

72 *IMM v The Queen* (2016) 257 CLR 300 at 311 [35]; [2016] HCA 14 at [35]; *Hughes v The Queen* (2017) 263 CLR 338 at 347 [13]; [2017] HCA 20 at [13]; *R v Bauer* (2018) 92 ALJR 846 at 861-2 [52]; [2018] HCA 40 at [52].

> against [L] and [E] as well." That's not how you can use this evidence that I'm talking to you about now.
>
> There is no coincidence here, ladies and gentlemen. These are the similarities. …"

After referring to a number of suggested similarities, the prosecutor continued her address as follows:

> "So all of those similarities, the combined effect of all of those similarities, establish, I submit, an underlying unity to the offending. And then you have to ask yourself this question. What is the objective improbability that one girl would complain of such similar, temporally proximate circumstances of offending against her by the defendant? Put simply, what are the chances of not just two, but three children, three girls, from the same family, making similar complaints about the defendant, unless they actually happened?"

[81] The prosecutor then addressed the jury on the subject of whether the possibility of concoction between the three complainants could be excluded. By s 132A of the *Evidence Act* 1977 (Qld), it was for the jury to consider whether the possibility was excluded. This provision is a modification of the common law, under which similar fact evidence was not admitted for this purpose unless the trial judge considered that the possibility of concoction could be excluded.[73] But that modification of the common law has not affected the degree of probative force which is required for the admission of the evidence.

[82] In the same way, the trial judge, Lynham DCJ, directed the jury about the use which might be made of the evidence of one complainant for the charges involving another complainant, if there was such a similarity between the two complaints that it was "highly improbable that the events simply occurred by chance". His Honour instructed the jury that they could not use the evidence to reason that the appellant was "the sort of person who would commit these sorts of offences, or is of bad character", and if they were satisfied beyond a reasonable doubt that he committed offences against one complainant, they should not reason from that fact that he must have committed the offences related to the other complainants.

[83] Clearly then, the evidence of one complainant was presented to the jury to be used, in relation to other charges, as what might be called coincidence evidence, and not tendency evidence. It was in that way that the evidence was said to have the necessary degree of probative force, according to *Pfennig v The Queen*. The question was not whether, for example, the evidence of E, if accepted, proved that the appellant had a propensity or tendency towards sexual offending against pre-pubescent girls. It was whether the evidence of L and M (or one of them) was so similar to the evidence of E that two persons would not independently come forward with such similar stories, unless they were true.

[84] The potential impact of similar fact evidence must be assessed, not by a consideration of the evidence in isolation, but in the context of the prosecution case as a whole. Only if there is no view of the similar fact evidence which is consistent

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[73] *Hoch v The Queen* at 296 per Mason CJ, Wilson and Gaudron JJ and 302 per Brennan and Dawson JJ.

with the innocence of the accused should it be concluded that the probative force of the evidence outweighs its prejudicial effect and therefore that it is admissible.[74]

[85] What is meant by a consideration of the similar fact evidence *in the context of the prosecution case* was discussed in the joint judgment of the High Court in *Phillips v The Queen*:[75]

> "What is said in *Pfennig v The Queen* about the task of a judge deciding the admissibility of similar fact evidence, and for that purpose comparing the probative effect of the evidence with its prejudicial effect, must be understood in the light of two further considerations. First, due weight must be given to the necessity to view the similar fact evidence in the context of the prosecution case. Secondly, it must be recognised that, as a test of admissibility of evidence, the test is to be applied by the judge on certain assumptions. Thus it must be assumed that the similar fact evidence would be accepted as true and that the prosecution case (as revealed in evidence already given at trial or in the depositions of witnesses later to be called) *may* be accepted by the jury. *Pfennig v The Queen* does not require the judge to conclude that the similar fact evidence, standing alone, would demonstrate the guilt of the accused of the offence or offences with which he or she is charged. But it does require the judge to *exclude* the evidence if, viewed in the context and way just described, there is a reasonable view of the similar fact evidence which is consistent with innocence."
>
> (Emphasis added, footnotes omitted.)

[86] The consideration of the probative force of the evidence must therefore be made on two assumptions, as Hodgson JA explained in *WRC*.[76] Hodgson JA said that the common law test of admissibility was to be applied as follows:[77]

> "In my opinion, what it must mean is 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."

[87] Hodgson JA there considered that it was the test of admissibility according to *Pfennig v The Queen* which had to be applied in the application of the coincidence rule in s 98 of the *Evidence Act* 1995 (NSW). In that respect, in *R v Ellis*,[78] Hodgson JA was held to have been in error; but as Heydon J said *HML v The Queen*,[79] this did not affect "the soundness of his exposition of the common law" in Hodgson JA's

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74 *Pfennig v The Queen* at 482-483 per Mason CJ, Deane and Dawson JJ.
75 (2006) 225 CLR 303 at 323-4 [63]; [2006] HCA 4 at [63].
76 (2002) 130 A Crim R 89; [2002] NSWCCA 210.
77 (2002) 130 A Crim R 89 at 102 [29]; [2002] NSWCCA 210 at [29].
78 (2003) 58 NSWLR 700; [2003] NSWCCA 319.
79 (2008) 235 CLR 334 at 429 [285]; [2008] HCA 16 at [285].

judgment in *WRC*.[80] In the present case therefore, the admissibility of E's evidence, for the counts involving, say, L, had to be determined upon two assumptions. The first was that the jury would believe E's testimony. The second was that, without E's testimony, the evidence would be insufficient to exclude a reasonable doubt on the counts involving L. Were the respective versions of E and L so similar that, absent concoction, each must be telling the truth, so that the addition of E's evidence would dispel a doubt about the counts involving L?[81]

[88] E gave evidence of three occasions where the appellant touched her on the vagina on the outside of her underpants. On two of those occasions, she was lying on a mattress on the floor watching a movie when the appellant placed his hand under her shorts. The other occasion occurred, she said, when she was lying on her bed, and the appellant came into her room and put his hand up her shorts and touched her on the vaginal area over her underwear.

[89] L's evidence was that she was abused over an extended period, both at the appellant's house and her house, during which there were frequent occasions where he raped her by inserting his penis into her vagina, and where he inserted his fingers into, and licked, her vagina. On occasions he inserted a vibrator into her vagina. He made L insert her fingers into M's vagina, and told M to do the same thing to her. L said she was present on occasions when the appellant inserted his penis into M's vagina and used a vibrator on M. As the appellant's argument concedes, there was no basis for severing the counts involving L from those involving M. The argument is that the counts involving E should have been severed.

[90] The question here is not whether the joinder of the counts involving E, and the admission of E's evidence on the other charges, did make a difference to the outcome on those other counts. Nor is it a question of whether the jury's verdicts on the other charges were open on the evidence, with or without E's evidence. It is whether E's evidence was admissible on those counts according to the common law rule. That rule required an assumption that the other evidence, which was admissible in the counts involving L or M, would leave the jury in doubt, but that the jury would accept E's evidence.

[91] On those assumptions, E's evidence would not have dispelled the jury's doubts on the counts involving L or M. Put another way, in the context of the prosecution case on the counts involving L or M, E's evidence was capable of a rational view which was consistent with the innocence of the appellant on those other counts. It was open to the jury to reason that it was one thing to conclude that the appellant had done those things to E, but another to conclude from that that he had engaged in the horrific and sustained abuse of the other girls.

[92] Of course there were similarities between the respective accounts, but the dissimilarities are also relevant to this assessment.[82] In my conclusion, the differences between E's account and the accounts of L and M were such that it could not be concluded that, if E was telling the truth, so must L and M have been doing so. E's evidence lacked the necessary probative force in the proof of the other counts, as

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80 The reasoning of Hodgson JA was approved by Gleeson CJ in *HML* at 359 [27], and by Crennan and Kiefel JJ in *BBH v The Queen* (2012) 245 CLR 499 at 546 [155], 547 [157]; [2012] HCA 9 at [155], [157]; see also *Cross on Evidence* Australian Edition at [21035].

81 And similarly for the evidence of E and M.

82 *R v MAP* [2006] QCA 220 at [45] per Keane JA.

did the evidence of L and M in the proof of the three counts involving E. The evidence was not cross admissible.

[93] I would allow the appeal, set aside the convictions and order the appellant to be re-tried on the counts on the complaint of E, and, in a separate trial, re-tried on the other counts on this indictment.