The influence of propensity evidence on juror decision making

by

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Submitted in partial fulfilment of the requirements for the degree of Doctor of Psychology (Forensic)

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I am the author of the thesis entitled:

*The Influence of Propensity Evidence on Juror Decision Making*

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Table of Contents

Acknowledgments ........................................................................................................ i
Table of Contents ........................................................................................................ ii
List of Tables ............................................................................................................. iv
ABSTRACT ............................................................................................................... vi

CHAPTER ONE. OVERVIEW ................................................................................... 7

CHAPTER TWO. INFLUENTIAL FACTORS ON VERDICT OUTCOME .......... 11
  2.1 Age........................................................................................................ 11
  2.2 Gender .................................................................................................. 15
  2.3 Summary............................................................................................... 21

CHAPTER THREE. PROPENSITY EVIDENCE .................................................... 22
  3.1 A closer look at tendency (or propensity) evidence ............................. 25
  3.2 The probative value of tendency evidence .......................................... 26
  3.3 The prejudicial dangers of tendency evidence ..................................... 27

CHAPTER FOUR. ATTRIBUTION THEORY AND THE IMPACT ON
JURY DECISION-MAKING .................................................................................... 40
  4.1 Attribution theory ................................................................................. 40
  4.2 Summary............................................................................................... 46

CHAPTER FIVE. JUDICIAL INSTRUCTION ....................................................... 47
  5.1 The ineffectiveness of judicial instruction ............................................ 49
  5.2 The effectiveness of judicial instruction............................................... 56
  5.3 Why jurors may not comply with judicial instruction .......................... 59
  5.4 Summary............................................................................................... 72

CHAPTER SIX. CONTEXT FOR CURRENT THESIS .......................................... 74
  6.1 Research Aims and Hypotheses ............................................................ 74

CHAPTER SEVEN. METHOD ................................................................................ 76
  7.1 Design................................................................................................... 76
  7.2 Materials and procedure ................................................................. 77
  7.3 Participants .......................................................................................... 83
  7.4 Analyses................................................................................................. 85
CHAPTER EIGHT. RESULTS. ............................................................................... 87
8.1 Data Preparation ................................................................................... 87
8.2 Verdict ................................................................................................. 88
8.3 Verdict confidence ................................................................................ 94
8.4 Factors influencing participants’ verdicts ............................................. 98
8.5 Perceived evidentiary gaps ................................................................. 100
CHAPTER NINE. FINAL REMARKS. ................................................................. 108
9.1 Finding 1: The admission of propensity evidence did not significantly increase the percentage of guilty verdicts ...................... 109
9.2 Finding 2: The percentage of guilty verdicts decreased as a function of age .................................................................................... 116
9.3 Finding 3: Participants’ gender did not influence the percentage of guilty verdicts ................................................................. 118
9.4 Finding 4: The method of completion was related to verdict outcome .............................................................................................. 121
9.5 Contributions and implications of the current study ......................... 121
9.6 Limitations of the current study and recommendations for future research .......................................................................................... 123
9.7 Conclusion ........................................................................................... 125
References ................................................................................................ 127
APPENDIX A: JUDGE’S IMMEDIATE INSTRUCTION ........................................ 138
APPENDIX B: JUDGE’S END OF TRIAL INSTRUCTION .................................. 139
APPENDIX C: TESTIMONY CONSTITUTING PROPENSITY EVIDENCE .... 140
List of Tables

Table 7.1. The number of participants in each age-gender-propensity condition (N=119). ..................................................81

Table 8.2. The frequencies of guilty and not guilty verdicts for the four propensity conditions (N=121). .................................84

Table 8.3. The frequencies of guilty and not guilty verdicts for female and male participants (N=119). ..................................85

Table 8.4. The frequencies of guilty and not guilty verdicts as a function of participants’ age (N=119). .................................86

Table 8.5. The frequencies of guilty and not guilty decisions for the three age groupings (N=119). .................................86

Table 8.6. The frequencies of guilty and not guilty verdict for the age-gender conditions (N=119). ...................................88

Table 8.7. The frequencies of guilty and not guilty verdicts for the two completion methods (N=121). .................................89

Table 8.8. The number of participants who agreed and disagreed with the statement “I am confident in the verdict I provided” for guilty and not guilty verdicts (N=117). .................................90

Table 8.9. The frequencies of agreement and disagreement with the statement “I feel confident in the verdict I provided” for the four propensity conditions (N=117). .................................91

Table 8.10. The number of females and males who agreed and disagreed with the statement “I am confident in the verdict I provided”
Table 8.11. The number of participants who stated that “I am confident in the verdict I provided” for the three age groups (N=115).

Table 8.12. The number of participants who agreed with the statement “I am confident in the verdict I provided” as a function of the two methods of completion (N=117).

Table 8.13. The number of participants who identified particular factors influencing their verdicts (N=121).

Table 8.14. The number of participants who expressed a desire for additional information regarding the defendant as recorded in each propensity condition (N=116).

Table 8.15. The number of participants who expressed a desire for additional information about the victim as recorded in each propensity condition (N=113).

Table 8.16. The number of participants who expressed a desire for additional information about other witnesses as recorded in each propensity condition (N=109).

Table 8.17. The number of participants who expressed a desire for additional information on each of the five aspects of the trial as recorded by gender.

Table 8.18. The number of participants expressing a desire for additional information regarding the defendant as recorded in each of the three age groupings (N=115).
ABSTRACT

The current thesis was designed primarily to examine the effect of propensity evidence on verdict outcome and whether the gender or age of participants influenced the outcome. If propensity evidence did influence verdict, a consequential objective of the research reported in this thesis was to explore whether judicial instruction could limit or negate the impact of propensity evidence, and if there was an optimal time for the judicial instruction to be delivered. In addition, participants’ perceptions as to what they perceived as evidentiary gaps and their perceptions of the usefulness of propensity evidence in understanding the facts of the case were investigated. Results showed no significant differences in verdict outcome as a function of propensity evidence or as a function of participants’ gender; however, the age of the participant was significantly related to verdict outcome, with older adults more likely to deliver a verdict of not guilty. There were no significant associations in the confidence that participants reported in relation to their verdict. Propensity evidence did, however, interact with participants’ age in expressed desire to receive additional information regarding the defendant and other witnesses. A major limitation of the results of the current thesis was the ceiling effects that occurred, potentially obscuring any effects of propensity evidence and therefore the judge’s instruction. Explanations other than ceiling effects have been canvassed as to why no propensity effects were found. Recommendations have been made for future research to further examine the issue of admitting propensity evidence in the courtroom.
CHAPTER 1. OVERVIEW

Common law has laid the foundation for the Australian legal system and encompasses the fundamental principles of the rule of law and procedural fairness (Banks, 2007). The rule of law pertains to several notions including that every citizen, regardless of status, is bound by legislation and therefore accountable for their actions (Yenken, 2008). When an individual is charged with contravening legislation in a serious manner and enters a plea of not guilty, the individual is required to appear before a court of law and can be tried in front of a judge or jury. In instances where the jury has the task of determining the innocence or guilt of the individual, the role of the judge is to preside over the proceedings and maintain procedural fairness. Procedural fairness refers to the proceedings being conducted in a fair or just manner for all parties involved in the judicial process (Yenken, 2008).

Central to the conduct of proceedings in a courtroom is the legislation regarding the rules of evidence, as these rules govern what material is permitted to be adduced by legal parties (Ligertwood & Edmond, 2010). Over time, some of the rules of evidence are changed and these changes may or may not have unintended consequences for the outcome of cases before the courts. In 2010, the Evidence Act 2008 (Vic) came into effect and stipulated that tendency evidence, which is evidence about the defendant’s past conduct, reputation and offences, cannot be adduced by the prosecution unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.
The rationale for previously excluding propensity evidence was that jurors might engage in what is known as propensity reasoning and conclude that, because the defendant had previously acted in a disreputable manner, it was likely that the defendant had committed the offence for which the defendant was currently on trial. Explanations for propensity reasoning and the way a decision-maker interprets propensity evidence have typically centred on attribution theory, with smaller consideration also given to the fundamental attribution error (McEwan, 2003; Smith, 2005; Tetlock, 1985). In addition to psychological theory and research, the concern underlying the admission of propensity evidence is borne out by the comments of some jurors that, had they known the defendant was previously found guilty of offences similar to the charge contained in the trial, they would not have returned a verdict of not guilty (Thomson, personal communication, 2011).

If jurors are not able to discount or apply the evidence for its intended purpose, and therefore base the ultimate decision on irrelevant or prejudicial material, one consequence is that the defendant is unfairly disadvantaged (Diamond, Casper, & Ostergren, 1989). One approach the judiciary has taken to negate the improper use of propensity evidence in jury trials is to deliver an instruction aiming to limit the juror’s use of such evidence in their decision making. This approach is based on the expectation that jurors are capable of both understanding and applying the pertinent legal rules and the instructions by the judge which serve to govern their verdict (Diamond et al.). However, research findings have demonstrated inadmissible evidence can influence verdict even though jurors have been instructed to ignore this
evidence (Kassin & Sommers, 1997; Kassin & Wrightsman, 1979; Steblay, Hosch, Culhane, & McWethy, 2006).

Questions remain, however, as to how jurors interpret propensity evidence. For example, how does propensity evidence influence jurors’ decision making and can a curative instruction from the judge counter this influence? Our trial process relies upon both the appropriate delivery of instructions by judges to jury members and the ability of the juror to comprehend and follow these instructions throughout the decision-making process (Thompson & Fuqua, 1998). The assumption underlying directive instructions to disregard certain evidence is that jurors are able to forget or ignore the inadmissible evidence which the jurors have heard during the trial proceedings. It is dubious, however, as to whether jurors can simply erase the material from memory when directed to do so by the judge (Kassin & Studebaker, 1998). Further consideration needs to be given to what influence inadmissible evidence has on the jurors’ memory of the prior evidence, what influence the inadmissible evidence has on subsequent evidence when it is delivered with and without curative instructions, and the impression that is formed of the defendant by jurors who hear such evidence.

Prior to exploring the literature regarding the influence of propensity evidence and the utility of the limiting instruction, Chapter Two briefly examines demographic factors that have been shown to influence jurors’ verdicts. Research findings regarding jurors’ confidence in their verdict are also reviewed. Chapter
Three discusses propensity evidence and the research available on prior conviction evidence. Chapter Four explores possible theoretical underpinnings, specifically attribution theory, for the manner in which a juror may use propensity evidence in their decision making. Chapter Five details the role of a judge’s limiting instruction in controlling how jury members apply propensity evidence and also examines the overall effectiveness of a judicial instruction. Chapter Six provides an outline of the current study and lists the main aims and hypotheses. Chapter Seven contains the study’s method and Chapter Eight presents the results of the research study. The thesis concludes with Chapter Nine which examines the study’s results in greater detail, considers the results in line with previous literature and recommends future areas for research endeavours.
CHAPTER 2. INFLUENTIAL FACTORS ON VERDICT OUTCOME

Demographic characteristics of jurors and their relationship to verdict outcome have been researched extensively. While gender of jurors and mock jurors is one of the most commonly investigated demographic variables, age of jurors and mock jurors has been researched to a much lesser extent.

2.1 Age

A general critique noted of many empirical investigations is the frequent utilisation of university students to constitute a study’s sample. Hence, the sample is often composed of young adults. While some researchers have indicated that this may not limit the generalisability of findings, it is, nevertheless, a methodological limitation that has been noted by other researchers (Fischer, 1997; Mills & Bohannon, 1980; Pettus, 1990; Rose & Ogloff, 2001; Steblay et al., 2006).

The relatively limited research examining the role that age may have on jurors’ verdicts is not restricted to research in law and psychology issues. The judgement and decision making of older adults in general has also been largely neglected (Peters, Hess, Vastfjall, & Auman, 2007). Similar to juror decision making, the emphasis has been on adolescents and young adults and their decision-making processes (Peters et al., 2007).
A study by Sealy and Cornish (1973) involved participants being placed into groups of twelve and listening to one of two tape-recorded trials (regarding either a theft or rape case) prior to discussing and reaching a verdict. The theft case had one defendant and the rape case had two defendants. Both the nature (uncorroborated versus corroborated) and strength (strong versus weak) of the evidence differed for the two defendants in the rape case. The individual verdict of the participant was examined against the independent variables of participants’ age, educational attainment, gender, occupational status, and previous experience or knowledge of the legal system. Of particular relevance to the current study is the age and gender of the participant. Three hundred and nineteen participants (141 females and 178 males) listened to the theft case while 257 participants (78 females and 179 males) listened to the rape case. In each case, there was a preponderance of 21 to 25 year-old participants.

Although gender and verdict in the rape case were shown to be related, this effect was only apparent in relation to one of the defendants, with females significantly more likely to consider this particular defendant guilty in comparison to male participants. A significant finding across both cases was the relationship between the age and verdict of the participant. Specifically, individuals below the age of 30 years returned a not guilty verdict in both the theft and rape case significantly more so than any other age group. Thus, it appears that younger jurors are less likely to return a verdict supporting a conviction. Sealy and Cornish (1973) concluded that “the younger the juror the readier to acquit he will be” (p.508).
Feild and Barnett (1978) also later demonstrated a leniency in younger adults. These researchers compared 80 undergraduate students with 80 randomly selected community members. Gender was equally divided in both the student and community sample. The average age of the student was 20 years and the average age of the community member was 46 years. The case detailed how a female victim was approached by a male while walking home. Although he asked for the time, the victim ignored him and he subsequently grabbed her around the neck, dragging her into an alley and threatening her with a knife while raping her. After the rape, the victim immediately called the police and reported the incident. Participants were asked to provide a sentence for the defendant rather than a judgement regarding his guilt or innocence as Feild and Barnett argued this outcome to be a more sensitive measure. Results indicated that the students were significantly more lenient in their sentences in comparison to the community members, with a mean recommended sentence length of 35.8 years and 49.6 years respectively.

Mills and Bohannon (1980) also examined the influence of age on verdict outcome in relation to specific crimes. Their sample consisted of 197 individuals, 117 females and 80 males, who had actually served on a jury and responded to a mail-out survey regarding the juror’s perception of both the trial experience and deliberation process. The mean age of participants was 43 years with an age range between 18 and 77 years. The independent variables that formed this study were age, education, gender, and race. Mills and Bohannon found that, in general, guilty verdicts increased with age. However, this relationship differed between female and
male participants. Although guilty verdicts were high across all age levels for females, there were two peaks for males; between 26 and 35 years of age and between 50 and 64 years of age, with males between the ages of 18 and 25 reporting the lowest percentage of guilty verdicts. Mills and Bohannon speculated that this was possibly due to the 18 to 25 year old males being the most likely to identify with the defendants, who were also young and of the same gender.

In addition, although older participants were more likely to convict in rape cases, the pattern was reversed for murder cases, where older participants were less likely to render a guilty verdict. While verdict was best predicted by age in murder cases, gender was the best predictor of verdict in robbery cases. Mills and Bohannon (1980) surmised that the demographic variable with the most influence on jurors’ verdicts is related to the type and circumstances of each case.

However, other research shows there to be no effect on verdict outcome as a function of the participant’s age. For example, Moran and Comfort (1982) investigated a broad range of demographic and personality predictors on juror behaviour. Fifteen hundred questionnaires were distributed to jurors who had served and reached a verdict on felony trials during the period of 1975 to 1976 in Dade County, Florida. The type of trial charge for each participant was not recorded by researchers. Three hundred and nineteen jurors responded, with females constituting 47% of the total sample. Although specific information was not reported regarding age, researchers commented that their sample was similar in age to Mills and
Bohannon (1980) with the one exception being that it contained a higher percentage of jurors over the age of 60 years. Jurors provided demographic information and information in relation to verdict choice (both pre and post-deliberation), in addition to completing a number of opinion and personality measures. Age was found not to be related to verdict.

In summary, given the mixed findings that have been previously reported, the relationship of age to verdict outcome is unclear. Although early research appeared to demonstrate an interaction between age, gender and type of crime, few studies investigated this relationship further.

2.2 Gender

Researchers have posited that due to the different approaches that females and males take in solving moral-reasoning dilemmas and their different conceptualisations of justice, it is likely that gender differences occur in the opinions and decisions formed in the context of a trial (Fowler, 2005). Although a common view is that females are considered more empathetic and lenient than males (Mills & Bohannon, 1980), research exists to demonstrate that in general, more guilty verdicts are provided by females (Fischer as cited in Fowler, 2005; Fischer, 1997; Mills & Bohannon, 1980) and females indicate a higher degree of certainty in a guilty verdict (McNamara, Vattano, & Viney as cited in Fowler, 2005).
Fischer (1997) manipulated the composition of mock juries to investigate whether guilty verdicts increased as a function of the number of females participating in the mock jury deliberation process. A total of 426 female and 398 male college students participated in the overall study. Mock juries consisted of 0, 2, 4, 6, 8, 10 or 12 female college students where possible and a total of 76 mock juries were formed. Note that there were occasions when the male quota was not met and juries were conducted as close to the quota as possible (e.g. only eight out of the ten spots in a jury group allocated to males were filled). Approximately two-thirds of the participants were 18 or 19 years of age. Participants read a summarised trial of the alleged crime of rape prior to providing demographic information and answering a survey looking at trial variables. At the completion of the written materials, participants were asked to join other participants in a mock jury where the group was instructed to try and reach a unanimous verdict.

A logistic regression analysis was conducted on five demographic variables and their second order interactions on guilty verdicts. Gender produced a significant effect, with 86% of females compared to 66% of males finding the defendant guilty prior to deliberation. The linear hypothesis suggesting an increase in guilty verdicts as a function of the number of females in a jury was rejected as the verdict reported by the mock juries differed significantly only when females represented the majority of jury members (at ten females to two males) or when the jury was all female. Even then, guilty verdicts were only recorded for 56% of these two groups. Furthermore, an examination of the intercorrelations among gender, a verdict of guilty, and trial
variables produced only small correlations between gender and trial variables in comparison to guilty verdict and trial variables, highlighting that gender would not contribute significantly to the prediction of verdict choice.

However, there has been an overwhelming emphasis on gender-related crimes in studies that examine the relationship of gender to verdict (Ford, 1986; Fowler, 2005; Schutte & Hosch, 1997; Villemur & Hyde, 1983). A high number of guilty verdicts by females in rape cases may be as a result of blame avoidance, a concept coined by Shaver (as cited in Workman & Freeburg, 1999). The concept of blame avoidance suggest that the more personally relevant the perceiver (e.g. juror) considers the situation to be, the less likely it is that the perceiver will allocate responsibility to an individual similar to themselves (Workman & Freeburg, 1999); hence, the defendant is considered guilty by females whereas males are less likely to find the defendant guilty. Given the research focus on rape or sexual assault cases, research findings may not be able to be generalised to other offence types.

In addition, a study by Villemur and Hyde (1983) examined the effect of gender of the defence attorney, the age and attractiveness of the victim, and the juror’s gender on verdict. The sample consisted of 160 undergraduate students with an equal gender division. The study contained a 50-minute audiotape of a rape trial and pictures of the victim and defendant. Upon presentation of the case, participants were required to complete a questionnaire on items relating to the verdict, recommended length of sentence, and attitudes toward the crime of rape, the
defendant and the victim. An open-ended question also requested the participant’s rationale for verdict outcome. Results revealed no significant differences on the verdict outcome reported by females and males; however, the pattern of verdict decisions was consistent with past literature as female participants delivered more guilty verdicts than male participants.

Bridgeman and Marlowe (1979) interviewed actual jury members following the completion of the criminal trial in which they were involved. Their final sample consisted of a total of 65 jurors from 10 trials. As one trial contained two defendants, there were 11 defendants tried on charges such as assault, burglary, drug possession, murder, and rape. Thirty-six participants were female and 29 were male, all aged between 19 and 71 years. No more than seven participants were obtained from each trial. Researchers were interested in jurors’ perceptions regarding the trial process and participants responded to a 60-item questionnaire. Jurors’ verdict, the importance attached to evidence, their perceived competence in legal parties and fellow jurors, and demographic information was provided by each participant.

Participants reported an overall conviction rate of 82% which was comparable to the Santa Cruz County conviction rate, where the trials were held, of approximately 90% in felony trials. There were no significant relationships reported between verdict outcome and questionnaire data, nor were there any demographic variables that significantly related to verdict outcome. In addition, 90% of jurors agreed that they were “moderately” or “extremely confident” in their decision
making (Bridgeman & Marlowe, 1979). Moran and Comfort (1982) also found no significant differences in verdict outcome as a function of participants’ gender and a later study by Wissler and Saks (1985) also confirmed the finding that certain demographic variables, including gender, were not significantly influencing verdict outcome.

However, mixed results have been identified in the literature. Pope and Meyer (1999) investigated the effect of gender on verdict outcome in a 100 minute videotaped armed robbery trial. One hundred and eighty-six undergraduate students (115 females and 71 males) were recruited for the study. Participants responded to questions relating to verdict and sentencing, confidence in verdict, and factors that influenced their verdict. Results indicated that males were significantly more likely to deliver a guilty verdict than were female participants and males were also more confident in their verdict.

Gender differences have also been found in the prejudgement opinions of females and males. Costantini and King (1980-1981) conducted telephone interviews in which they surveyed participants in relation to one of three cases, all of which were of a non-fictitious nature. The first survey involved 323 participants who were to determine the verdict outcome for a charge of murder. The second survey was in relation to two cases, one of murder and one of attempted rape, and was considered by a sample of 369 participants. The questionnaire for the first survey contained 45 items while a similar questionnaire was utilised in the second survey and consisted
of 57 items. Questionnaire items measured participants’ tendency to prejudge the defendant, participants’ recall of specific details of the cases, and participants’ demographic information.

To ascertain prejudgement opinions, participants were asked whether they believed the defendant to be guilty of the alleged crime and whether the participant could act as an impartial juror in determining the case. This measure was obtained prior to reading the case materials and was based on the participant’s prior knowledge of the case via pre-trial publicity. Gender of the participant was significantly related to the juror’s prejudgement of the defendant’s guilt across all three of the cases, with females more likely than males to judge the defendant guilty prior to the trial commencing. This finding that females are more likely to prejudge the defendant as guilty in comparison to males was replicated by Constantini, Mallery and Yapundich (1983) who utilised an additional case and sample of 383 participants to determine the verdict in a murder trial.

In summary, while gender differences have been identified in research studies, these have been found predominantly in relation to investigations utilising a case of rape or sexual assault. While females have also been shown to report higher conviction rates in some studies involving a case of robbery or murder, these findings are not found in other studies. Thus, currently no definitive conclusion can be drawn about the relation of gender and verdict.
2.3 Summary

The above sections have reviewed what is known about the relationship between both jurors’ age and gender on verdict outcome. While gender has been frequently examined, there have been relatively few studies examining the impact of age on juror decision making. The findings suggest that the influence of demographic characteristics is not straightforward and requires further investigation.
CHAPTER 3. PROPENSITY EVIDENCE

Rules of evidence exist to ensure that trial proceedings are conducted in an accurate and fair manner for all parties involved (Kassin & Sommers, 1997; Kassin & Studebaker, 1998). These rules were formulated by judges initially and latterly by statute. These rules are crucial in ensuring a fair trial as although numerous variables can influence a juror's decision making, the evidence presented at trial is the most influential (Darbyshire, Maughan, & Stewart, 2002; Kassin & Neumann, 1997).

One specific type of evidence, namely propensity evidence, has proved problematic for judges and law-makers. Propensity evidence is evidence about the disposition or tendencies of an individual and propensity evidence about the defendant has traditionally been excluded from criminal trials on the principle that the defendant should be tried on the facts relating to the present charge and not on evidence in relation to previous misconduct (Just, 2008; Ligertwood & Edmond, 2010). However, propensity evidence was admissible in common law under limited circumstances. Evidence about past behaviour or previous offences of the defendant could be admitted if they were of a strikingly similar nature to the offence for which the defendant was on trial. Because of the similarity requirement, this type of propensity evidence became known at common law as similar fact evidence.

In 1998 the State of Victoria enacted legislation to widen the circumstances under which propensity evidence might be permitted (Crimes Act, 1958).
However, Section 398A was repealed when the state of Victoria adopted the Evidence Act 2008 (Vic) on January 1st 2010. The Evidence Act 2008 (Vic) is largely uniform with the Evidence Act 1995 (Cth), the Evidence Act 1995 (NSW) and the Evidence Act 2001 (Tas) and is therefore also known as the Victorian UEA. Together, these previously mentioned Acts are referred to as the Uniform Evidence Acts.

Sections 97 and 101 of the Evidence Act 2008 (Vic) state:

*The tendency rule*

97 (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless-

   (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

   (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

97 (2) Subsection (1)(a) does not apply if -

   (a) the evidence is adduced in accordance with any directions made by the
(b) court under section 100; or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note: The tendency rule is subject to specific exceptions concerning character of and expert opinion about an accused (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

101 (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

101 (2) Tendency evidence about an accused, or coincidence evidence about an accused, that is adduced by the prosecution cannot be used against the accused unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.

101 (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the accused.

101 (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the accused.

Note that while section 97 addresses tendency evidence in civil proceedings and evidence which is adduced by an accused in criminal proceedings, section 101
specifies evidentiary burdens which pertain to prosecution evidence. The following section provides a background to propensity evidence and subsequent sections address propensity evidence in the context of psychological and legal implications.

3.1 A closer look at tendency (or propensity) evidence

Similar fact evidence, known under the uniform Evidence Acts as tendency evidence, is evidence where conduct displayed by a party, typically the defendant, is of conduct or a state of mind similar to that alleged by the prosecution in relation to the current charge (Ligertwood & Edmond, 2010). This evidence is typically evidence that the defendant has committed an offence other than the one charged. It can also include evidence of criminal history, that is, that he or she has acted criminally or inappropriately even though a formal charge or conviction may not have resulted from the behaviour (Hunter, Boniface, & Thomson, 2010).

Historically, the admission of tendency evidence was evaluated in regard to two competing principles; the danger of unfair prejudice to the defendant from the admission of propensity evidence about the defendant and the probative value that was added to the case by presenting the propensity evidence (Arenson, 1999; Just, 2008; Ligertwood & Edmond, 2010). The probative value of the evidence is assessed by that evidence increasing the probability of certain facts in issue which provide proof of those facts and support a guilty verdict (Hamer, 2002). The prejudicial effect arising from reliance upon propensity evidence relates to the danger
that a juror may attribute greater weight to the propensity evidence than is merited by
the evidence (Hamer, 2002; Ligertwood & Edmond, 2010). To determine whether
the prejudice is unfair, the judiciary considers if the evidence has the potential to
unduly influence the court whilst bearing insufficient probative worth. In the event
that propensity evidence has little probative weight or relevance but has substantial
prejudicial value, the propensity evidence must be excluded under common law
(Arenson, 1999; Just, 2008; Ligertwood & Edmond, 2010). The balance between the
effects of probative and prejudicial value is at the basis of determining whether
propensity evidence is admissible in court.

### 3.2 The probative value of tendency evidence

Tendency (or propensity evidence) have probative value in instances where
the evidence contextualises the current charge by revealing to the jury the type of
relationship or context in which the alleged offence occurred. This is used as an
approach in rebutting the argument of the incident as an isolated event. For example,
in *R v. Loguancio* (2000) evidence of the prior relationship between the deceased
and the defendant was adduced for the purpose of rebutting the defence of
consensual sex and instead establishing the offences in light of a non-consenting
sexual relationship. Thus, the jury was provided with necessary background
information in order to accurately assess the situation in which the current charge
arose; however, this context was not to be used to imply a propensity in the defendant.
In *GBF v. The Queen* (2010), it was reported that evidence was adduced by the Crown to establish the similarity of the defendant’s inappropriate behaviour toward female employees and illustrate a pattern of behaviour and tendency to act in a particular way at their place of employment. This tendency was used to highlight that if the defendant acted in the alleged manner on one occasion, he was likely to have offended in the same way on separate occasions. Various notices of intention to adduce tendency evidence were submitted and assessed against the common benchmark that the more general the tendency is stated, the less likely that the evidence has probative value (*Townsend v. Townsend*, 2001).

*R v. McDonald* (2011) contained evidence used to illustrate the context or nature of the relationship between the accused and his partner (presumed abducted and murdered). The evidence consisted of various assaults on the deceased and incidents of stalking, harassment, and verbal insults over a period of almost 24 months. The Crown argued that such evidence pertained to several issues in dispute in the case, including whether a crime had actually been committed (or whether Ms McDonald had absconded from her husband), the identity of the killer, the alleged abduction of Ms McDonald being for a malevolent purpose, and the accused’s motive and intent.

### 3.3 The prejudicial dangers of tendency evidence

In contrast, one of the inherent risks of presenting tendency evidence is the belief that jurors may apply the material inappropriately to the prejudice of the
defendant. While there are occasions when jurors can rightfully use this evidence to determine the innocence or guilt of the defendant, there are also instances where the juror is not permitted to use the evidence in such a manner. In the event that the evidence is misused, a decision on the ultimate issue may be based on the defendant’s past behaviour or propensity to act in a certain manner and not on the facts that are presented in the current case (Forde, 2008; Hamer, 2002). One prominent approach to decision making that the juror engages in is known as propensity reasoning (Arenson, 1999; Just, 2008). Jurors are thought to reason that the defendant’s previous behaviour is indicative of someone who is ‘that kind of person’ (R v. PZG, 2007) in each and every occasion the defendant is confronted with (Hamer; Waight & Williams, 1985; Walton, 2006).

Furthermore, time and again an application for an appeal is made on the grounds that the jury was inadequately instructed by the judge and consequently utilised the evidence in an impermissible manner (R v. Best, 1998; R v. PZG, 2007). If a juror is considering the ultimate issue on the basis of an inappropriate application of facts, this may hinder the course of justice by perverting the assumptions that underpin our legal system. Such assumptions include those of fair justice, the right to an unbiased trial, and the presumption of innocent until proven guilty (Arenson, 1999; Ligertwood & Edmond, 2010; Waight & Williams, 1985).

Alternatively, appeals are also sought on the grounds that the propensity evidence should have been deemed inadmissible at the outset by the trial judge due to the excessively prejudicial nature of the propensity evidence (R v. Pearce, 1999).
Faith in the legal system may falter if inconsistent judgments are made regarding the admissibility of propensity evidence or if jurors are perceived to be unduly exposed to propensity evidence of weak probative value and this influence from the evidence is unable to be corrected by the trial judge (Marder, 2005). Therefore, the role of the judge is critical; first in determining whether the propensity evidence is permitted in the courtroom, and then directing the jury on the appropriate use of the evidence (Just, 2008; R v. PZG, 2007). Such a direction from the judge can instruct jurors in one of three ways: the first being to limit the use of propensity evidence by the jury; the second being to provide no direction or limitation to the jury; and the third being to direct the jury to disregard the evidence (Hunter, personal communication, 2012).

The difficulty also lies in the recognition that prosecution evidence can be of high probative strength while also being of a prejudicial nature toward the defendant. Therefore, the implication for the defendant is that regardless of whether the evidence adduced is of a prejudicial nature, the judge will nevertheless permit the evidence to enter the trial proceedings if its probative value is worthwhile. Researchers have commented that information regarding the appropriate evaluation of propensity evidence and how to instruct on its use would be an invaluable aid to legal professionals (Walton, 2006).

One of the more recent empirical contributions to the field is by Hunter et al. (2010) who conducted a pilot study utilising 39 jurors from ten criminal trials across Sydney’s District and Supreme Courts between 2004 and 2006. Twenty-five
The sole requirement for the inclusion of a trial into the pilot study’s sample was that either the defence or the prosecution adduced evidence of a defendant’s prior criminal record or history of criminal behaviour. In particular, four trials were closely examined in relation to the use of a judge’s limiting instruction and whether the instruction was effective in restricting the juror’s use of propensity evidence. The focus on these four trials in particular was due to the quality of responses that jurors provided in the questionnaire. Two trials involved a single count of murder and two trials involved 10 and 14 counts of assault and sexual assault. In the first two trials, the evidence involved background information on the relationship between the defendant and the victim and details of uncharged criminal acts engaged in by the defendant prior to the alleged offence being tried before the court. The other two trials also involved information relating to uncharged acts and one of the trials also contained evidence of the relationship between the alleged victim and defendant. In all four trials, the judge informed the jury that the evidence could only be used as a means of contextualising the events prior to the offence and not to reason a tendency
for the defendant to act violently and infer that this propensity is an explanation for the current charges against him (Hunter et al., 2010).

Questionnaires were administered post-verdict and ascertained jurors’ attitudes and views in relation to criminal history, their experience of the trial process, evidence presented in the trial and the most important factor in reaching their verdict, judicial direction and instruction from the judge, and assessment of the judge, defence and prosecution as well as fellow jury members throughout trial proceedings. Demographic information was also obtained.

A review of the responses from jurors revealed concerning comments. In considering acts of a discreditable nature, jurors were more likely to engage in propensity reasoning and infer in a prejudicial manner. Jury members also overvalued prior discreditable conduct allegedly engaged in by the defendant. For example, in the response to the query regarding what factors influenced the verdict that they delivered, one juror reported it was based on the defendant’s previous plea of guilty to two counts of assault (Hunter et al., 2010).

Furthermore, jurors expressed a high level of confidence in predicting the defendant’s commission of future crime when the defendant had no prior record but did possess a violent, dishonest or immoral past. Such a past may prejudice jurors to a greater extent than a defendant’s prior criminal record, as the defendant with a negative past is considered resourceful in not being apprehended. A limitation of the
pilot study, conducted at the University of New South Wales, was that it was mainly observational and only qualitative data was reported from survey responses.

Pettus (1990) conducted face-to-face, tape recorded interviews with 17 jury members when the trial in which they were participating had concluded. Of the 17 participants, five were involved in a trial covering the alleged sexual abuse and sodomy of a child, eight in a case of second degree murder, and four in a case of aggravated robbery. Pettus posed questions to the participants that covered the factors influencing their verdict outcome, the time at which the verdict was arrived at, their experience of the deliberation process, and their personal decision-making process. Pettus noted that the adage “innocent until proven guilty” may be a fallacy as jurors began forming negative impressions of the defendant prior to the judge’s opening address. Importantly, in describing the factors involved in their general decision making, jury members indicated the influence of a defendant’s prior conviction when weighing up the evidence and determining a verdict. However, this was a general observation made by Pettus (1990) and the jury members and trials from which these comments originated from were not specified.

Greene and Dodge (1995) investigated the influence of disclosing the defendant’s past criminal record on the verdict rendered by participants. Their sample of 105 individuals had been called upon to serve as jurors and ranged in age from 19 to 71 years. Participants were required to read a summarised bank robbery trial transcript which was mailed to them and contained approximately 1,500 words.
Participants then responded to questions regarding verdict outcome and their confidence in the verdict, the defendant’s criminal propensity, and the credibility of specific witnesses. The independent variables consisted of the type of evidence that was presented in the transcript (no prior record, prior acquittals, or prior convictions) and the presence or absence of judicial instruction regarding the use of such evidence. Participants were also asked the extent to which the prior acquittal or prior conviction evidence influenced their verdict outcome. Each research condition contained between 16 and 19 participants. Participants convicted the defendant more when they were informed of his prior convictions than when they were aware of a prior acquittal or that the defendant had no previous record. Note that the deliberation process of jurors was not investigated in this study.

Earlier studies also show similar findings. Doob and Kirshenbaum (1972) explored the effect of a prior criminal record detailing five convictions for breaking and entering private homes and a further two convictions for possession of stolen property. Forty-eight participants ranging in age from 18 to 50 years were provided with a hypothetical case study approximately 400 words in length. The study’s design consisted of four conditions; a control group in which the scenario was read with no prior record and three experimental groups. The first group contained no prior record and information that the defence considered there to be no purpose in the defendant testifying; the second group consisted of the defendant taking the stand and providing no important evidence, although his prior convictions were established while he was on the witness stand; and a third group received the evidence regarding
the defendant’s prior convictions and an instruction from the judge clarifying that this information was only relevant in determining the defendant’s credibility as a witness. Upon reading the case, participants were required to indicate how likely it was that the defendant was guilty. Irrespective of the experimental condition, participants who received information regarding the defendant’s prior criminal record were more likely to find the defendant guilty than participants in the control group. Note that the deliberation process was absent once more from empirical examination.

Wissler and Saks (1985) investigated the influence of charge similarity on juror verdict outcome in a sample of 160 participants. No demographic information about the participants was provided by researchers. Participants read a written, two-page hypothetical case involving a charge of either auto-theft or murder. The charge of auto-theft constituted the dissimilar prior conviction evidence in the murder case and vice versa for the murder case, which contained the auto-theft charge as evidence of a prior criminal record. The other research conditions consisted of either prior convictions of the same nature to the current charge (i.e. auto-theft or murder), a charge of perjury, and a no-information control group. Therefore, the independent variables were type of charge and type of prior conviction evidence presented to the participant. An instruction from the judge was provided after participants were made aware of the defendant’s prior criminal record, regardless of the type of evidence that constituted the previous conviction. As in previously reviewed studies, participants
were instructed to use such evidence only to determine the credibility of the defendant’s testimony and not as an indication of guilt.

After reading the hypothetical case, participants responded to a series of questions relating to verdict outcome, certainty in verdict, witness credibility, the rationale for their verdict, and to what extent the knowledge of the prior criminal record had in influencing their verdict. Results showed that a greater number of guilty verdicts were obtained when the prior conviction was for an offence similar to the defendant’s current charge and the lowest conviction rate recorded was in the group who did not receive evidence relating to a prior criminal record.

Research by Hans & Doob (1976) demonstrated the prejudicial effect of prior criminal record on juries, as opposed to individual jurors. They investigated individual and group decision making in a sample of 160 participants reading a hypothetical burglary case. Of note, 40 of the 160 participants were undergraduate students; however, no further demographic information (e.g. age or gender) was reported by researchers. The independent variables were whether or not the hypothetical case involved evidence that the defendant had been previously convicted of a single count of burglary and individual versus group verdict. When evidence of the defendant’s past conviction was provided, this was followed by an instruction from the judge regarding the use of such evidence.
While prior conviction evidence did not influence the number of guilty verdicts returned by individual participants, there was a difference in the number of group guilty verdicts. Juries who had received evidence of the prior conviction when compared to juries who did not receive such evidence were more likely to convict the defendant. Hans and Doob (1976) surmised that it may be easier for an individual to obey a judicial instruction and disregard or ignore certain pieces of evidence when determining a verdict, whereas the evidence may be discussed and strengthened in the minds of the jurors during the group deliberation process, thereby potentially affecting verdict outcome.

A more recent study investigating the effects of a defendant’s prior criminal record on juror decision making was conducted by Lloyd-Bostock (2000). Participants in her study viewed a condensed, reconstructed half-hour videotaped trial of a defendant either charged with handling stolen goods, indecently assaulting a woman, or deliberately stabbing another individual. There were eight variations in the previous conviction evidence tendered in the trial: no mention of previous conviction or good character; mention that the defendant had no prior convictions and was therefore of good character; previous convictions of a similar and recent offence; previous conviction of a similar yet old offence; previous conviction of a dissimilar and recent offence; previous conviction of a dissimilar and old offence; previous and recent conviction of indecent assault on a child; and previous and old conviction of an indecent assault on a child.
Participants were required to watch the videotape and complete a questionnaire asking for their initial verdict and the extent to which the defendant was likely to have committed the offence. Participants then engaged in deliberation in groups of twelve and subsequently completed a second questionnaire, again indicating their verdict and the likelihood that the defendant had committed the offence. Participants also had to respond to questions regarding their impressions of the defendant.

It was found that opinions of the defendant’s likely guilt were lower in the condition in which the participants received evidence of a dissimilar conviction and that these ratings were lower than those reported from participants in the baseline conditions (that is, where either no mention was made of previous conviction or good character or mention was made in regards to the defendant possessing no prior convictions and was therefore of good character). Lloyd-Bostock (2000) proposed that when no information is provided about the character of a person, participants rely on general stereotypes about the type of individual that is on trial in a court of law. In relation to verdict, a recent similar conviction generated the highest number of guilty verdicts. Thus, a previous criminal conviction appears highly prejudicial to the defendant and the juror’s consideration of culpability.

Finally, being informed of a defendant’s past criminal convictions can influence the impression formed of the defendant. Neuberg and Fiske (1987) proposed that the process of impression formation occurs via one of three mechanisms. First, the task of understanding individuals and their behaviour may be
simplified and merely attributed on the basis of their categorisation to a relevant stereotype or group. Alternatively, a person may be considered in relation to their characteristics or traits; which is a more personal or attribute-oriented approach. Lastly, the person forming the impression may decide that the original category is unsuitable and alter the categorisation as a result of further information regarding the individual’s traits or attributes, with their behaviour now interpreted in line with the new category.

When an impression has been formed, interpretations of behaviour or evidence presented in a courtroom are then made in support of the initial impression (Snyder, Decker-Tanke, & Berscheid, 1977). Therefore, a negative impression that is formed in relation to the defendant may result in the contamination of future evidence, as the juror discounts or rejects information that is inconsistent with their initial impression. Moreover, as negative information is weighted more heavily than information with a positive quality; trial evidence that paints the defendant in an unfavourable light will be more salient to a juror (Tanford & Penrod, 1984). Hence, it appears that exposure to propensity evidence has the potential to create a bias in the juror and may therefore result in jurors overlooking evidence that is contrary to the negative impression they have already formed. Furthermore, jurors in the study by Hunter et al. (2010) said that they had observed fellow jury members form prejudicial impressions of the defendant early in the trial proceedings. Thus, the earlier this bias is created, the more this is to the detriment of the defendant.
However, a study by Thompson, Fong, and Rosenhan (1981) showed that knowledge of the defendant’s previous conviction did not result in a significantly higher number of guilty verdicts. In their study, 288 participants viewed videotapes of a felony murder trial before rendering a verdict individually and after group deliberation. The evidence adduced in the trial (either evidence supporting a conviction that was of an inadmissible nature, evidence supporting an acquittal that was of an inadmissible nature, or no inadmissible evidence) and the content of judicial instruction (highlighting the importance of either protecting the defendant’s right to a fair trial versus delivering an accurate verdict) were the independent variables of the study. Participants who received the evidence supporting an acquittal were less likely to convict the defendant than the other two groups; however, the latter two groups did not vary significantly in their conviction rates. Interestingly, the experimental group receiving evidence regarding a defendant’s prior criminal record were less likely to convict than the control group who received no such evidence. Researchers hypothesised that this occurred as a result of participants who received pro-conviction inadmissible evidence overcorrecting for the influence of such evidence on verdict outcome.

In summary, while a small number of studies exist to refute the prejudicial nature seemingly inherent in disclosing prior conviction evidence to a jury, overall it appears that, when considering the literature regarding the effects that disclosure of a defendant’s prior criminal record produces on verdict outcome, such evidence can have a damaging effect on the outcome of the verdict for the defendant on trial.
CHAPTER 4. ATTRIBUTION THEORY AND THE IMPACT ON JURY DECISION-MAKING

The general dangers inherent in the improper use of propensity evidence have been noted in the previous chapter. An insight into the development of these dangers and the consequences of such reasoning would be an important contribution to understanding how to target these inferences effectively through judicial instruction (Walton, 2006). In general, the social psychology perspective of attribution theory is posited as providing insight into how cause, responsibility, and blame are assigned to different phenomena (Calhoun & Townsley as cited in Workman & Freeburg, 1999). Specific to the legal arena, jurors’ unfair biases influencing their verdicts have been explained by reference to attribution theory (McGillis, 1978). Given the relevance of attribution theory to the field of psychology and the law, this theory is reviewed in the below section.

4.1 Attribution theory

Broadly speaking, attribution theory encompasses a range of theories relating to the explanations people use to understand the causes of behaviour, often in the form of imputing an individual’s character traits or circumstances (Buss, 1978; McArthur, 1972). There is a degree of overlap among the various attribution theories discussed in the literature today and collectively they provide comprehensive explanations regarding human judgmental processes (McGillis, 1978). For the
purposes of the current research study, attribution theory loosely refers to the explanation an individual develops upon assessing the behaviour of others and subsequently inferring the causes of such behaviour (McGillis, 1978). In general, there are two broad domains; one which posits behaviour to be a result of external or situational aspects and one which posits the behaviour to arise from the internal or dispositional nature of the individual (McEwan, 2003; Smith, 2005).

It has been well observed that individuals often create an immediate first impression of a person and draw inferences on aspects of that particular person, such as personality and general demeanour (Tetlock, 1985). Indeed, personality traits are readily identified and observed in an individual. Moreover, these traits are viewed as being an accurate representation of the person’s general disposition and aid in providing an explanation for behaviour (Tetlock, 1985). In other words, behaviour is viewed as being the result of that individual being a certain ‘type’ of person without taking into account any contextual factors. An assumption is made that behaviour observed from a single situation is representative of that individual’s behaviour across all contexts. Therefore, individuals are inclined to infer from one example of behaviour that this is representative of the person’s behavioural repertoire (Smith, 2005).

Attribution theory also contends that there is an element of consistency in the behaviour of a person. Therefore, tendering evidence which demonstrates a pattern of behaviour, such as Livermore’s (1978) example of a defendant with a long history
of sexual assaults, is appropriate when considering this notion of consistency. The fear of juror’s wrongly engaging in propensity reasoning and utilising previous conduct of the defendant to prove their guilt in the current case, however, has constrained the submission of such evidence (Livermore. 1978).

McGillis (1978) argues that the theories relevant to the legal system are those by Heider (1958), Jones and Davis (as cited in McGillis, 1978), and Kelley (1973). Heider conceptualised behaviour as the product of intrapersonal and environmental factors and considered the responsibility attributed to these factors to vary along five levels. As the levels and attribution to the environment concurrently increase, intrapersonal attribution decreases. These levels were later titled by Shaw and Sulzer (1964) as association, causality, foreseeability, intentionality and justifiability.

The perspective of Jones and Davis (as cited in McGillis, 1978) specifically concentrates on how an individual perceives the intentions and dispositions of others via behavioural observation. Their theory, labelled “correspondent inference theory” is composed of six steps which outline an individual’s process from the time of observing an individual’s behaviour to attributing personality traits of that individual (Jones & Davis as cited in McGillis, 1978).

Lastly, Kelley’s (1973) view relates to the judgements that an individual makes from information on three elements of the person: a history of similar behaviour toward the same entity (consistency); a history of behaviour toward
differing entities (distinctiveness); and similar behaviour exhibited by other individuals toward the same entities (consensus) (Boyll, 1991; Lussier, Perlman, & Breen, 1977; McGillis, 1978).

Kelley’s (1973) theory integrates with the two approaches of Heider (1958) and Jones and Davis (as cited in McGillis, 1978) in describing behaviour as being due to external or situational aspects or as a result of the internal or dispositional nature of the individual (McEwan, 2003; Smith, 2005). In particular, behaviour is thought to reflect the internal or dispositional nature of the individual (person attribution) when the individual engages in the behaviour across a number of different situations and others do not engage in this behaviour. Conversely, behaviour is more likely to be attributed externally or to the environment (stimulus attribution) when the individual acts in this manner solely in relation to specific stimuli and other people also engage in the same conduct only in the presence of the specified stimuli (Kelley, 1973; Lussier et al., 1977; McGillis, 1978). Kelley also considered that behaviour could result from chance and labelled this as circumstance attribution.

The consistency variable is pertinent to discussions regarding the effect of a defendant’s prior criminal record (McGillis, 1978). In a study by Lussier et al. (1977), researchers provided 79 psychiatric nursing students (61 female and 18 male; mean age of 20.4 years) with a hypothetical case detailing a drug offence. Researchers varied the drug offender’s socio-economic status (low versus high), offence history (no previous convictions versus an extensive record) and trial format
(by judge or jury). Participants were asked to rate the extent that they considered the person, environment, and circumstance to contribute to the defendant’s behaviour, and to recommend the length of sentence to be imposed. Results showed that drug offenders with an extensive criminal record were viewed with higher levels of attribution regarding personal causation and therefore received sentences of a longer duration than first-time offenders. Conversely, participants’ attributions relating to environment and circumstance were significantly related to recommendations of a shorter sentence.

In addition, as propensity evidence often encompasses prior criminal history, such evidence is likely to display the defendant in an unfavourable manner. When individuals are ‘liked’ or well-known to a person, positive behavioural outcomes are more likely to be attributed to dispositional influences and negative outcomes to environmental causes. Taylor and Koivumaki (1976) have termed this occurrence the ‘positivity effect’ and suggest that, conversely, people who are viewed negatively will be held accountable for bad behaviour on a dispositional level and considered not responsible for positive behaviour (Taylor & Koivumaki, 1976). This ‘negativity effect’ (Taylor & Koivumaki, 1976) may transpire from the admission of propensity evidence in a courtroom, where jurors regard the defendant responsible for negative behaviour (i.e. the alleged crime) and consequently deliver a guilty verdict.

The harmful effects associated with the overall attributional process are that individuals tend to engage in overly confident predictions regarding people and their
behaviour when provided with minimal information on the individual’s trait characteristics. These confident predictions are due to the ill-founded belief regarding cross situational behavioural consistency, which refers to the notion that the behaviour an individual displays in one situation is indicative of their behaviour across a wide variety of situations (Ross & Nisbett, 1991). Hence, not only may jurors be unaware of when their confidence is misplaced, they may also be over-emphasising the wrong information in their decision making. This also has implications on the juror’s consideration regarding beyond reasonable doubt (Smith, 2005) as it may unduly sway the juror’s rationale and decrease their level of uncertainty.

Generally speaking in relation to juror confidence, research by Greene and Dodge (1995) revealed that confidence varied significantly as a function of the type of verdict returned by the juror. Specifically, jurors who considered the defendant guilty were more confident in their verdict than jurors who delivered a not guilty verdict. A series of studies conducted by Kassin and Neumann (1997) also replicated the finding that participants who voted guilty were significantly more confident in their verdict choice than participants who returned a verdict of not guilty. Fischer also determined that an individual’s certainty in their verdict was a predictor of verdict outcome (as cited in Fischer, 1997) and demonstrated in a later study that not guilty verdicts were significantly related to uncertainty about one’s verdict (Fischer, 1997).
4.2 Summary

The aim of the preceding chapter was to underline the relevance of attribution theory to the admission of propensity evidence into the courtroom. While propensity evidence can act to demonstrate consistency in the defendant’s behaviour, research has shown that there are also harmful consequences when underestimating the role of the situation and overestimating the role of the individual’s disposition in regard to explaining behaviour. For example, once an individual has attributed the cause of behaviour to the disposition or personality of the individual, they are unlikely to easily modify their perspective. Therefore, any behaviour that follows from this conceptualisation will be considered in a manner that fits consistently with this initial framework (Ross & Nisbett, 1991). This is irrespective of new information that becomes available which disputes the initial judgment that was formed (Lord, Ross, & Lepper, 1979), such as any evidence that follows the propensity evidence in the trial proceedings. Given the risk to the defendant’s right to a fair trial, measures need to be implemented to diminish the chance of any bias occurring. The following chapter addresses how instructions from a judge aim to mitigate improper influences of propensity evidence on a juror’s decision-making process and final verdict.
CHAPTER 5. JUDICIAL INSTRUCTION

One of the most fundamental roles of the judge is to apply the rules of evidence that relate to material adduced throughout the trial proceedings (Kassin & Sommers, 1997; Tanford, 1990; Thompson & Fuqua, 1998). Therefore, a judge has the authority to instruct jury members on the manner in which they can use certain pieces of evidence. Thompson and Fuqua (p.445) cite this as “perhaps the most interesting evidentiary rule”. There are a number of common instructions that can be provided by the judge to the juror. Research in the field has typically focused on the admonition to disregard. This instruction is required when evidence of an inadmissible nature is revealed to the court and the judge directs the jury to ignore the particular piece of information previously presented to them (Thompson & Fuqua, 1998).

However, as stipulated in Sections 97 and 101 of the Evidence Act 2008 (Vic), tendency (propensity) evidence is admissible in instances where it is of “significant probative value”, despite its potential prejudice against the defendant. As aspects of this particular act are also common in the Australian Capital Territory, New South Wales, and Tasmania, this section that is the focal point of the legal context discussed in this thesis essentially represents an Australian-wide position on the law. In recognising the bias inherent in the nature of propensity evidence, judges are required to caution jurors on the appropriate manner in which to use the information and inform the juror of the constraints surrounding the application of
such evidence. The cautioning of jurors is achieved through providing what is known as a limiting instruction, whose purpose is to curtail both inappropriate attributions and use of propensity evidence by jurors (Hunter et al., 2010; Marder, 2005; Tanford, 1990).

In providing this instruction, however, there is the assumption that jurors ignore or compartmentalise the specified material. The questions that often arise from a judicial instruction concern whether the instruction is successful in detailing to the juror what is expected of them and the extent to which the juror can use evidence for one specific purpose and then isolate its influence when deciding other aspects of the matter before them (Kassin & Studebaker, 1998). Aside from whether jurors can comprehend such an instruction is the question of whether jurors are willing to and capable of following the directions of the judge. These questions are the focus of this chapter.

In general, research exists to support the view that instructions from a judge are unsuccessful in achieving their intended purpose. Studies investigating the legal system have criticised the timing of the instruction and its content (Elwork, Sales, & Alfini, 1977; Marder, 2005; Severance, Greene, & Loftus, 1984; Tanford, 1990). The following sections review the literature available in relation to the effectiveness of judicial instructions, prior to providing an overview of the explanations posited to account for jurors’ inability to implement an instruction from the judge.
Research findings about instructions to disregard and limiting instructions are discussed in the following section. As researchers have commented that the effects from studies investigating limiting instructions are similar to those examining an admonition to disregard, the parallel appears appropriate (Tanford, 1990). In addition, a common example that appears in the literature relating to both types of instructions concerns a defendant’s prior criminal record (Diamond et al., 1989; Severance et al., 1984).

5.1 The ineffectiveness of judicial instruction

Currently, as has been the tradition for many years, instructions are generally delivered orally in the end of trial summation by the judge after all evidence and closing arguments have been presented (Charrow & Charrow, 1979; Goldberg, 1980; Marder, 2005; Young, 2003). However, the delivery of the judge’s instructions during the summation stage is not without criticism. This is owing to jurors disclosing that they find the judge’s final summation tedious and do not pay full attention during the address (Young, 2003). For this reason, it has being argued that the limiting instruction is a futile exercise and a case of ‘too little, too late’ (Goldberg, 1980).

In addition, Section 5.3 describes how the juror actively constructs a version of events that fit the evidence presented throughout the trial and arrives at a finished product prior to or at the conclusion of the trial (Hastie, Penrod, & Pennington, 1983;
Pennington & Hastie, 1992). Researchers involved in a New Zealand study have observed that this active and interpretative evaluation is an accurate representation of the method a juror utilises during the trial process (Young, Cameron, & Tinsley as cited in Young, 2003). Thus, in Section 5.3 research is described which suggest that jurors actively construct a story-like tale of the evidence presented during a trial. Evidence is therefore commonly evaluated on the basis of preceding material.

Providing judicial instruction to prohibit the use of certain evidence at the conclusion of the trial may have little impact, as evidence has already been assimilated into the story in line with prior evidence disclosed in the courtroom. Furthermore, jurors themselves have attested to observing fellow jury members form biased opinions relatively early in the trial (Hunter et al., 2010) and this effect has also being established in research endeavours (Bridgeman & Marlowe, 1979; Hastie, et al., 1983; Kassin & Wrightsman, 1979; Pennington & Hastie, 1981).

For example, Kassin and Wrightsman (1979) conducted a study with 107 introductory psychology students (60 females and 47 males) who were required to view a one-hour videotaped auto-theft trial. The timing of the judge’s instruction on the requirements of proof was manipulated by the researchers and was either provided prior to the presentation of evidence, after the presentation of evidence, or not provided at all. Participants did not enter deliberation and responded in writing to questions relating to verdict outcome, confidence in verdict, and the strength of the evidence. Results indicated that participants who were instructed before the evidence
was presented were less likely to render a guilty verdict in comparison to participants in the other two research conditions.

Half of the sample ($N = 54$) was also required to record their opinion on verdict outcome and confidence during specified points in the trial. It was found that participants who were instructed before the admission of evidence were less likely to consider the defendant guilty at points recorded throughout the course of the trial. Importantly, early decision making appeared predictive of verdict outcome, with opinions at the first decision point in the trial (after the examination-in-chief and cross-examination of the first witness) found to significantly relate to the participant’s final verdict. Therefore, not only is remaining evidence likely to be perceived in a biased manner but an instruction from the judge at the conclusion of the trial is likely to be ineffective as opinions have already been formed during the trial process.

Research by Greene and Dodge (1995) has also revealed that an instruction from the judge regarding the use of the defendant’s prior criminal record was ineffective in controlling the use of such evidence. This finding regarding the futility of judicial instruction to control the juror’s use of a defendant’s past conviction is substantiated by Doob and Kirshenbaum (1972), Hans and Doob (1976), and Wissler and Saks (1985) (refer to Section 3.4 for a review of these studies). Notably, participants in Wissler and Saks’ study openly verified that the evidence of the defendant’s prior conviction increased their view that he was guilty of the current
charge and was therefore central in their decision making on verdict outcome. Wissler and Saks commented that the repetition, or consistency, of the defendant’s behaviour also appeared to increase the juror’s confidence that the defendant was guilty of the current charge. The earlier theory of attribution is relevant to this finding that consistency of behaviour is influential toward a juror’s confidence in decision making.

In a study by Pickel (1995), 236 psychology students listened to an audiotape of a fictional trial in which the defendant was being tried on a charge of theft. The independent variable of evidence (prior criminal record relating to a perjury conviction) was ruled either admissible or inadmissible. In the inadmissible condition, the judge either provided a legal basis as to the determination or did not provide any explanation after the ruling. Additionally, there was a control group who received no evidence about the defendant’s prior criminal record. A second independent variable, the credibility of the witness (high and low) was also varied in the experiment. At the conclusion of the audiotape, participants were required to complete a questionnaire covering verdict outcome, the extent to which the defendant’s prior criminal record influenced verdict outcome, and the credibility of each witness. The results demonstrated that the percentage of guilty verdicts varied significantly across the research conditions, with the participants in the control group reporting the lowest percentage and the participants in the admissible group reporting the highest percentage.
Nietzel, McCarthy, and Kern (1999) undertook a meta-analysis of research findings pertaining to limiting instructions. On the basis of this analysis, Nietzel et al. concluded that instructions to disregard or limit the evidence adduced in a trial are ineffective in eliminating or restricting its influence on verdict outcome. Steblay et al. (2006) also conducted a meta-analysis of the research findings assessing 175 hypotheses about limiting instructions drawn from 48 studies involving a total of 8,474 participants. Their objective was to examine the effect of three interrelated variables on juror decision making: that of potentially inadmissible evidence, judicial instruction to disregard such evidence, and the timing of the judicial instruction. The results of the meta-analysis confirmed the earlier findings of Nietzel et al. that judicial instructions are largely ineffective.

A suggested approach in counteracting the potential effects of propensity evidence involves the judge providing an immediate instruction once propensity evidence is adduced (Bjork, 1998; Marder, 2005). The rationale behind this approach is that by interjecting prior to or at the very beginning of the integration process, there is minimal opportunity for the juror to use the propensity evidence in an unintended manner. Hence, the likelihood that the admission of propensity evidence will wrongly influence jurors’ conceptualisation of events and erroneously shape jurors’ perceptions throughout the remainder of the trial, as described by the integrated representation (Hastie et al., 1983) or story formation (Pennington & Hastie, 1992) perspective in Section 5.3, may be decreased when the appropriate use
and purpose of propensity evidence is immediately made known to jurors. However, the meta-analysis by Steblay et al. (2006) also revealed that when the evidence was coupled with an immediate instruction from the judge, this particular combination generated higher convictions rates from the participants.

From a memory perspective, Bjork (1998) posits that although a judicial instruction aims to inform the juror of what is required in order to restrict the use of certain pieces of evidence, the juror is concurrently being re-exposed to this information or piece of evidence. As a result, the information may be reinstated. Hans and Doob (1976) also alluded to the idea that discussion of the defendant’s prior criminal record in the group deliberation process may strengthen the evidence and Tanford (1990) concluded that the judge may be emphasizing the material by highlighting the need to constrain the manner in which the evidence is used. This effect may be even more pronounced when an explanation for the delivery of an instruction is provided, as evidence is elaborated on. Hence, a judicial instruction immediately following the evidence may in fact be detrimental to the defendant’s case.

In Pickel’s (1995) previously mentioned study, participants who received the instruction to disregard without any further explanation from the judge reported a percentage of guilty verdicts that varied by one-point in comparison to the control group. However, participants who were provided with an explanation as to why the evidence was inadmissible recorded a guilty verdict at a rate of 12% more than the
conviction rate recorded by participants who did not receive an explanation. Thus, participants who were provided with a rationale regarding the inadmissible nature of the evidence were more likely to convict the defendant in comparison to participants who did not receive any justification.

The adverse influence of a limiting instruction has also been demonstrated in civil cases (Tanford & Cox as cited in Greene & Dodge, 1995; Wolf & Montgomery as cited in Greene & Dodge). This counterproductive effect was demonstrated more than half a century ago when Broeder (1959) reviewed the findings of a jury project conducted by the University of Chicago. An unspecified number of participants (with no demographic information reported in reference to them) listened to an audiotape of a mock civil trial consisting of an automobile accident. The defendant’s liability and the status of his liability insurance were manipulated. It was either very clear or doubtful as to the defendant’s liability. Participants were either informed that the defendant had no insurance, informed that the defendant had insurance and this disclosure was met with no further comment by legal personnel, or informed that the defendant had insurance, however, the defence objected to this information being disclosed and the judge subsequently instructed jurors to disregard. Participants engaged in group deliberation at the conclusion of the audiotape.

The majority of the participants found in favour of the plaintiff and the average awards were $33,000, $37,000 and $46,000 for the no insurance, insurance details provided, and insurance details provided with instructions to disregard
conditions respectively. Thus, a higher award amount was recommended by participants who had heard the information regarding the defendant’s insurance status and an instruction to disregard it, perhaps indicating that addressing a matter in court will heighten the material and therefore the likelihood that it will be retained by jurors. However, no statistical analyses were reported by Broeder (1959) and this is merely an observation of the data. Of note, the admonition to disregard was effective in curtailing discussion in relation to the defendant’s insurance status during the group deliberation process. Just as a judge must weigh up the prejudicial nature versus probative value of the propensity evidence, the defence must exercise caution in objecting to evidence, as this action may draw unwarranted attention to the material.

5.2 The effectiveness of judicial instruction

Adding to the complexity is empirical evidence that suggests an instruction from the judge to disregard a particular piece of evidence can prevent biases being formed in the mind of the juror. Furthering the work of Nietzel et al. (1999), Steblay and colleagues reported varied effectiveness for an instruction by the judge when delivered in the end of trial summation. They found that when comparing a control group, who received evidence and no judge’s instruction to disregard such evidence, with an experimental group who received evidence and an end of trial instruction, the control group reported a significantly higher conviction rate than the experimental group. Thus, Steblay et al. (2006) showed that an instruction provided at the
conclusion of trial proceedings can act to mitigate any prejudicial effects that inadmissible evidence may have on verdict outcome. As this is in contrast to other research in the field (Hastie, et al., 1983; Kassin & Wrightsman, 1979; Pennington & Hastie, 1981), further investigations are required into the varied findings in relation to the temporal positioning of judicial instruction.

Furthermore, a study by Borgida and Park (1988) showed that a limiting instruction enabled participants to consider the defendant’s prior criminal record only in the context of his truthfulness. The study investigated the effects of providing 147 participants with a judicial instruction regarding either one of the two approaches to America’s entrapment defense. The first, a subjective approach, relates to the predisposition of the defendant and involves the prosecution proving that the defendant was willing to engage in the criminal act even before an inducement was offered. The second, an objective approach, relates to the type of inducement presented to the defendant and ensures improper methods were not utilised by law enforcement.

Of relevance to the current thesis is that the admission of the defendant’s prior conviction was also varied by researchers. Sixty-four female and 83 male undergraduate psychology students viewed a videotaped trial of a defendant charged with cocaine possession and distribution. In the trial, participants in one of the research conditions were informed of the defendant’s earlier conviction for the
distribution of a different substance and participants in another research condition remained uninformed of the conviction. Participants then deliberated in groups of five to seven and returned a verdict prior to completing a questionnaire.

Responses were recorded in relation to the juror’s verdict outcome, confidence in verdict, and understanding of the judge’s charge, entrapment instructions and general trial testimony. It was found that participants who were informed of the defendant’s prior criminal record were significantly more likely to convict the defendant in comparison to participants who were unaware of the defendant’s prior conviction. However, this result was only produced by participants who received (subjective) judicial instruction that permitted the use of the previous conviction to establish the defendant’s criminal predisposition and therefore demonstrated that he had not been entrapped or duped into committing a criminal act.

Lastly, Greene and Dodge (1995) concluded that although a limiting instruction was to no avail in controlling the use of prior conviction evidence, the instruction did influence the standard of reasonable doubt that jurors required in order to convict the defendant. In addition, Steblay and colleagues (2006) acknowledged that while an admonition to disregard may not inhibit the influence of inadmissible evidence, the rationale that the judge offers regarding the inadmissible nature of the evidence may increase juror compliance. For example, providing little to no justification or stating that the evidence is inadmissible on the grounds that it
was illegally obtained proved less successful than explanations relating to the hearsay, irrelevant, or unreliable nature of the evidence. This is in contrast to previous research by Borgida and Park (1988), Pickel (1995), and Tanford and Cox (1988). However, the value of the judge’s instruction may lie in his or her reasoning as to why such evidence is unacceptable in the courtroom. Therefore, the factors that facilitate adherence to a judge’s limiting instruction require further investigation.

5.3 Why jurors may not comply with judicial instruction

While the juror’s comprehension of the instruction is regarded as one explanation for the ineffectiveness of judicial instruction, several psychological theories have also been proposed to explain the difficulties that a juror may encounter when attempting to follow an instruction from the judge. In general, cognitive and motivational factors have been implicated in the ability of the juror to obey a judge’s instruction (Daftary-Kapur, Dumas, & Penrod, 2010; Steblay et al., 2006). The theory of juror justice describes a motivational component of the juror that may preclude obeying the judge’s instruction, while the theory of integrated representation addresses the cognitive processes of the juror which may prevent jurors from following the judge’s limiting instruction. The following paragraphs outline each of these rationales in more detail.
Jury Comprehension

For jurors to be able to follow an instruction that is given by a judge they must first be able to understand what is being asked of them. Thompson and Fuqua (1998) cite this difficulty in relation to understanding limiting instructions and argue that this problem exists because verdicts can be appealed on the grounds of inadequate instructions by the judge, yet are rarely appealed on the basis of jurors failing to understand the instructions provided to them (Marder, 2005; Tanford, 1990; Thompson & Fuqua, 1998). Therefore, judges ensure their instructions are legally sound at the possible expense of being easy to comprehend by jurors (Severance et al., 1984). Hence, it first needs to be determined whether jurors can understand the instruction before consideration is made as to the extent that they can follow its direction.

Research studies from over thirty years ago indicate that the use of a pattern instruction was no more effective than not providing one at all. However, when mock jurors in an experimental group received a rewritten form of the instruction there was an improvement shown in comprehension (Elwork et al., 1977). Elwork et al. redrafted Michigan negligence instructions in light of empirical knowledge regarding memory, perception, and comprehension of language. Twenty-nine undergraduate students viewed a videotape of a judge providing legal instructions to a jury. There were two versions of the instructions; one was a set used in an actual automobile injury case and the second was a set of instructions revised by researchers. After watching the videotape, questionnaires that covered areas relating
to the role of the jury, courtroom procedures, and laws specific to the trial charge were supplied to participants. Comprehension scores were compared between the two research conditions and results showed that the rewritten instructions enabled participants to more easily comprehend and recall the instructions. Note, however, that the participants’ ability to apply the legal instruction did not vary significantly among groups.

Elwork et al. (1977) conducted a further study to assess their variables of interest in a more heterogeneous sample, while additionally examining the effect of instructions delivered at different periods of the trial. The researchers utilised 84 female and 70 male participants with a mean age of 34.5 years. The videotaped trial again involved an automobile accident. A control group viewed a videotape that contained no judicial instruction while one experimental group received standard instructions and a second experimental group received rewritten instructions. The instructions were either provided at the outset of the trial, at the conclusion of the trial, or on both occasions. Participants responded to a questionnaire relating to verdict outcome, role of the jury, courtroom procedures, and the facts and laws specific to the trial charge. Participants were also provided with a chance to change their verdict. No significant effect was found in relation to the time that the judicial instruction was presented to participants and their comprehension and recall of the instruction’s content. Comprehension was again poor in the standard instruction group while the rewritten instructions proved once more to negate any uncertainty or confusion in the participants who received this form of instruction.
Although research by Elwork and colleagues (1977) examined the use of a pattern instruction in a civil matter, these results have been replicated by other researchers in criminal cases involving a limiting instruction. For example, Severance and Loftus (1982) conducted a series of studies; two of which are of relevance to this discussion. Two hundred and sixteen students viewed a videotaped burglary trial and were provided with pattern instructions that excluded specific legal definitions, pattern instructions that defined reasonable doubt and intent in addition to clarifying the manner in which participants could use evidence of the defendant’s prior conviction, or no pattern instruction. Half of the participants responded to a questionnaire without engaging in the process of group deliberation and the other half of participants deliberated in groups of six prior to completing the questionnaire. Responses were provided in relation to verdict outcome, confidence in verdict, comprehension of the instructions, ability to apply the instructions to the trial, and the participant’s recall of details presented in the trial process.

There were no significant effects reported for verdict outcome across the three research conditions. Furthermore, the three conditions did not significantly vary in their comprehension of the limiting instruction. Participants who received pattern instructions that defined reasonable doubt and intent, in addition to clarifying the manner in which participants could use evidence of the defendant’s prior conviction, reported a similar percentage of errors in comparison to the group who did not receive any instructions.
In a follow-up study, Severance and Loftus (1982) tested revisions made by researchers to the previously supplied instructions that were in accordance with legal and psychological perspectives. Two hundred and sixteen psychology students were recruited for the study which involved the independent variables of instruction (no instructions, pattern instructions, or revised instructions) and opportunity to deliberate (deliberation or no deliberation). The videotaped trial remained identical to the previous study and the questionnaire was also retained, albeit with minor amendments.

Error rates for participants’ comprehension of the limiting instruction varied significantly across the research conditions with the lowest errors recorded by the group receiving the revised instructions. Thus, rewording judicial instructions with the aid of empirical work in the legal and psychological arena enabled participants to more easily understand the content of these instructions. Albeit American literature, this highlights the need for comparative and recent Australian data regarding both the juror’s comprehension of judicial instruction and whether revised judicial instruction is necessary.

In addition, Hunter et al. (2010) found that jury members were unclear over several fundamental functions of the trial process that impact upon their decision making. For example, jurors appeared to misconstrue the fact that the inability of the prosecution to present a case to its required standard of proof should therefore result
in an acquittal. The opinions formed by the juror in relation to these matters may also influence their overall decision making.

In recognising the shortcomings of the present day instructions, recommendations have been outlined in order to aid the judge and juror to perform their relevant roles. There is much support from researchers who believe that the task of the juror would benefit from providing mechanical aids (Darbyshire et al., 2002; Wood, 2007; Marder, 2005; Tanford, 1990). These recommendations also relate to the fact that different people learn via different methods and the trial process should be seen to accommodate these various methods rather than relying solely on the oral approach (Wood, 2007; Marder, 2005). One suggestion is to provide the transcript of the court proceedings or a copy of the judge’s summation (Marder, 2005; Tanford, 1990) and jurors in the past have made such a request (Young et al. as cited in Young, 2003). To the author’s knowledge, although court transcripts are provided to jurors in Victoria (Thomson, personal communication, 2008) researchers have not investigated what the effect of providing the transcript has on jurors’ ability to follow judge’s instructions. This approach appears novel in the empirical arena.

Juror Justice

While comprehension of the instruction’s content is one factor purported to influence compliance with judicial instruction, other explanations have also been
advanced to account for the difficulties that jurors may encounter when attempting to obey an instruction from the judge. The *juror justice* theory refers to the juror’s belief that justice is encapsulated in achieving an accurate outcome regarding the guilt or innocence of the defendant. This is achieved through assessing all of the relevant evidence available, even if it is not admitted through an appropriate medium in the courtroom (Bjork, 1998; Kassin & Studebaker, 1998). However, this view contrasts with that of the overall legal system which deems that justice is achieved when due process is followed throughout court proceedings (Kassin & Sommers, 1997).

Due process is achieved when the trial is conducted in line with the rules of evidence and procedures stipulated in legislation (Kassin & Studebaker, 1998). The admission of propensity evidence into the courtroom, and the subsequent limiting instruction delivered by the judge, highlights the incongruence between these two values. Whilst the court’s idea of justice is preserved through providing the limiting instruction, it may be at the expense of the juror’s notion of justice as the instruction requires the juror to restrict the use of a specific piece of evidence which may be of probative value. Hence, some jurors may be reluctant and unmotivated to follow such an instruction as it impedes upon their notion of justice (Bkork, 1998; Kassin & Studebaker, 1998; Steblay et al., 2006). Therefore, a suggested factor in determining whether jurors will comply with the admonition from a judge is in relation to the judge’s reasoning surrounding the instruction.
Support for the notion of juror justice is in a study by Kassin and Sommers (1997). They compared the reported verdicts of four groups of undergraduate students who had read a prepared summary of a murder trial. The 81 participants were divided into groups that consisted of a baseline control group and three experimental groups. Evidence in the experimental conditions involved a wiretap and was either declared admissible, inadmissible on the grounds that the information was obtained illegally (due-process) or inadmissible as a result of the evidence being inaudible and thus unreliable (low credibility) immediately after the evidence was presented by the prosecution. Results showed that a guilty verdict was delivered more often by participants in the admissible and inadmissible (due-process) groups in comparison to the inadmissible (low credibility) groups, thus indicating that jury members are willing to sacrifice due process and disobey the instructions of a judge by employing any source of evidence they view as relevant in achieving what they believe is a just verdict.

An associated finding from the Kassin and Sommer’s (1997) study was that jury members were more likely to follow the instruction to disregard from the judge when material was withdrawn on the grounds of lacking credibility. In this particular study, the evidence was considered to possess low credibility as a result of the judge declaring the audio recording to be of poor quality. Therefore, how credible the propensity evidence is perceived to be by the juror may be one determining factor that is related to the willingness of the juror to follow judge’s instruction.
Specifically, it is thought that the extent to which the evidence is discredited enhances the juror’s willingness to obey instructions from the judge (Bjork, 1998).

*Integrated representation*

A second explanation of why judge’s instructions may not be adhered to, albeit perhaps unintended, and the difficulties that jurors may encounter when attempting to follow a limiting instruction is as a result of a process known as integrated representation (Hastie et al., 1983) or story formation (Pennington & Hastie, 1992).

The hypothesis underlying the integrated representation explanation is that jurors construct a story of the events surrounding the charge being contested in the trial by progressively assimilating the material presented before them, with each piece of new information evaluated in a manner that is consistent with the juror’s evolving portrayal of events (Goldberg, 1980; Hamilton, 2004; Young et al. as cited in Young, 2003). This evaluation occurs through methods such as inference and credibility appraisals (Hastie et al., 1983; Pennington & Hastie, 1992). In essence, a plausible story is made to fit the evidence and more often than not, only one story is constructed.

Additionally, the juror must also comprehend the instructions that the judge is providing in relation to the charge, verdict alternatives, and the components that
define each alternative before being required to deliver a decision regarding the defendant’s culpability on the basis of their overall representation. Determining a decision requires the juror to match their story with the verdict alternatives to deliver a verdict outcome. If no match is made, the defendant is considered not guilty (Pennington & Hastie, 1990). It is thought that the clearer the evidence is to the juror, the earlier they will begin to formulate a verdict. If the evidence is ambiguous or complex, then it appears decision making is delayed until the deliberation phase of the trial (Pettus, 1990).

A shortcoming of this process is that, as discussed in earlier chapters, subsequent information can be shaped or manipulated by the initial impression that is formed. In attempting to identify the influences on the early stages of an individual’s integrated representation or story formation process, Pennington and Hastie (1990) posit that a major consideration is the juror’s perception of how the social world functions. Hence, the relevance of attribution theory is established once more as it details how individuals, and therefore jurors, perceive the general functioning of society and the behaviours that are exhibited by individuals. Whether the juror’s belief is that behaviour is due to external or situational aspects or pertaining to the internal or dispositional nature of the individual (or an entirely different idea) is of most relevance in a setting where a defendant may be judged by these beliefs (Smith, 2005).
In addition, jurors have a tendency to embellish particular details if they receive inadequate information as a means of constructing a plausible sequence of events. Indeed, actual jury members after the conclusion of their trial revealed that jurors who felt the prosecution case was lacking in evidence were frustrated to not receive more evidence, even from the defence, to ‘fill in the gaps’ that the prosecution had failed to do in meeting their burden of proof (Hunter et al., 2010). However, the information that they choose to incorporate is likely to be consistent with this earlier (potentially biased) impression and subsequent assimilation and evaluation of specific evidence. Therefore, only the evidence relevant to the ‘story’ will be considered as opposed to the entire content of the trial proceedings.

It is through this process of integrated representation (Hastie et al., 1983) or story formation (Pennington & Hastie, 1992) that the influence of propensity evidence is fully realised. The integration of propensity evidence into the sequence of the story shapes how subsequent evidence is perceived by the juror, thus the influence of propensity evidence has the potential to persist by moulding the direction of the story as the trial progresses (Kassin & Wrightsman, 1979). Specifically, information presented after the disclosure of propensity evidence will be subject to the juror’s appraisal of propensity evidence. The more inferences that an individual makes as a result of the propensity evidence, the more difficult it will be to counteract that influence (Eichhorn, 1989).
Consequently, upon presentation of all evidence the juror finishes with a constructed representation of events that will then aid in determining their verdict. As is the norm today, a limiting instruction is then delivered in the judge’s final address to the jury in an attempt to contain the use of propensity evidence to a specified function. The extent that jurors can not only discount the evidence in their decision on the ultimate issue, yet also unravel the persisting influence that the propensity evidence has had on information, is questionable (Kassin & Wrightsman, 1979; Pennington & Hastie, 1992).

An example of this process is revealed in the previously reviewed study by Kassin and Wrightsman (1979), who found that although jurors were capable of discounting the evidence, and in fact later indicated that it was not influential in determining their verdict, jurors in the admissible and inadmissible (due-process) experimental groups evaluated subsequent information as more incriminating in comparison to jurors in the baseline control and inadmissible (low credibility) experimental groups. Similar results were also produced nearly two decades later in a study by Kassin and Sommers (1997). These findings highlight the perhaps unconscious manner in which propensity evidence influences the evaluation of later evidence and the importance in containing this influence as soon as practicably possible (Pennington & Hastie, 1992). Hence, the introduction of an instruction at the conclusion of the trial process appears illogical as all pieces of evidence have been assimilated and evaluated in conjunction with one another.
The literature on intentional forgetting supports this view by recommending that an early attempt to intercept or correct the influence that may unjustly develop from propensity evidence is ideal, as opposed to endeavours associated with removing the information once it has been encoded and assimilated into an integrated representation of the trial at hand (Johnson, 1994; Steblay et al., 2006).

The last point to consider concerns methodological or measurement issues in assessing the effectiveness of a judicial instruction. Research studies show little evidence of explicitly enquiring as to whether the juror understood the content of the instruction and instead infers from results that this is indicative of a juror’s lack of comprehension. Consideration needs to be afforded toward the juror’s understanding of the instruction yet their possible defiance in following it (e.g. juror justice). Moreover, an alternative explanation is that the juror understood the instruction, however, found it near impossible to implement what is required under current judicial conditions (Tanford, 1990).

Additionally, how researchers operationalise the ‘effectiveness’ of judge’s instructions will have implications as to whether an instruction proves to be effective or not. In conceptualising the effectiveness of judge’s instructions in a dichotomous manner, there is little scope to consider optional indicators of effectiveness. For example, rather than focus exclusively on the yes or no ability of the juror to forget or limit the use of the evidence, another means of verifying effectiveness may be to assess the weight that is assigned to other evidence adduced in the trial. It may be
that the juror’s inability to follow such an instruction is indisputable; however, a low percentage rating in relation to how they assess this evidence for credibility and contribution toward the verdict is indicative of the instruction working if little regard has been afforded to the evidence (Bjork, 1998).

5.4 Summary

In summary, there exists uncertainty surrounding the effectiveness of a judicial instruction and the juror’s ability to comply with the request of the judge. This request involves the juror attempting to inhibit the application of propensity evidence for purposes in which its use is prohibited by the judge’s limiting instruction. This attempt requires an active effort to edit information and deny the opportunity for propensity evidence to act persuasively in other decision-making processes, such as in determining the ultimate issue (Bjork, 1998; Johnson, 1998). A number of factors contributing to the difficulty in complying with a judge’s instruction have been identified; thus, how effective an instruction is appears dependent upon a number of mechanisms. These mechanisms involve the temporal positioning of such an instruction, the juror’s comprehension of what is required, and the juror’s motivation and their ability to ignore the highlighted material in addition to undoing the influence that this material has had on subsequent information presented to them in the courtroom. Given that the trial by jury process rests on the notion that jurors follow judge’s directions and are competent in their ability to carry out their tasks, this is a vital research area (Charrow & Charrow, 1979). Given the
high risk of potentially unfair prejudice to the defendant, the need to understand the juror’s utilisation of propensity evidence and to deliver appropriate and effective limiting instructions is paramount.
CHAPTER SIX. CONTEXT FOR CURRENT THESIS

The proposed study is a by-product of the research conducted by the University of New South Wales (UNSW) in 2006. This project, under the working title of the Pilot Jury Study (PJS; Hunter et al., 2010), involved investigating jurors’ responses regarding the issues of jury sleuthing (a topic not examined in this thesis) and the effectiveness of judge’s limiting directions regarding evidence of the defendant’s criminal history. Responses were obtained via a questionnaire that was developed for the specific purpose of this pilot study.

Many of the findings from this study have been discussed throughout the preceding chapters where relevant. At the conclusion of their report, Hunter et al. (2010) recommended a follow-up study to thoroughly address and investigate methods which may aid in increasing juror comprehension and obedience to judicial instruction. The research reported in this thesis was designed to mirror the design of the UNSW-PJS as closely as possible.

6.1 Research aims and hypotheses

Following recommendations made by Hunter et al. (2010), the general research aim was to investigate whether the admission of propensity evidence would significantly influence the verdict delivered in relation to a murder charge. If propensity evidence produced a significant effect toward verdict outcome, a secondary aim was to examine whether a limiting instruction can contain the
influence of propensity evidence and whether an optimal time exists for the limiting instruction to be delivered to the jury. A concurrent aim was to also explore whether propensity evidence assisted in adding context to the case, as contextual background is posited as a rationale for such evidence to be adduced in the courtroom.

It was hypothesised that the presentation of propensity evidence would significantly influence the verdict returned by the participant. Specifically, a significantly higher number of guilty verdicts would be delivered by participants who received the admission of propensity evidence. In addition, although it was hypothesised that age would significantly relate to verdict outcome, it was unclear in which direction this relationship would occur. It was also hypothesised that gender would significantly influence verdict outcome; however, again the exact relationship was uncertain. Next, it was hypothesised that an instruction from the judge regarding the use of propensity evidence would be most effective in controlling for its appropriate use when the limiting instruction was delivered immediately following the admission of such evidence. Lastly, it was hypothesised that participants receiving the admission of propensity evidence would indicate less desire to obtain additional information regarding aspects of the prosecution’s case, and therefore would not perceive there to be any evidentiary gaps, in comparison to participants who did not receive propensity evidence.
CHAPTER SEVEN. METHOD

The present study was designed primarily to examine whether the admission of propensity evidence would affect participants’ verdicts within the context of a murder trial. If the admission of propensity evidence does affect participants’ verdicts, then a secondary aim was to explore whether an instruction from the judge can limit the influence of propensity evidence and whether there exists an optimal time for the instruction to be provided. Concomitantly, participants’ age, gender, method of completion, and perceptions regarding the utility of propensity evidence in assisting the participant to understand the facts of the case were also investigated.

7.1 Design

The design of the current study was a 4 x 2 x 6 x 2 between participants design. The first factor was propensity evidence and instructions: no propensity evidence; propensity evidence; propensity evidence with limiting instructions immediately following propensity evidence; and propensity evidence with the limiting instructions provided during the judge’s final address to the jury. To view the limiting instructions refer to Appendix A and B. The second factor was gender (female and male) and the third factor was age: 18-24 years; 25-34 years; 35-44 years; 45-54 years; 55-64 years; and 65 years and over. The fourth factor was method of completion: hard-copy and online format. The dependent variables were frequency of guilty and not guilty verdicts, participants’ rating of the statement “I am
confident in the verdict I provided” on a 5 point Likert scale ranging from ‘very strongly agree’ to ‘very strongly disagree’, factors identified by participants as influential in their verdict, and perceived evidentiary gaps in the prosecution case. Note that in Chapter 8.3, the dependent variable of verdict also acts as an independent variable to participants’ agreement of confidence in their verdict.

7.2 Materials and procedure

The stimulus materials in the current study consisted of a Plain Language Statement and an amended court transcript of a murder trial and accompanying questionnaire which were part of the UNSW-PJS conducted by Hunter et al. (2010).

The court transcript detailed a trial of a male defendant accused of murdering his female de facto partner. The original transcript was amended to reflect the research conditions involved in the study. Each court transcript contained the indictment, defendant’s plea, the prosecution and defence testimonies (i.e. opening statements, examination and cross-examination of several witnesses, and closing statements) and the trial judge’s summary which included instructions as to the standard of proof and criteria required in order to find the defendant either guilty or not guilty of the offence charged. Note that the evidence of some of the prosecution’s witnesses was substantially edited and details are therefore lacking in the direct
examination process. Depending on the research condition, the transcripts contained between 46 and 50 pages with an average word length of 20,784.

The details of the alleged offence were identical in each of the four research conditions; the transcripts varied only in the admission of propensity evidence and the presence of a limiting instruction from the judge. The propensity evidence was contained in the testimony of the deceased’s mother, who was the second of four witnesses called in the prosecution case. The deceased mother’s testimony was received after the testimony of a neighbour of the couple and prior to the testimony of the police officer who responded to the 000 call and the medical practitioner who examined the deceased on two occasions; the previous incident that constitutes propensity evidence and following the alleged murder. Please refer to Appendix C to view the testimony containing the propensity evidence.

Each questionnaire contained four sections: general views regarding criminal history; views regarding the participant’s experience in the mock trial; views regarding the evidence; and demographic information. Participants who received the judge’s instruction pertaining to the use of propensity evidence also completed a section enquiring into their views regarding the judge’s directions. The package materials took approximately one and a half to two hours to read and complete.

Ethics approval for the current study was sought and granted by the Deakin University Human Research Ethics Committee. Potential participants were recruited
for the current study via the researcher’s social networks, by presenting the research study to book groups that convened across Melbourne, or through a snowballing technique. Participants were notified of the nature and purpose of the current study through the Plain Language Statement and that the research materials were available in a hard-copy format or online via the Deakin University website. Participants were advised that their involvement was voluntary and informed consent was indicated by the return of the package materials or the submission of data online.

Each participant was randomly assigned to a research condition regardless of the method in which they participated. Participants were first asked, at their own convenience, to assume the role of a mock juror and read through the court transcript detailing a true-life criminal case. Participants in the control condition read a case that did not contain the admission of propensity evidence. Participants in the remaining three conditions read a transcript that consisted of the admission of propensity evidence; however the transcripts varied regarding judge’s instructions, with no instruction provided, an instruction provided immediately following the admission of propensity evidence, or an instruction provided in the judge’s closing summary to the jury.

After reading the court transcript, participants subsequently completed the questionnaire that related to their transcript. The questionnaire required the participants to:
1. Provide their verdict by indicating whether the defendant was guilty or not guilty;

2. Specify the confidence in the verdict provided by marking an option ranging from disagree to agree in relation to the statement “I am confident in the verdict I provided”;

3. Detail the factors that influenced their verdict and list the factors that may influence other people provided with the same transcript by responding to open-ended questions such as ‘What are the factors that influenced your decision that the accused was guilty/not guilty of those offence(s)/charge(s)?’;

4. Provide their views regarding the evidence adduced in the trial by answering questions such as “While reading the transcript were you interested in finding out more than the evidence presented in the trial process about the accused, the victim, other witnesses, other people not called as witnesses, and other aspects of the crime or where it occurred’ by marking the corresponding box; and

5. Provide demographic information relating to, for example, gender, age, and occupation.

In addition, participants who were randomly allocated to receive propensity evidence were required to:
1. Detail any criminal history provided by responding to the open-ended question ‘If you recall any evidence concerning the accused person’s criminal history that came out during the trial, briefly describe that evidence’; and

2. Indicate whether the criminal history was related to their verdict by marking a checkbox.

Participants who were allocated to the research condition with the limiting instruction from the judge were required to:

1. Provide a recollection of the information contained in the judge’s instruction by answering the open-ended question ‘Can you tell us to the best of your recollection what was said’;

2. Confirm when the instruction was provided by marking an option ranging from at the time when the evidence was first raised to after the judge gave his summary;

3. Rate the clarity of the instruction from unclear – I could not understand the directions at all to clear – I understood the directions precisely; and

4. Detail what their understanding of the instruction was by responding to the open-ended question ‘What did you understand the judge to mean by these directions?’
After completion of the questionnaire, participants were instructed to return the package materials to the researcher in the reply-paid, self-addressed envelope provided to them or to submit their responses online. Upon receipt of the hard-copy materials or online data, the demographic information and responses provided in the questionnaire were coded accordingly and entered into the Statistical Package for the Social Sciences (SPSS) Version 19 program to collate and analyse data.

As the court transcripts were modified with the inclusion or exclusion of propensity evidence, a pilot study was conducted to evaluate the consistency and readability of each transcript. A pilot study was also considered necessary given that the research study rests on the premise that propensity evidence will in fact influence the juror’s decision making. In addition, as a limiting instruction was inserted into two of the four court transcripts, the pilot study was used to assess the comprehension of the instruction from the judge. This is essential as it is redundant to expect jurors to follow an instruction when they cannot comprehend what the instruction entails (Thompson & Fuqua, 1998).

Twenty participants were involved in the pilot study; thirteen of which completed the research materials in a hard-copy format and seven of which participated online. In general, verdict outcome was evenly distributed, with nine participants considering the defendant guilty and eleven participants delivering a verdict of not guilty. Of the 15 participants who received the propensity evidence, six indicated that the criminal history was related to their verdict. Of the nine
participants who received the judge’s limiting instruction, six participants rated it as ‘clear’ or ‘very clear’. Three participants indicated that the instruction was ‘neither clear nor unclear’; however, their qualitative responses suggested that they understood the instruction, with interpretations such as “only use the current evidence” and “that the evidence given was to be taken more to the credibility of the accused and not to the actual events that took place”. General feedback regarding the overall participation process revealed that most participants described the experience as “interesting”.

7.3 Participants

Although 126 questionnaires were initially returned, two participants who completed less than half of the questionnaire were subsequently removed from the data set. As previously mentioned, participants were randomly assigned to one of four research conditions that varied on the admission of propensity evidence and the presentation of a limiting instruction by the judge. For three of the participants, the research condition could not be determined as the amended court transcript was not returned by the participant in the reply-paid, self-addressed envelope which identified the propensity-instruction condition. Hence, the number of participants in the four propensity-instruction conditions could only be identified for 121 of the participants. The breakdown is as follows:
1. No admission of propensity evidence ($N = 26$ and $6$ for hard-copy and online completion respectively equalling 32 in total);

2. Admission of propensity evidence with no instruction by the judge ($N = 22$ and $6$ for hard-copy and online completion respectively equalling a total of 28);

3. Admission of propensity evidence with an immediate instruction by the judge ($N = 26$ and $8$ for hard-copy and online completion respectively equalling 34 in total);

4. Admission of propensity evidence with an instruction by the judge in the closing summary ($N = 21$ and $6$ for hard-copy and online completion respectively equalling a total of 27).

The final research sample therefore consisted of the 121 participants whose research condition could be identified by the researcher. Note that not all of the 121 remaining participants completed every question in the questionnaire; therefore, the recorded $N$ may not consistently total 121. Of the 121 participants, 33 were male and 86 were female (two participants did not record their gender). Table 1 presents the number of participants in each age-gender condition. Note that there are two missing values for both of the demographic variables.
Table 1.

*The number of participants in each age-gender-propensity condition (N=119).*

<table>
<thead>
<tr>
<th>Propensity Condition</th>
<th>Control Group</th>
<th>Evidence with no Instruction</th>
<th>Evidence with Immediate Instruction</th>
<th>Evidence with End Instruction</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Age</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18-24 years</td>
<td>3</td>
<td>5</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>25-34 years</td>
<td>8</td>
<td>6</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>35-44 years</td>
<td>3</td>
<td>1</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>45-54 years</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>55-64 years</td>
<td>7</td>
<td>7</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>65 years plus</td>
<td>8</td>
<td>5</td>
<td>10</td>
<td>9</td>
</tr>
<tr>
<td><strong>Gender</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>7</td>
<td>6</td>
<td>9</td>
<td>11</td>
</tr>
<tr>
<td>Female</td>
<td>25</td>
<td>21</td>
<td>25</td>
<td>15</td>
</tr>
</tbody>
</table>

7.4 Analyses

As previously mentioned, upon receipt of the hard-copy materials and online data, participants’ responses were coded and entered into the Statistical Package for the Social Sciences (SPSS) Version 19 program. This enabled the researcher to generate the statistical analyses required to test each research hypothesis.

A series of 4 x 2 chi-square tests were performed to analyse the non-parametric data. Although the degree or strength of the association is not reported in
a chi-square, a measure of association can be obtained. In the current study, the Phi coefficient and Goodman and Kruskal’s tau (\(\tau\)) were utilised as a directional measure of association for nominal and ordinal variables respectively.

As it is recommended that no greater than one fifth (20\%) of cells contain a count less than five (Boslaugh & Watters, 2008; Connolly, 2007; Krysik & Finn, 2010; Mitchell, 1971), the chi-square test is also sensitive to small expected frequencies in the cells of the table. Fisher’s Exact Test was employed in instances where the expected cell count was violated and the table was a 2 x 2 design. Fisher’s Exact Test has no assumptions and can be used regardless of the expected cell count; however, please note that it has no formal test statistic and provides only a \(p\)-value. The \(p\)-value for all statistical analyses was set at .05.
CHAPTER EIGHT. RESULTS

8.1 Data preparation

Data were initially screened for responses that were outside the expected values and no abnormalities were found in the data set. Although 121 participants were included in the final sample, not all 121 completed every question in the questionnaire. The $N$ will also vary as a result of the control group (i.e. the group that were not presented with the propensity evidence) being excluded from particular data analyses that were targeted toward the influence of receiving such evidence. Thus, the $N$ recorded in subsequent data analyses does not consistently total 121.

The analyses of participants’ responses follow the same order in which they were obtained from participants and the order in which the dependent variables were presented in Chapter Seven. Thus, the impact of the independent variables on verdict will be examined first, followed by investigating the participants’ confidence, and exploring the factors that influenced participants’ verdicts. The current chapter concludes with an analysis of the participants’ perceptions regarding the adequacy of the prosecution’s evidence.
8.2 Verdict

Participants in the current study were required to submit a verdict of guilty or not guilty in relation to the defendant’s charges. Of the 121 participants involved in the current study, a total of 14 participants (12%) considered the defendant not guilty while 107 participants (88%) returned a verdict of guilty.

The frequencies of guilty and not guilty verdicts for the four propensity conditions are contained in Table 2.

Table 2.

The frequencies of guilty and not guilty verdicts for the four propensity conditions (N=121).

<table>
<thead>
<tr>
<th>Propensity condition</th>
<th>Guilty</th>
<th>Not guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did not receive propensity evidence</td>
<td>26</td>
<td>6</td>
</tr>
<tr>
<td>Received propensity evidence and no instruction from the judge</td>
<td>26</td>
<td>2</td>
</tr>
<tr>
<td>Received propensity evidence and immediate instruction from the judge</td>
<td>30</td>
<td>4</td>
</tr>
<tr>
<td>Received propensity evidence and instruction in the judge’s final address</td>
<td>25</td>
<td>2</td>
</tr>
</tbody>
</table>

Because 50% of cells reported an expected count less than five, the three groups who received the propensity evidence were collapsed into one grouping. No differences were found in the number of guilty and not guilty verdicts between
participants who did not receive propensity evidence and participants who received propensity evidence, \( p = 0.20 \), Fishers Exact Test, two-sided).

Gender was next examined to determine whether a significant relationship existed with the dependent variable of verdict. Note that as previously mentioned in Chapter 7.3, two participants did not record their gender. The frequencies of guilty and not guilty verdicts for females and males are contained in Table 3.

Table 3.
The frequencies of guilty and not guilty verdicts for female and male participants \((N=119)\).

<table>
<thead>
<tr>
<th>Gender</th>
<th>Guilty</th>
<th>Not guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>78</td>
<td>8</td>
</tr>
<tr>
<td>Male</td>
<td>27</td>
<td>6</td>
</tr>
</tbody>
</table>

Although there appeared to be a higher percentage of guilty verdicts given by female participants (90%) than male participants (82%), that difference was not significant \( p = 0.21 \), Fishers Exact Test, two-sided).

The relationship between age and verdict was next investigated. Note that as previously mentioned in Chapter 7.3, two participants did not indicate their age. Table 4 contains the frequency distribution of the verdict returned in each age category.
Table 4.

*The frequencies of guilty and not guilty verdicts as a function of participants’ age (N=119).*

<table>
<thead>
<tr>
<th>Age</th>
<th>Guilty</th>
<th>Not guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>18-24 years</td>
<td>17</td>
<td>0</td>
</tr>
<tr>
<td>25-34 years</td>
<td>27</td>
<td>1</td>
</tr>
<tr>
<td>35-44 years</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>45-54 years</td>
<td>9</td>
<td>2</td>
</tr>
<tr>
<td>55-64 years</td>
<td>19</td>
<td>2</td>
</tr>
<tr>
<td>65 plus years</td>
<td>24</td>
<td>8</td>
</tr>
</tbody>
</table>

Given 50% of cells contained less than the expected count, the six age groupings were collapsed into three age groupings: 18-34 years, 35-54 years and 55 plus years. Table 5 contains the revised frequencies of guilty and not guilty verdicts for the three age groupings.

Table 5.

*The frequencies of guilty and not guilty decisions for the three age groupings (N=119).*

<table>
<thead>
<tr>
<th>Age</th>
<th>Guilty</th>
<th>Not guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>18-34 years</td>
<td>44</td>
<td>1</td>
</tr>
<tr>
<td>35-54 years</td>
<td>18</td>
<td>3</td>
</tr>
<tr>
<td>55 plus years</td>
<td>43</td>
<td>10</td>
</tr>
</tbody>
</table>
Overall, participants in each age grouping delivered more guilty verdicts than not guilty verdicts. There was an age difference in the number of guilty and not guilty verdicts, $\chi^2 (2, N=119) = 6.65, p = 0.04$. Almost 19% of participants in the 55 plus years category considered the defendant not guilty compared to 2% of participants aged between 18-34 years and 14% of participants aged between 35-54 years. Note that although one cell reported an expected count below the minimum, it constituted only 16.7% of overall cells.

No significant difference was observed between participants’ age and verdict for participants between the ages of 18-34 and 35-54 years, ($p = 0.09$, Fishers Exact Test, two-sided) and for participants between the ages of 35-54 years and participants aged 55 years or older, ($p = 0.75$, Fishers Exact Test, two-sided). The significant difference was shown to exist between participants aged 18-34 years and participants 55 years or older, $\chi^2 (1, N=98) = 6.77, p = 0.01$.

Goodman and Kruskal’s tau (9) value of .06 indicates that knowledge of a participant’s age would reduce the error inherent in predicting participants’ verdict by only 6%. In other words, there is a 6% improvement in accuracy in predicting verdict when the age of the individual is taken into consideration.

The frequencies of verdict for the age and gender interaction are shown in Table 6.
Table 6.

The frequencies of guilty and not guilty verdict for the age-gender conditions (N=119).

<table>
<thead>
<tr>
<th>Gender</th>
<th>Age</th>
<th>Verdict</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Guilty</td>
<td>Not guilty</td>
</tr>
<tr>
<td>Female</td>
<td>18-34 years</td>
<td>31</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>35-54 years</td>
<td>15</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>55+</td>
<td>32</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>18-34 years</td>
<td>13</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>35-54 years</td>
<td>3</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>55+</td>
<td>11</td>
<td>4</td>
<td></td>
</tr>
</tbody>
</table>

A series of chi-squares was conducted to identify an interaction between age, gender, and verdict outcome. There was no significant difference in verdict outcome between females and males aged 18 to 34 years, \( p = 1.00 \), Fishers Exact Test, two-sided), 35 to 54 years, \( p = .13 \), Fishers Exact Test, two-sided), and 55 years or older, \( p = 0.44 \), Fishers Exact Test, two-sided).

Finally, the method in which participants completed the study materials was also examined. The frequencies of guilty and not guilty verdicts for the two completion methods are displayed in Table 7.
Table 7.

The frequencies of guilty and not guilty verdicts for the two completion methods (N=121).

<table>
<thead>
<tr>
<th>Completion method</th>
<th>Guilty</th>
<th>Not guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hard-copy completion</td>
<td>81</td>
<td>14</td>
</tr>
<tr>
<td>Online completion</td>
<td>26</td>
<td>0</td>
</tr>
</tbody>
</table>

A significant association was found between verdict and method of completion. Participants in the online condition were more likely to render a guilty verdict (100%) than participants who completed their task with a hard-copy of the materials (85%) \( (p = 0.04, \text{Fishers Exact Test, two-sided}) \). However, a Phi coefficient value of -.19 shows little to no negative association between the verdict of a participant and their completion method.

In summary, neither participants’ gender nor knowledge of propensity evidence was found to be related to verdict outcome. However, participants’ age and the method in which the research materials were completed were found to influence verdicts.
8.3 Verdict confidence

Participants in the current study were required to agree or disagree to the statement “I am confident in the verdict I provided”. In this instance, the dependent variable of verdict was also examined as an independent variable. The number of participants who agree and disagree with the statement “I am confident in the verdict I provided” for guilty and not guilty verdicts is contained in Table 8. Note that four participants did not indicate their confidence in the verdict outcome they determined.

Table 8.

The number of participants who agreed and disagreed with the statement “I am confident in the verdict I provided” for guilty and not guilty verdicts (N=117).

<table>
<thead>
<tr>
<th>Statement choice</th>
<th>Guilty</th>
<th>Not guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree</td>
<td>93</td>
<td>10</td>
</tr>
<tr>
<td>Disagree</td>
<td>12</td>
<td>2</td>
</tr>
</tbody>
</table>

No relationship was found between participants’ verdicts and their agreement with the statement “I am confident in the verdict I provided” ($p = 0.64$, Fisher’s Exact Test, two-sided).

The frequencies of agreement and disagreement for the four propensity conditions are displayed in Table 9. Four participants did not indicate their
confidence in the verdict outcome they determined and this is again reflected in the $N$ value.

Table 9.

*The frequencies of agreement and disagreement with the statement “I feel confident in the verdict I provided” for the four propensity conditions (N=117).*

<table>
<thead>
<tr>
<th>Propensity condition</th>
<th>Agree</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did not receive propensity evidence</td>
<td>26</td>
<td>5</td>
</tr>
<tr>
<td>Received propensity evidence and no instruction from the judge</td>
<td>25</td>
<td>2</td>
</tr>
<tr>
<td>Received propensity evidence and immediate instruction from the judge</td>
<td>30</td>
<td>3</td>
</tr>
<tr>
<td>Received propensity evidence and instruction in the judge’s final address</td>
<td>24</td>
<td>2</td>
</tr>
</tbody>
</table>

Due to violations in expected cell counts in the data presented in Table 9, the propensity conditions were collapsed to contain the group of participants who did not receive propensity evidence as one grouping and participants in the three conditions who received propensity evidence as a second grouping. Collapsing the propensity conditions did not remedy the chi-square assumption violation. Retaining the collapsed propensity conditions, propensity evidence did not influence the number of participants who agreed with the statement “I am confident in the verdict I provided” ($p = 0.30$, Fisher’s Exact Test, two-sided).

The impact of gender on the number of participants who agreed with the statement “I am confident in the verdict I provided” was next examined. The number
of females and males who agreed with the statement “I am confident in the verdict I provided” is contained in Table 10. Note that the N value reflects the two participants who did not report their gender and the four participants who did not report the confidence in their verdict.

Table 10.

The number of females and males who agreed and disagreed with the statement “I am confident in the verdict I provided” (N = 115).

<table>
<thead>
<tr>
<th>Gender</th>
<th>Agree</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>71</td>
<td>11</td>
</tr>
<tr>
<td>Male</td>
<td>32</td>
<td>1</td>
</tr>
</tbody>
</table>

No difference were found in agreement with the statement “I am confident in the verdict I provided” between females and males, (p = 0.18, Fishers Exact Test, two-sided).

The association between age and agreement with the statement “I am confident in the verdict I provided” could not be determined, due to expected cell counts below the required minimum. Implementing the collapsed age groups did not remedy the violation. The frequency distribution for the agreement in verdict confidence as recorded by the collapsed age categories is displayed in Table 11. Note
that the $N$ value reflects the two participants who did not indicate their age and the four participants who did not report the confidence in their verdict.

Table 11.

_The number of participants who stated that “I am confident in the verdict I provided” for the three age groups (N=115)._  

<table>
<thead>
<tr>
<th>Age</th>
<th>Agree</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>18-34 years</td>
<td>38</td>
<td>5</td>
</tr>
<tr>
<td>35-54 years</td>
<td>19</td>
<td>2</td>
</tr>
<tr>
<td>55+ years</td>
<td>46</td>
<td>5</td>
</tr>
</tbody>
</table>

Visual inspection indicates little or no differences between the three age groups in their agreement with the statement “I am confident in the verdict I provided”. Due to the low expected value of the disagree responses, a chi square test was not performed.

Finally, the method in which participants completed the research materials was explored in relation to agreement of the statement “I am confident in the verdict I provided”. The number of participants who agreed that “I am confident in the verdict I provided” for the two methods of completion is shown in Table 12. Recall that four participants did not indicate their confidence in the verdict outcome.
Table 12.

*The number of participants who agreed with the statement “I am confident in the verdict I provided” as a function of the two methods of completion (N=117).*

<table>
<thead>
<tr>
<th>Completion method</th>
<th>Agree</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hard-copy completion</td>
<td>80</td>
<td>11</td>
</tr>
<tr>
<td>Online completion</td>
<td>25</td>
<td>1</td>
</tr>
</tbody>
</table>

There was no difference in agreement with the statement “I am confident in the verdict I provided” between the two methods of completion ($p = 0.30$, Fisher’s Exact Test, two-sided).

In summary, there was no relationship between verdict, propensity evidence, gender, age or method of completion and the number of participants who agreed with the statement “I am confident in the verdict I provided”.

### 8.4 Factors influencing participants’ verdicts

Participants were asked to specify the most important factor determining their decision whether the defendant was guilty or not guilty. This information was obtained from an open-ended question and responses were grouped into ten categories. Note that 13 responses were classified as ‘other’ due to their divergent
nature. Table 13 displays the frequency distribution of these influential factors as recorded by verdict.

Table 13.

The number of participants who identified particular factors influencing their verdicts ($N=121$).

<table>
<thead>
<tr>
<th>Factor</th>
<th>Guilty</th>
<th>Not guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alleged act of strangulation</td>
<td>19</td>
<td>0</td>
</tr>
<tr>
<td>Defendant’s admission/confession</td>
<td>22</td>
<td>0</td>
</tr>
<tr>
<td>Doubt regarding cause of death</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Doubt regarding defendant’s intent</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Medical evidence</td>
<td>15</td>
<td>1</td>
</tr>
<tr>
<td>Post-offence behaviour of the defendant</td>
<td>9</td>
<td>0</td>
</tr>
<tr>
<td>Presence of intent in the defendant</td>
<td>13</td>
<td>0</td>
</tr>
<tr>
<td>Propensity evidence</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>Relationship between the defendant and the deceased</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Statements/address from legal personnel</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>10</td>
<td>2</td>
</tr>
</tbody>
</table>

Inspection of the reasons given by participants for their verdict suggests that participants give weight to different pieces of evidence for guilty and not guilty decisions. For example, a greater number of participants who delivered a not guilty verdict were influenced by their doubt regarding the cause of death or the intent of the defendant. The two factors most often forming the basis for a guilty verdict were the defendant’s admission or confession and the perceived act of strangulation that was (allegedly) engaged in by the defendant. Due to the low number of not guilty verdicts, it was not considered appropriate to undertake any statistical analyses.
8.5 Perceived evidentiary gaps

As a means of evaluating participants’ perceptions regarding the prosecution case, participants were required to indicate whether they desired additional information in five aspects of the trial: the defendant; the victim; other witnesses; other people not called as witnesses; and other aspects of the crime.

Responses to these five aspects formed the dependent variable and were first examined in relation to the independent variable of participants’ research condition. The number of participants who expressed a desire for more information about the defendant is displayed in Table 14 for each of the four propensity conditions. Note that five participants did not answer the question.

Table 14.

The number of participants who expressed a desire for additional information regarding the defendant as recorded in each propensity condition (N=116).

<table>
<thead>
<tr>
<th>Propensity Condition</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did not receive propensity evidence</td>
<td>11</td>
<td>21</td>
</tr>
<tr>
<td>Received propensity evidence and no instruction from the judge</td>
<td>15</td>
<td>10</td>
</tr>
<tr>
<td>Received propensity evidence and immediate instruction from the judge</td>
<td>21</td>
<td>12</td>
</tr>
<tr>
<td>Received propensity evidence and instruction in the judge’s final address</td>
<td>20</td>
<td>6</td>
</tr>
</tbody>
</table>
As the data in Table 14 show, significantly more of the participants not receiving propensity evidence compared to participants in the other three propensity conditions expressed a desire for additional information about the defendant, $\chi^2 (3, N=116) = 11.60, p = 0.01$. Multiple chi-square tests comparing each propensity condition with another highlighted a significant result for each analysis involving the propensity condition that did not receive the evidence; $\chi^2 (1, N=57) = 3.72, p = 0.05$, $\chi^2 (1, N=65) = 5.57, p = 0.02$, $\chi^2 (1, N=58) = 10.44, p < 0.01$, respectively for the three propensity conditions that received the evidence.

A phi coefficient value of .25, .29 and .42 respectively for the previous chi-square analyses indicates little to weak positive associations between participants’ responses as to whether they desire additional information regarding the defendant and their propensity condition.

The number of participants who expressed a desire to have additional information about the victim in each propensity condition is shown in Table 15. Note that eight participants did not answer the question.
Table 15.

The number of participants who expressed a desire for additional information about the victim as recorded in each propensity condition (N=113).

<table>
<thead>
<tr>
<th>Propensity condition</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did not receive propensity evidence</td>
<td>13</td>
<td>19</td>
</tr>
<tr>
<td>Received propensity evidence and no instruction from the judge</td>
<td>16</td>
<td>9</td>
</tr>
<tr>
<td>Received propensity evidence and immediate instruction from the judge</td>
<td>21</td>
<td>11</td>
</tr>
<tr>
<td>Received propensity evidence and instruction in the judge’s final address</td>
<td>17</td>
<td>7</td>
</tr>
</tbody>
</table>

The overall relationship between propensity condition and the desire for further information regarding the victim was at best of marginal significance, $\chi^2 (3, N=113) = 6.71$, $p = 0.08$. However, multiple chi-square analysis identified a significant difference in the number of participants between the propensity condition not receiving the propensity evidence, 40.6% no response, and both propensity conditions receiving propensity evidence and judicial instruction; $\chi^2 (1, N=64) = 4.02$, $p = 0.05$ and $\chi^2 (1, N=56) = 5.03$, $p = 0.03$ for immediate instruction, 65.6% no responses, and instruction in the judge’s final address, 70.8% no responses, respectively.

A phi coefficient value of .25 and .30 respectively for the previous chi-square analyses indicates little to no association between participants’ responses as to whether they will desire additional information regarding the victim as a function of their propensity condition. Therefore, while a significant relationship is shown...
statistically, the strength of the contribution that the propensity condition has on a participant’s desire for additional information is weak.

There was also a relationship between the propensity condition and the desire to obtain more information about other witnesses, χ² (3, N=109) = 9.95, p = 0.02. The numbers of participants who expressed this desire are displayed in Table 16. Note that 12 participants did not answer the question.

Table 16.

The number of participants who expressed a desire for additional information about other witnesses as recorded in each propensity condition (N=109).

<table>
<thead>
<tr>
<th>Propensity condition</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did not receive propensity evidence</td>
<td>18</td>
<td>12</td>
</tr>
<tr>
<td>Received propensity evidence and no instruction from the judge</td>
<td>13</td>
<td>12</td>
</tr>
<tr>
<td>Received propensity evidence and immediate instruction from the judge</td>
<td>24</td>
<td>8</td>
</tr>
<tr>
<td>Received propensity evidence and instruction in the judge’s final address</td>
<td>20</td>
<td>2</td>
</tr>
</tbody>
</table>

The pattern obtained in Table 16 is different from that of Table 14 and Table 15, with more participants in all four propensity conditions indicating that they do not desire additional information compared to the number of participants affirming their desire to have additional information. Multiple chi-square tests comparing each propensity condition with another showed a significant difference in the responses of those participants not receiving propensity evidence, 60% no responses, and the
responses of those participants receiving propensity evidence and an instruction from the judge in the final address, 90.9% no responses, $\chi^2 (1, N=52) = 6.16, p = 0.01$. A phi coefficient value of .34 indicates a weak association between participants’ desire for additional information regarding other witnesses and receiving propensity evidence and instruction at the conclusion of the trial.

In addition, there was a significant difference in the percentage of ‘no’ responses of participants receiving propensity evidence and no judicial instruction, 52% no responses, and the percentage of “no” responses of participants receiving propensity evidence and an instruction in the judge’s final address, 90.9% no responses, $\chi^2 (1, N=47) = 8.47, p < 0.01$. A phi coefficient value of .43 indicates a weak association between the desire for additional information regarding other witnesses and the participant receiving propensity evidence and an instruction in the judge’s final summation. There was no significant difference between participants who did not receive propensity evidence, 32.7% no responses, when compared with participants who received propensity evidence and no judicial instruction, 23.6% no responses, $\chi^2 (1, N=55) = 0.36, p < 0.55$.

There was no relationship between propensity condition and the desire to obtain further information about other people not called as witnesses, $\chi^2 (3, N=108) = 3.22, p = 0.36$. Note that 13 participants did not answer the question. There was also no relationship between propensity condition and the desire to obtain further
information about other aspects of the crime, $\chi^2 (3, N=108) = 1.40, p = 0.71$ and again, 13 participants did not answer the question.

Gender was next examined in relation to perceived evidentiary gaps. There was no difference in the responses from male and female participants desiring additional information about the five specified aspects of the trial: the defendant, $\chi^2 (1, N=115) = 0.74, p = 0.39$; the victim, $\chi^2 (1, N=112) = 0.02, p = 0.89$; other witnesses, $\chi^2 (1, N=108) = 0.31, p = 0.58$; other people not called as witnesses, $\chi^2 (1, N=107) = 0.09, p = 0.77$; and other aspects of the crime, $\chi^2 (1, N=107) = 0.08, p = 0.78$. The responses from participants regarding their desire for additional information are displayed by gender in Table 17.

Table 17.

The number of participants who expressed a desire for additional information on each of the five aspects of the trial as recorded by gender.

<table>
<thead>
<tr>
<th></th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Defendant</td>
<td>21</td>
<td>12</td>
</tr>
<tr>
<td>Victim</td>
<td>18</td>
<td>12</td>
</tr>
<tr>
<td>Other witnesses</td>
<td>18</td>
<td>10</td>
</tr>
<tr>
<td>Other people not called as witnesses</td>
<td>21</td>
<td>6</td>
</tr>
<tr>
<td>Other aspects of the crime</td>
<td>20</td>
<td>7</td>
</tr>
</tbody>
</table>
The relationship of age of the participant to expressing a desire for further information was next explored. Note that two of the five chi-square analyses revealed expected cell counts below the required minimum and age was again combined into three categories. Age was significantly related to the desire to obtain further information about the defendant, $\chi^2 (2, \ N=115) = 6.95, \ p = 0.03$. The number of participants who desired additional information is shown in Table 18 for each of the three age groupings. Recall that five participants did not answer the question regarding their desire for additional information about the defendant.

Table 18.

The number of participants expressing a desire for additional information regarding the defendant as recorded in each of the three age groupings (\(N=115\)).

<table>
<thead>
<tr>
<th>Age</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>18-34 years</td>
<td>31</td>
<td>12</td>
</tr>
<tr>
<td>35-54 years</td>
<td>12</td>
<td>9</td>
</tr>
<tr>
<td>55 plus years</td>
<td>23</td>
<td>28</td>
</tr>
</tbody>
</table>

Inspection of Table 18 demonstrates that participants aged 55 years or over were more inclined to desire additional information about the defendant than were the participants aged from 18 to 54 years (55% versus 27.9% and 42.9%), $\chi^2 (2, \ N=115) = 6.95, \ p = 0.31$. Goodman and Kruskal’s tau (\(\tau\)) value of .06 indicates a 6% reduction in error in predicting whether participants desire additional information.
regarding the defendant when predictions are made on the basis of the participant’s age.

There were no further findings of significance regarding age and the desire to obtain additional information about the victim, $\chi^2 (2, N=112) = 0.26, p = 0.88$; other witnesses, $\chi^2 (2, N=108) = 0.13, p = 0.94$; other people not called as witnesses, $\chi^2 (2, N=107) = 0.57, p = 0.75$; and other aspects of the crime, $\chi^2 (2, N=107) = 0.23, p = 0.89$.

Finally, there was no relationship between the method of completion and the desire to obtain additional information about the five specified aspects of the trial: the defendant, $\chi^2 (1, N=116) = 1.81, p = 0.18$; the victim, $\chi^2 (1, N=113) = 2.66, p = 0.10$; other witnesses, $\chi^2 (1, N=109) = 0.84, p = 0.36$; other people not called as witnesses, $\chi^2 (1, N=108) = 0.84, p = 0.36$; and other aspects of the crime, $\chi^2 (1, N=108) = 0.07, p = 0.79$.

In summary, a significant relationship was found between propensity evidence and the desire for further information regarding the defendant. The participants’ research condition was also significantly associated with the desire for extra information about other witnesses. Lastly, age was significantly related to the desire to obtain further information about the defendant.
CHAPTER NINE. FINAL REMARKS.

The primary aim of the current study was to examine whether the admission of propensity evidence would influence participants’ verdicts within the context of a murder trial. If the propensity evidence did affect participants’ verdict, a secondary aim was to explore whether an instruction from the judge to jurors would mitigate such an influence and whether there exists an optimal time for that instruction. In addition, participants’ age, gender, method of completion, and perceptions regarding the utility of propensity evidence in facilitating their understanding of the facts of the case were investigated.

The main findings of the research reported in this thesis are:

1. The admission of propensity evidence did not increase the percentage number of guilty verdicts;
2. The percentage of guilty verdicts decreased as a function of age. Older participants rendered fewer guilty verdicts than younger participants;
3. Gender of the participant did not influence verdict outcome; and
4. A higher percentage of guilty verdicts were given by participants who completed the task online than by participants who were provided with a hard copy of the materials.
9.1 Finding 1: The admission of propensity evidence did not significantly increase the percentage of guilty verdicts.

The salient finding of the current study is the very high number of guilty verdicts reported by participants. One consequence of the very high number of guilty verdicts across all conditions is that any effects of the experimental manipulations will be difficult to detect. Thus, the failure to find any effects of propensity evidence, judge’s instructions and timing of those instructions, and gender is not surprising. The fact that there was an age effect suggests that age is a powerful factor in determining verdict in the present study.

The high number of guilty verdicts returned in the current study was unexpected as a pilot study conducted to ensure the readability of the transcript and test the effects of the experimental conditions had found approximately equal numbers of guilty and not guilty verdicts. Why there were ceiling effects in the final study and not in the pilot study is puzzling, as participants in the main study received the same instructions, read the same transcripts, and were provided with the same task requirement as the pilot study.

Earlier studies which found propensity effects (e.g. Doob & Kirshenbaum, 1972; Hans & Doob, 1976; Greene & Dodge, 1995; Lloyd-Bostock, 2000; Pettus, 1990; Wissler & Saks, 1985) did not have ceiling effects. All of these researchers found a significantly higher number of guilty verdicts when participants were
provided with evidence of the defendant’s past criminal convictions. When comparing the studies previously mentioned to the present research, however, a number of variations are evident which may have accentuated the effect of propensity evidence in these earlier studies and minimised those effects in the present study.

Some studies (e.g. Doob & Kirshenbaum, 1972; Hans & Doob, 1976; Lloyd-Bostock, 2000; Wissler & Saks, 1985) have utilised a fictitious or hypothetical court case whereas the current study consisted of an actual court transcript. Therefore, researchers may have had more control over the manipulation of certain variables which produced significant results. It is also possible that given the propensity evidence consisted of one incident of alleged assault in the current study, participants did not view the evidence as indicative of the defendant’s tendency to engage in violent or criminal acts and a weak manipulation may have occurred as propensity evidence was not shown to significant influence verdict outcome. However, the strength of the manipulation regarding propensity evidence may be an irrelevant factor to consider, given that guilty verdicts were already at a ceiling level.

Furthermore, rather than a relatively short one to two page case summary, such as those employed by Doob and Kirshenbaum (1972), Hans and Doob (1976), or Wissler and Saks (1985), the current study provided participants with a comprehensive and approximate 20,000 word transcript. Well-developed and extensive information or case description is likely to provide an abundance of
information on which to base a verdict. Given the length of the trial transcript contained in the present study, it can be argued that participants were provided with a wealth of information on which to base his or her verdict and propensity evidence, enmeshed with other pieces of evidence was not a crucial factor for the participant (Diamond, 1997). This position is supported by the fact that, for those groups who received propensity evidence, propensity evidence was identified as an influential factor in coming to a verdict by only 8 out of 121 participants.

Another potential reason for the apparent weak manipulation regarding propensity evidence is that in addition to the testimony of Jane’s mother, propensity evidence was contained in the medical report, as the same medical practitioner examined Jane after the incident that now constitutes propensity evidence and also shortly before her death. As research (e.g. Pennington & Hastie, 1992) supports the idea that each piece of evidence is assimilated into the minds of a juror in a story-type fashion, then it is possible that the medical evidence, the information about the previous incident, and the allegations of strangulation all combined in the minds of the participant to influence verdict outcome.

Lastly, the ceiling effect observed in the current study may be a product of the presence of confession evidence, which has been established as being decisive in previous research (Kassin & Neumann, 1997; Kassin & Sukel, 1997) and in this research was found to be identified as the evidence most influential on verdict outcome. Medical evidence was also a piece of evidence that was highly relevant to
participants. These two factors assist in establishing the guilt of the defendant, as the evidence that was submitted by the medical examiner supported the alleged act of strangulation that the defendant was said to have inflicted on the victim.

The non-significant results of the current study are, however, consistent with research by Thompson et al. (1981) who also found that knowledge of the defendant’s previous conviction did not increase the conviction rate among participants. In the Thompson et al. research, participants whose ages ranged from 17 to 69 years viewed a videotaped trial of a defendant facing a murder charge. Ceiling effects can be ruled out as an explanation for the failure to find a propensity effect in Thompson et al’s study. Because of the ceiling effects obtained in the current study, the contradictory findings pertaining to the effect of propensity evidence on verdict outcome cannot be resolved.

The juror’s confidence in verdict outcome was also examined in the current study. Previous research has posited that confidence varies significantly as a function of the type of verdict that is delivered by the juror. Specifically, jurors who return a verdict of guilty report more confidence than jurors who determine that the defendant is not guilty (Greene & Dodge, 1995; Kassin & Neumann, 1997). However, the results of the current study found no relationship between juror’s confidence in verdict outcome and presence or absence of propensity evidence. That there was no difference in verdict confidence is surprising given that the juror is
required to be certain ‘beyond reasonable doubt’ of the defendant’s culpability, whereas there is no such requirement for a verdict of not guilty.

It is also possible that the measure of confidence was not sensitive enough to detect any significant differences. While responses were originally recorded on a 5-point Likert scale, responses were later collapsed into two categories, agree or disagree, for the purposes of statistical analysis because of small numbers in some of the cells. Thus, additional information about propensity evidence may have increased participants’ confidence about their verdict; however, this could not be determined in the current study because most of the verdicts delivered by jurors were guilty and 103 of 117 participants agreed with the statement “I am confident in the verdict I provided” irrespective of that verdict. This distribution of responses precluded detecting a relationship between verdict outcome and verdict confidence.

However, prior research has found no relationship between participants’ verdicts and their confidence in those verdicts (Kassin & Wrightsman, 1979; Green & Dodge, 1995; Wissler & Saks, 1985). Kassin and Wrightsman examined the influence of the timing of a judicial instruction on participants who were either provided with the instruction prior to the presentation of evidence, after the presentation of evidence or not provided with an instruction at all. Participants’ judgements were also either obtained on one occasion (at the conclusion of the audiotape) or at several points throughout the course of the trial. The level of confidence did not vary across the experimental groups.
Greene and Dodge (1995) also reported a similar finding with results from their study demonstrating that the admission or exclusion of prior record evidence or judicial instruction had no effect on confidence levels. Wissler and Saks (1985) also reported that verdict certainty did not significantly differ by type of crime or research condition. The failure to find a significant result in the previous literature examples cannot be attributed to ceiling effects. Because of ceiling effects, the current study is therefore unable to shed any light as to the reasons why some research studies have found a relationship between verdict outcome and confidence and others have not.

A secondary aim of the current study was to explore whether an instruction from the judge can mitigate the influence of propensity evidence on verdict outcome and whether there exists an optimal time for the instruction to be presented to the juror. Given that propensity evidence not did influence verdict outcome, there was no effect for judge’s instructions to mitigate.

A subsidiary aim of this research was to explore whether the admission of propensity evidence assisted in providing context to the case, given that a rationale for adducing such evidence is that it contributes contextual background for the juror. Despite the absence of any significant differences between propensity conditions in verdict outcome and confidence, more participants in the no-propensity research condition expressed the need for additional information in comparison to the participants in other research conditions. Specifically, participants’ research
condition was associated with the desire for further information regarding the defendant, the victim, and other witnesses involved in the trial.

While the finding that the control group desired further information about the defendant may appear to support the rationale for admitting propensity evidence into the trial, that of providing a more complete picture of the defendant, this explanation is inconsistent with the explanation advanced earlier that there was no effect of propensity evidence, because sufficient other evidence had been provided by the prosecution to produce a guilty verdict in the control group.

The fact that the control group was the only group who desired extra information about the victim and other witnesses can be interpreted in two ways. First, that those participants in the groups receiving propensity evidence are able to deduce details about the victim and other witnesses from the propensity evidence. The second interpretation of the control group desiring further information about the victim and other witnesses as well as desiring additional information about the defendant is that the desire for additional information about the defendant is the result of an unidentified artifact. This latter interpretation is supported by the finding that verdict outcome did not significantly differ between the control group and the experimental conditions; hence, it appears that the information was not crucial to the overall decision making and verdict outcome of participants in the control group.
9.2 Finding 2: The percentage of guilty verdicts decreased as a function of age.

The finding that the percentage of guilty verdicts decreased with age is an important one, given that it occurred despite the overall high percentage of guilty verdicts. This finding is comparable to the findings of Mills and Bohannon (1980), who found that older adults were less likely to convict a defendant charged with murder than were younger adults. Although previous research has found that younger jurors are more inclined to render a verdict of not guilty in rape cases (Sealy & Cornish, 1973; Mills & Bohannon, 1980), it may be that the explanation for the conflicting findings has to do with the type of crime that was described in the case study.

For example, in Sealy and Cornish’s (1973) study where younger participants were less likely to convict, the participants were returning a verdict for either a theft or a rape charge. Mills and Bohannon (1980) also found a similar age pattern to Sealy and Cornish (1973); that is, that younger participants were less likely to convict when the charge was rape. Lastly, Feild and Barnett (1978) found that younger adults imposed a more lenient sentence than older adults on a defendant who was charged with rape. However, when the crime of murder was examined, Mills and Bohannon (1980) found younger adults more likely to render a conviction than older adults, the reversal of the pattern they found for rape. This particular finding is one that also emerged in the current study where the defendant was on trial.
for murder, with all bar one of the participants aged between 18 to 34 years rendering a guilty verdict and 11 of the 15 (73.3%) participants who returned a verdict of not guilty being aged 55 years or over.

While the explanation regarding the effect of different crimes on different ages has been proposed by Sealy and Cornish (1973), the authors failed to elaborate on the exact manner in which particular crimes would impact on particular ages. It is also unclear to the author of this thesis as to how crimes of murder, rape, or theft would differentially impact participants of varying ages and, moreover, reverse the pattern of guilty verdicts that is found (i.e. a higher number of guilty verdicts reported by young people in murder cases and a higher number of guilty verdicts reported by older people in rape cases).

A significant relationship was also found between the age of participants and their need for more information, with participants aged 55 years or older being significantly more likely to desire additional information about the defendant in comparison to participants aged between 18 and 34 years (refer to Table 18). This is an interesting finding given that previous literature suggests older adults process less pieces of information than younger adults when involved in decision making (Peters et al., 2007; Phillips & Sternthal, 1977); however, the information that is involved in this processing is vital to the decision at hand. Thus, it is possible that older adults in the current study felt that there was insufficient detail to reach a verdict and they therefore requested additional information significantly more so than younger adults.
This explanation may also help to account for the significant relationship between age and verdict outcome, where a higher number of acquittals were returned by those in the 55 years or older age group, as this age group may have felt that they did not possess sufficient information to deliver a verdict. However, this explanation fails to account for the absence of an interaction between age and propensity evidence in the current study, which would result from a higher percentage of older participants who received propensity convicting the defendant compared to older participants who did not receive propensity evidence, and also fails to account for the findings regarding a reverse pattern in studies examining rape.

9.3 Finding 3: Participants’ gender did not influence the percentage of guilty verdicts.

The finding that gender did not influence the percentage of guilty verdicts is not entirely surprising because of the ceiling effects. Gender effects were also not obtained in a study by Villemur and Hyde (1983) who utilised an audiotaped rape trial. In considering research studies that have examined other charges, research also shows little support for the influence that gender produces on verdict outcome (Bridgeman & Marlowe, 1979; Moran & Comfort, 1982; Wissler & Saks, 1985). In particular, the overall conviction rate reported by Moran and Comfort was 82%, which was only 8% short of the conviction rate of the overall county in which the trials took place in (which was estimated at 90%). These figures are similar to the conviction rate reported by the overall sample (88%) in the current study. However,
failure to find gender effects in Moran and Comfort’s study may also be due to the high conviction rates reported.

An important distinction is made between the research of Costantini and King (1980-1981) and Costantini, Mallery, and Yapundich (1983), who found females are more likely to prejudge the defendant as guilty in comparison to males, when compared to the current study as the dependant measure in the former studies was participants’ prejudgement of the defendant, and not final verdict outcome, which was the dependant variable in the current study. Costantini et al. (1983) were also able to demonstrate a link between pre-trial information and gender; that is, the propensity for women to prejudge the defendant as guilty was a function of their level of knowledge regarding the case. As the transcript used in the current study was from the state of New South Wales, and participants were recruited in the state of Victoria, it is assumed that participants’ knowledge of this particular case was minimal and therefore no prejudgments based on knowledge of the case could be made.

Mills and Bohannon (1980) found that although guilty verdicts remained at a high level for females across all age categories, guilty verdicts increased with the age of males. A similar pattern for females was found in the current study, with 96.8% of the female participants in the 18-34 years of age category, 93.7% of the 35-54 year-olds females, and 84.2% of the female participants in the 55 years and over age category returning a guilty verdict. However, the pattern of verdicts by male
participants differed from that found by Mills and Bohannon, and the pattern of female verdicts obtained in this study, with 100% of male participants in the 18-34 years of age category finding the defendant guilty, 60% in the 35-54 years of age category, and 73.3% of the male participants in the 55 years and over age group returning a guilty verdict.

Female participants, across all age groups, delivered more guilty verdicts than not guilty verdicts. While a similar pattern was found in male participants who were 18-34 years of age and the males who were aged over 55 years, male participants who were between the ages of 35 and 54 years reported a similar number of guilty and not guilty verdicts. However, it would be premature to draw any definitive conclusions about the responses of 35 to 54 year-old males due to the small sample size of males between these ages.

The finding regarding gender and verdict outcome in males has been previously reported by Mills and Bohannon (1980) who also found two peaks for guilty verdicts in males between 26 and 35 years of age and between 50 and 64 years of age. While the age categories in the current study are set up in a somewhat different manner, these ages are captured in the two age categories reporting higher guilty than not guilty verdicts, although the second category only partially overlaps. This U-shaped relationship has also been reported by Sealy and Cornish (1973); however, both sets of researchers offered no explanation for this finding. Why 35 to 54 year old males appear to be more ready to acquit or return a verdict is puzzling.
Lastly, a significant relationship was not found between the gender of participants and their need for more information regarding the following five aspects of the trial: the defendant; the victim; other witnesses; other people not called as witnesses; and other aspects of the crime. Thus, no difference in interest was shown between females and males in acquiring further information.

9.4 Finding 4: The method of completion was related to verdict outcome.

There was a significant finding between method of completion and verdict outcome, with individuals who were completing the research materials online more likely to record a guilty verdict than participants completing the materials via the paper-and-pencil method. Given that 92% of participants who completed the research materials online were younger than 44 years of age, and those younger adults were more likely to vote guilty in comparison to older adults, it is not surprising that there were a higher percentage of guilty verdicts rendered by online participants.

9.5 Contributions and Implications of the Current Study

Notwithstanding the ceiling effect, there were two significant results that were obtained in the current study: the percentage of guilty verdicts decreased as a function of age; and, a higher percentage of guilty verdicts were delivered by participants who completed the task online rather than via hard-copy. The finding in
relation to age and verdict outcome in a murder trial is consistent with research that is available in the field and supports the notion that demographic variables, such as age, can influence the verdict outcome for different types of crime. In considering the implications of the current study’s findings for the practice of jury selection, it appears that a jury panel composed of older adults may be preferred by the defence team when the charge is one of murder, arising in the context of domestic violence, against the defendant.

Although ceiling effects may have masked any propensity effects, the present study does address a criticism noted in the meta-analysis by Steblay et al. (2006). These researchers comment that, in general, the majority of the studies that were reviewed in the meta-analysis did not seek to examine the independent impact of the evidence on the verdict outcome of participants. The primary aim of the current study was to investigate this impact; however, ceiling effects precluded any definitive conclusions being made about the relationship between propensity evidence and verdict outcome.

In addition, one of the study’s strengths is its diversity in the ages represented in the sample, as opposed to past research samples which are commonly composed of university students. This narrow research sample is often identified as a limitation by researchers in the field (Fischer, 1997; Mills & Bohannon, 1980; Pettus, 1990; Rose & Ogloff, 2001; Steblay et al., 2006). Thus, the present study illuminated the possibility that participants of varying ages may process evidence and engage in
decision making regarding the ultimate issue differently whilst also highlighting a research area requiring future empirical investigation.

Lastly, in contrast to several studies that were reviewed throughout the second chapter (Doob & Kirshenbaum, 1972; Hans & Doob, 1976; Lussier et al., 1977; Pickel, 1995; Wissler & Saks, 1985), the current thesis utilised a transcript amended from an actual criminal trial conducted in 2006 in Sydney, Australia. Thus, the trial transcript provides a higher degree of ecological validity than studies which provide briefer details. The shortcoming to this approach, however, and one that is often cited by researchers (e.g. Fischer, 1997; Lloyd-Bostock, 2000; Tanford & Cox, 1988; Thompson et al., 1981) is that the ability to generalise the research findings may be limited to the facts of the specific case.

9.6 Limitations of the Current Study and Recommendations for Future Research

While several strengths were identified in the previous section, there are a number of limitations in the current study that need to be highlighted. As previously mentioned, the major limitation in the current thesis was the ceiling effect that occurred and which potentially obscured any effects of propensity evidence and the judge’s instruction. In addition, although the number of participants in each propensity condition is comparable to prior research (Doob & Kirshenbaum, 1972; Greene & Dodge, 1995; Lloyd-Bostock, 2000; Wissler & Saks, 1985), the small
numbers in many of the cells of the various contingency tables, as evidenced by the frequent violations in expected cell counts when performing a chi-square analysis, precluded more complex statistical testing.

Other limitations that are commonly acknowledged in the research field and which were present in the current thesis include the use of a simulated research environment for empirical work on mock jurors. In an attempt to counter these issues, a transcript rich in detail was provided to the participants and focus was on the individual’s evaluation and impact of propensity evidence and the comprehension and effect of a subsequent limiting instruction prior to the social process of deliberation (Pennington & Hastie, 1990). Although the ability to generalise the findings is limited, examining the pre-deliberation response of the participant is important as it allows an insight into the initial reactions to the evidence that are often altered during deliberation and the final verdict outcome (Diamond, 1997; Kerr, 1981; Leigh, 1984; Sandys & Dillehay, 1995; Hastie et al. (1983).

The attempt to mirror the University of New South Wales – Jury Pilot Study precluded changes being made to the content of the propensity evidence in an attempt to potentially increase the number of not guilty verdicts. Although there were significant amendments made to the evidence provided by witnesses, this was not in relation to propensity evidence. In addition, whilst changes could have been made to other aspects of the trial, the focus of the current study was the effect of propensity evidence on verdict outcome.
Pettus (1990) has also argued for the examination of actual jury members in order to generate the ecological validity of research findings. This line of approach appears necessary, as the current study did not replicate findings that have been obtained in studies which have used an actual jury sample (e.g. Hunter et al., 2010; Pettus, 1990). Lastly, other opportunities for future empirical work have been highlighted where appropriate throughout the current chapter.

9.7 Conclusion

In conclusion, the present study did not replicate the findings from previous literature regarding the prejudicial impact of propensity evidence on verdict outcome. While it may be the case that the concern from the legal and psychology arena regarding propensity evidence being utilised in a prejudicial manner may not be warranted, it is also likely that as a result of the comprehensive evidence adduced in the transcript, participants were convinced of the defendant’s guilt without the need for propensity evidence. Nevertheless, a number of potential explanations have been provided as to why this contradictory result was obtained and recommendations have been made for future research to further examine this issue.

While it is understandable that future research may wish to focus on the variables that have been shown here to influence juror decision making (i.e. age and other demographic variables), these ‘estimator’ variables, which are psycho-legal variables that are not under the control of the court, are useful only when challenging
and selecting certain individuals for a jury pool (Wells, 1978). Thus, the focus of research should be on ‘system’ variables, or those that are manipulable and therefore controllable in the courtroom, as findings to do with system variables can actually be applied and implemented in the criminal justice system (Wells). Thus, future research to clarify the inconsistent findings regarding propensity evidence and verdict outcome remain relevant.
References


GBF v. The Queen, VSCA 135 (2010).


R v Loguancio, 33 VSCA (2000).

R v McDonald, VSC 241 (2010)

R v Pearce, 221 VSCA (1999).

R v PZG, 54 VSCA (2007).


APPENDIX A: JUDGE’S IMMEDIATE INSTRUCTION

Examination in chief of Mrs Smith concludes and at this point in time the judge intercepts in the proceedings.

May I remind members of the jury of what I stated during my opening address to you, that is that during any stage of the trial, although predominantly at the end of the trial, it is my duty to sum-up to you and to give you directions as to the matters of law you are to apply in performing your very important task. Given the nature of the evidence just presented to you by Mrs Smith I find that it is imperative I provide to you at this point in time a clear direction as to the manner in which you, members of the jury, can use such evidence.

As a general rule in criminal cases, bad behaviour or anything in the nature relating to an accused person is not admissible before a jury. If it does not get in under some other principle it is certainly not gratuitously admitted. If such evidence is to be received it must owe its admissibility to some, quite specific, other purpose, including for example, in an appropriate case, proof of a guilty passion, intention, or propensity, or opportunity, or motive. There may also be cases in which a relationship between people may be directly relevant to an issue in a trial and in those circumstances admissible as such.

This evidence can only be used by you, the jury, if the jury was satisfied beyond reasonable doubt that such conduct in fact occurred. Furthermore, even if you the jury accept the whole or part of the evidence of uncharged acts, that evidence does not of itself prove the offence/s with which the accused is charged. This offence/s can be proved only by the evidence which relates to this count/s.

The evidence introduced and received here by you, if you choose to accept all or any part of it, is admissible for two limited purposes and can only be used for these two purposes. It is relevant to the question of the nature of the relationship between the accused and the deceased, and it places the evidence relating to the offence against the accused in a more complete and realistic context. In the long run you must be satisfied of the guilt of the accused of the actual charge or charges brought before you in order to convict him. You may not substitute evidence of some other incident not the subject of a charge for the evidence in support of the charged incident. It would be wrong, prejudicial and contrary to law for you to reason that because the accused had engaged in some improper conduct at some other time or times, he was the kind of person who was likely to have committed the crimes charged and to use such a conclusion as evidence that he committed them or any of them. That is improper reasoning and it is never allowed in our criminal legal system.

Thank you. Defence, you may proceed with your cross-examination of Mrs Smith.
APPENDIX B: JUDGE’S END OF TRIAL INSTRUCTION

In relation to the matter of inference, I must also caution you against a type of reasoning known as propensity reasoning. In this trial, you have heard evidence from Mrs Smith and Dr. Jones concerning a previous alleged assault conducted on the deceased by the accused in June of 2006.

As a general rule in criminal cases, bad behaviour or anything in the nature relating to an accused person is not admissible before a jury. If it does not get in under some other principle it is certainly not gratuitously admitted. If such evidence is to be received it must owe its admissibility to some quite specific, other purpose, including for example, in an appropriate case, proof of a guilty passion, intention, or propensity, or opportunity, or motive. There may also be cases in which a relationship between people may be directly relevant to an issue in a trial and in those circumstances admissible as such.

This evidence can only be used by you, the jury, if the jury was satisfied beyond reasonable doubt that such conduct in fact occurred. Furthermore, even if you the jury accept the whole or part of the evidence of uncharged acts, that evidence does not of itself prove the offence/s with which the accused is charged. This offence/s can be proved only by the evidence which relates to this count/s.

The evidence introduced and received here by you, if you choose to accept all or any part of it, is admissible for two limited purposes and can only be used for these two purposes. It is relevant to the question of the nature of the relationship between the accused and the deceased, and it places the evidence relating to the offence against the accused in a more complete and realistic context. In the long run you must be satisfied of the guilt of the accused of the actual charge or charges brought before you may convict him. You may not substitute evidence of some other incident not the subject of a charge for the evidence in support of the charged incident. It would be wrong, prejudicial and contrary to law for you to reason that because the accused had engaged in some improper conduct at some other time or times, he was the kind of person who was likely to have committed the crimes charged and to use such a conclusion as evidence that he committed them or any of them. That is improper reasoning and it is never allowed in our criminal legal system.
APPENDIX C: TESTIMONY CONSTITUTING PROPENSITY EVIDENCE

Q. Whilst they were still living in the boarding house was there an occasion when Jane came to you?
A. There was. There was, in June.

Q. The incident I am asking you to talk about when Jane came to your place, you said it was in June. Which is the year of her death, 2006.
A. She turned up at our place at 3 o'clock in the morning. Her face was - all her eyes she couldn't - I couldn't recognise her. I knew she was my daughter but I couldn't recognise her face was all swollen, she had blood on her slippers, she had finger marks on her arm, bruising on her back. I mean I was in shock. I brought her inside --

The swelling in her face. On one side of her face, her eye was nearly closed. She had blood on her jumper, she had spots on her - she had her sleeves rolled up so she had blood on her skin and she had blood on her slippers.

Q. Did she say what had led him to do those things?
A. She kept saying "John's accusing me of playing up and he just kept going on and on and on".

Q. When she woke up what did you and she do?
A. I had a good look at her and sat her down and I said to her - I didn't know if her nose was broken. I said "You will have to go to the hospital. I will have to take you to the hospital".

Q. And were the police contacted?
A. I rang Fraser Town Police. I had a talk to her and I said - she said "that's it. I've had enough, I'm leaving". And I rang Fraser Town Police. And I said "Okay, I will take you to the hospital then we will go to the police station, okay". She said "We will".

Q. And so did you go to the hospital?
A. I took her to the hospital.

Q. And did she stay at your place that night? And did she continue to live at your place after she had come out of hospital?
A. She did for a little while, a few days, may be a week.

Q. And to your knowledge did she ever report the matter to the police?
A. I asked her if she had been to the police station and she said, no.

Q. Well, did she resume her contact with John after this incident in June 2006? A. She did. She went to stay at a girlfriend's house and then she rang me and said that "Mum, I'm back with John".
Q. Did you see her again? On how many occasions, can you say?
A. A few times, a couple of times.

Q. Did you notice anything about her on that occasion?
A. She still had the bruising. Her eyes were orange. She looked terrible.