PROPENSITY EVIDENCE IN VICTORIA: A TRIUMPH FOR JUSTICE OR AN AFFRON'T TO CIVIL LIBERTIES?

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[Sections 398A and 372(3AA) and (3AB) of the Crimes Act 1958 (Vic), inserted by way of the Crimes (Amendment) Act 1997 (Vic), purport to institute radical changes to the pre-existing common law doctrine regarding the admissibility of 'similar fact evidence' in criminal prosecutions. The discussion to follow will examine the construction accorded this legislation by the Court of Appeal in R v Best and R v Bullen. In particular, the discussion will address the question of whether this legislation, as presently construed, represents a triumph for justice or merely an integral component of a well-conceived plan to emasculate civil liberties under the pretext of a 'get tough on law and order' campaign.]

CONTENTS

I Introduction ................................................................. 263
II The Nature of 'Similar Fact Evidence' ........................................ 264
III The 'Similar Fact Evidence Rule' under Present Common Law Doctrine .......... 266
IV Section 398A and its Impact in the Aftermath of R v Best .................. 272
   A The Decision in Hoch v The Queen .................................. 272
   B Section 398A .................................................................. 274
   C R v Best ......................................................................... 276
V Sub-Sections (3AA) and (3AB) of Section 372 of the Crimes Act 1958 (Vic) and Their Impact on the Rule of Cross-Admissibility ................... 279
VI Conclusion ...................................................................... 282

I INTRODUCTION

There are few who would disagree with the statement that the common law rules governing the admissibility of so-called 'similar fact evidence' are among the most esoteric and hotly debated of our time. This is exemplified in many ways, not the least of which is that jurists, academics and practitioners have yet to so much as agree on a definition of what 'similar fact evidence' is.¹ As one might expect, the complexity and controversy surrounding this topic have engendered more than their fair share of commentary among members of the legal profession. The discussion to follow, therefore, is not intended as yet another attempt to trace the evolution of the common law prohibition against 'similar fact evidence', much less reconcile the seemingly endless number of contradictory court decisions and views which have permeated this troubled area of the law. Instead, our attention will focus primarily on ss 398A and 372(3AA) and (3AB) of the

II THE NATURE OF 'SIMILAR FACT EVIDENCE'

As noted above, there is no universally accepted definition of what constitutes 'similar fact evidence'. In *Pfennig v The Queen*, the majority wrote:

> There is no one term which satisfactorily describes evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged. It is always propensity evidence but it may be propensity evidence which falls within the category of similar fact evidence, relationship evidence or identity evidence. Those categories are not exhaustive and are not necessarily mutually exclusive. The term 'similar fact' evidence is often used in a general but inaccurate sense.

Regrettably, the Court did not endeavour to define the terms 'propensity', 'similar fact', 'identity', or 'relationship' evidence, nor did it explain how or why the term 'similar fact' evidence is often used in a general but inaccurate sense. In *R v Best*, the foregoing passage was quoted with approval by the Court of Appeal. The Court then proceeded to subdivide 'propensity evidence' into 'similar fact' and 'relationship' evidence, but likewise failed to define these terms or offer any guidance as to how they differ from one another. Moreover, a cursory review of the work of some of the leading text writers and other respected authorities on the law of evidence indicates a similar lack of harmony in defining 'propensity' and so-called 'similar fact evidence'. So then what do the terms 'propensity' and 'similar fact' evidence denote?

Although the terminology varies somewhat among the reported cases and leading writers on this subject, it is clear that however 'similar fact evidence' is defined, it constitutes a species of a broader category of evidence known as

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2 *(1995) 182 CLR 461 ('Pfennig').
3 See, eg, Waigh and Williams, above n 1, 428.
5 Ibid 465.
6 *(Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JJ, 23 July 1998) ('Best').
7 Ibid 3.
8 Ibid.
9 See above n 1.
'propensity', 'character', or 'disposition' evidence. Each of these terms have been used to describe evidence which, if accepted, shows that a person has a 'continuing propensity to behave in some way or with some state of mind'. Although these terms are often used interchangeably, the term 'propensity' shall be used for the remainder of our discussion for convenience purposes. Consonant with this definition, when an accused tenders evidence which shows that he or she has a good reputation in the community for the relevant character trait involved in the offence at issue, such evidence would fall under the rubric of 'propensity evidence'; the same would be true when a defendant in a defamation action, in order to mitigate damages, tenders evidence that the plaintiff's general reputation in the community for the relevant character trait was already poor at the time of the defamatory statement. Although tendered as circumstantial evidence of innocence in the former example and as direct evidence of poor reputation in the latter, in both instances the evidence, if accepted, shows a continuing propensity to act in a particular manner or with a particular state of mind.

A particular species of 'propensity evidence', which is hereafter referred to as 'similar fact evidence', is any evidence of specific conduct, normally discredit­able in nature, which is of the same general character or shares some common feature with the conduct which is the subject of the proceeding in question — and which is tendered as circumstantial evidence of one or more of the constituent elements of that conduct. If, for example, an accused has been convicted of one or more offences having a highly unique modus operandi, there are circumstances in which the convictions are admissible as circumstantial evidence of the accused's guilt of another offence committed with the same or very similar modus operandi. Or, suppose an accused is on trial for knowingly possessing cocaine with intent to sell. Assume that the accused admits possession but denies knowledge on the basis of having never seen or used cocaine in the past. If the accused has a conviction for illegal use of cocaine which predates his or her alleged possession with intent to sell, it is likely that the prosecution can adduce evidence of this conviction to rebut his or her claim of ignorance and prove the requisite mens rea. While evidence of this type is most commonly referred to as 'similar fact evidence', the courts in particular have displayed a penchant for using this term coterminously with others such as 'identity', 'tendency', 'dispositional', 'relationship', and even 'propensity'. Recently, the Victorian Parliament made its own contribution to the confusion in this area by employing

11 Ligertwood, above n 1, 93–5.
12 Waugh and Williams, above n 1, 382.
13 Ibid.
14 Forbes, above n 1, 1.
17 Ibid.
18 Ibid.
19 Ibid.
the broader term 'propensity evidence' in s 398A of the Crimes Act 1958 (Vic) to denote what has heretofore been regarded as classical 'similar fact evidence'. Although the common law rules which govern the admissibility of 'similar fact evidence' and their underlying rationale will be dealt with in Part III, suffice it to say that this type of evidence, as with any type of 'propensity evidence', is fraught with danger. One of the most obvious dangers, and one which varies in degree depending on the facts, is that the fact-finder will erroneously conclude that because a person has a tendency to behave or think in a particular manner, he or she must have acted or thought in the same or similar manner on the occasion which is the subject of the proceeding.\(^20\)

Before proceeding to an abbreviated exposition of the present common law rules which govern the admissibility of 'similar fact evidence', two additional points of controversy surrounding the nature of 'similar fact evidence' should be noted. The first is that despite some occasional judicial indications to the contrary,\(^21\) the term 'similar fact evidence' is not limited to conduct which is criminal\(^22\) or even discreditable\(^23\) in nature. Although the vast majority of reported cases involving putative error in admitting or receiving 'similar fact evidence' have been concerned with disputed evidence consisting of prior criminal acts,\(^24\) there is more than ample authority to support the proposition that 'similar fact evidence' encompasses all forms of conduct which meet the aforementioned criteria.\(^25\) The second is that it is important to distinguish between 'similar fact evidence' and the evidentiary rule of exclusion under which evidence of this type is presumptively inadmissible.\(^26\) In particular, it must be emphasised that this rule of presumptive exclusion is applicable only in criminal proceedings and operates only against the prosecution.\(^27\)

### III The 'Similar Fact Evidence Rule' under Present Common Law Doctrine

Although the rule of exclusion most commonly referred to as the 'similar fact evidence rule' appears to have originated in the early nineteenth century,\(^28\) there is little doubt that the most influential decision in its evolution is that of the Privy Council in *Makin v A-G (NSW)*.\(^29\) In *Makin*, the defendants (husband and wife) were convicted of murdering a baby boy whose body was found buried on their premises. The prosecution's theory was that the defendants committed the murder

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20 Ligertwood, above n 1, 94; Waight and Williams, above n 1, 426.
22 Heydon, above n 1, 566; Ligertwood, above n 1, 110 fn 30.
23 Heydon, above n 1, 567.
24 Forbes, above n 1, 2-3.
25 Ibid 169-76; Heydon, above n 1, 604-8; Ligertwood, above n 1, 170-5.
26 *Pfennig* (1995) 182 CLR 461, 483-5 (Mason CJ, Deane and Dawson JJ); Forbes, above n 1, 34-8; Ligertwood, above n 1, 109-14.
27 Ligertwood, above n 1, 110-32.
28 Heydon, above n 1, 554.
29 (1894) AC 57 ('Makin').
as part of a comprehensive scheme whereby they would agree to adopt infants for
a nominal fee to be used for their care, all the while intending to kill the infants
and retain the monies for themselves.\textsuperscript{30} The defendants' explanation was that the
child had died of natural causes and thus, their only crime was in disposing of the
body improperly.\textsuperscript{31} To rebut the defendants' claims and prove the requisite
elements of murder, the prosecution adduced evidence that 12 other infants had
been found buried on premises occupied by the defendants at various times,
several of which had been entrusted to them under a similar arrangement to adopt
and provide care for a nominal fee.\textsuperscript{32} In holding that this evidence was properly
received, Lord Herschell wrote:

It is undoubtedly not competent for the prosecution to adduce evidence tending
to show that the accused has been guilty of criminal acts other than those cov­
cered by the indictment, for the purpose of leading to the conclusion that the ac­
cused is a person likely from his criminal conduct or character to have com­
mitted the offence for which he is being tried. On the other hand, the mere fact
that the evidence adduced tends to show the commission of other crimes does
not render it inadmissible if it be relevant to an issue before the jury, and it may
be so relevant if it bears upon the question whether the acts alleged to consti­
tute the crime charged in the indictment were designed or accidental, or to rebut
a defence which would otherwise be open to the accused.\textsuperscript{33}

The foregoing passage was regarded at the time as the most explicit statement
of what later became known as the 'similar fact evidence rule' of exclusion.\textsuperscript{34} So
influential was Lord Herschell's passage that it was adopted some 81 years later
by the House of Lords in \textit{DPP v Boardman}\textsuperscript{35} and continues to be cited with
approval in most, if not all, appellate court decisions in the United Kingdom and
Australia.\textsuperscript{36} That acknowledgment notwithstanding, it must be emphasised that a
\textit{literal} interpretation of Lord Herschell's formulation is inherently paradoxical
and difficult, if not impossible, to reconcile with the 'similar fact evidence rule'
under present common law doctrine. The paradoxical aspect of this formulation
was adroitly expressed by Andrew Ligertwood in the most recent edition of his
treatise, \textit{Australian Evidence}:

\begin{quote}
(S)ubsequent generations of lawyers have sought to raise the statement of Lord
Herschell to the status of a definitive, virtually legislative, formulation of the
law. As commentators have shown, it just cannot stand up to such analysis. In
particular, if interpreted \textit{literally}, the second sentence renders the first of no ef­
fect, for, taken \textit{literally}, the second sentence admits all relevant evidence, not­
withstanding that it may be relevant only in showing the accused as the sort of
person likely to commit crime! Evidence revealing previous misconduct is not
excluded because it is irrelevant. Considerable reinterpretation is required to
\end{quote}

\textsuperscript{30} Ibid 62-3.
\textsuperscript{31} Ibid 57.
\textsuperscript{32} Ibid 62-3.
\textsuperscript{33} Ibid 65.
\textsuperscript{34} \textit{Pfennig} (1995) 182 CLR 461, 475-6 (Mason CJ, Deane and Dawson JJ); Forbes, above n 1, 34­
8; Ligertwood, above n 1, 109-14.
\textsuperscript{35} [1975] AC 421.
\textsuperscript{36} See, eg, \textit{Pfennig} (1995) 182 CLR 461 and below n 38.
avoid the literal contradiction of the Herschell formulation and to explain when evidence disclosing other misconduct is admissible as an exception to the rule.\(^7\)

Ligertwood's point is so critical to an acute understanding of the balance of our discussion that further explanation is appropriate. The first sentence of Lord Herschell's formulation purports to totally prohibit evidence of other criminal misconduct if it is being tendered for the sole purpose of proving guilt through what is commonly referred to as a propensity chain of reasoning.\(^8\) In legal parlance, a propensity chain of reasoning denotes a scenario in which the fact-finder, assuming it accepts the evidence of other misconduct as truthful, is asked to infer therefrom that the accused has a propensity to behave in a manner consistent with that misconduct, from which it is then asked to draw an additional inference that the accused is likely to have acted in a similar manner on the occasion in question.\(^9\) Common sense dictates, and a plethora of appellate decisions and scholarly writings confirm, that evidence of other misconduct which is of the same general character or shares some common feature with the conduct at issue, does have logical relevance through a propensity chain of reasoning.\(^9\) Bearing this thought in mind, the second sentence of Lord Herschell's formulation declares that evidence of other criminal misconduct is admissible if it is relevant to an issue which the jury must decide. Thus, a literal construction of the second sentence renders the first sentence nugatory, and the paradoxical nature of Lord Herschell's formulation becomes apparent.

Lord Herschell's passage is also problematic in that its literal interpretation cannot be reconciled with the 'similar fact evidence rule' of exclusion under the present common law doctrine in Australia. In illuminating this point, it is noteworthy that prior to its decision in Pfennig, the High Court repeatedly cited Lord Herschell's formulation in steadfastly adhering to the proposition that under no circumstances could evidence of other misconduct be received as circumstantial evidence of guilt through a propensity chain of reasoning.\(^4\) With the passage of time, however, the view began to emerge that many of the reported cases upholding the reception of 'similar fact evidence' were explicable only on the basis of a propensity chain of reasoning.\(^2\) This view was eventually adopted by a majority of the High Court in Pfennig.\(^3\) A question then arose as to how this view could be reconciled with the Court's additional pronouncement in Pfennig that Lord Herschell's formulation continues to represent one of the guiding tenets

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\(^7\) Ligertwood, above n 1, 100 (emphasis added).

\(^8\) See also ibid 94–5, 106–9; Waht and Williams, above n 1, 423–5.

\(^9\) Ibid.

\(^4\) *Perry v The Queen* (1982) 150 CLR 580, 585 (Gibbs CJ) ('Perry'); *Harriman v The Queen* (1989) 167 CLR 590, 597 (Dawson J); Ligertwood, above n 1, 100; Waht and Williams, above n 1, 424.

\(^2\) *Perry* (1982) 150 CLR 580, 585 (Gibbs CJ); *Sutton v The Queen* (1984) 152 CLR 528, 533 (Gibbs CJ); *Harriman v The Queen* (1989) 167 CLR 590, 597–8 (Dawson J).

\(^3\) *Perry* (1982) 150 CLR 580, 592–3 (Murphy J); Ligertwood, above n 1, 107.

\(^3\) *Pfennig* (1995) 182 CLR 461, 483–4 (Maron CJ, Deane and Dawson JJ), 504–7 (Toohey J).
of this common law rule of exclusion. This seemingly irreconcilable conflict harkens back to Ligertwood's observation that 'considerable reinterpretation is required to avoid the literal contradiction of the Herschell formulation and to explain when evidence disclosing other misconduct is admissible as an exception to the rule.' Ironically, the reinterpretation to which Ligertwood refers commenced in DPP v Boardman, the decision in which the House of Lords finally adopted Lord Herschell's formulation, and continued throughout a long line of High Court decisions which culminated in its landmark decision in Pfennig.

These decisions have continually recognised that in the context of criminal prosecutions, 'similar fact evidence' must be handled with special care because of its nature. Tendency to unfairly prejudice an accused's right to a fair trial. As noted earlier, evidence disclosing conduct other than that with which an accused is charged is fraught with many dangers, one of the most insidious being that the fact-finder will erroneously conclude that because a person has a propensity to behave or think in a particular manner, he or she must have acted or thought in the same or similar manner on the occasion in question. Although not intended as an exhaustive list, other possible dangers include the following: the evidence may be accorded undue weight by the jury; the jury may conclude that despite what may amount to reasonable doubt on the offences charged, the accused nonetheless deserves to be convicted because he or she has committed other misdeeds; and in instances where the accused is charged with multiple offences such that evidence of each is admissible in respect of all the others, the sheer number of weak allegations may cause the jury to find that at least one appears to have been proven satisfactorily.

At the same time, however, the foregoing decisions have recognised that situations will arise in which the probative value of 'similar fact evidence' will be so strong as to outweigh any prejudicial effect it may have on an accused's right to a fair trial. In these instances, the decisions have repeatedly held that consonant with Lord Herschell's formulation, 'similar fact evidence' may be received. The quintessence of the judiciary's reinterpretation of Lord Herschell's formulation, therefore, is a balancing of the probative value of such evidence against its potential to unfairly prejudice the accused's right to a fair trial.

While this approach is hardly impervious to criticism, it does afford a basis for reconciling the literal conflict between the first and second limbs of Lord Herschell's edict. Firstly, it emphatically underscores the point that notwith-
standing the literal wording of the second limb, mere logical relevance to an issue in the case will not exempt evidence which discloses other misconduct from the ambit of the first limb. Secondly, it comports well with the fact that evidence disclosing other misconduct is not excluded under the first limb because it lacks logical relevance vis-à-vis an issue in the case. Finally, and despite what appears on its face to be the clear import of the first limb, it leaves open the possibility that evidence disclosing prior misconduct may be admitted in cases where its relevance is predicated solely on a propensity chain of reasoning. On the other hand, such an approach is open to criticism on the basis that it involves a balancing process so similar to an exercise of the type of discretion used in *R v Christie*53 ("the Christie discretion") that its status as an evidentiary rule of exclusion can be called into question. In order to withstand this criticism, therefore, it was incumbent upon the judiciary to formulate articulable guidelines — a test of sorts — for determining when evidence disclosing other misconduct reaches the threshold level where its probative value outweighs its potential to unfairly prejudice the accused's right to a fair trial.

In *Pfennig*, the High Court not only acknowledged this criticism, but endeavoured to formulate such a test. Succinctly stated, a majority of the Court held that before the prosecution can adduce evidence of 'similar facts', the trial judge must be satisfied that there is no rational (meaning reasonable) view of such evidence which is consistent with innocence.54 In addressing this point, Mason CJ, Deane and Dawson JJ wrote:

> Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused: *Hoch* (1988) 165 CLR at 296. Here 'rational' must be taken to mean 'reasonable' ... and the trial judge must ask ... the question in the context of the prosecution case; that is to say, he or she must regard the evidence as a step in the proof of the case. Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect. And unless the tension between probative force and prejudicial effect is governed by such a principle, striking the balance will continue to resemble the exercise of a discretion rather than the application of a principle.

In our view, the principles stated above which derive from *Hoch* correctly state the law with respect to the admissibility of similar fact evidence ... The discussion in *Hoch* was expressed in terms of evidence of similar facts rather than propensity evidence ... because the evidence in that case lent itself to that classification.55

While the foregoing passages are a vivid reaffirmation of the continued controversy surrounding the meanings to be ascribed to the terms 'propensity' and 'similar fact evidence', they also represent the High Court's most current and

53 *R v Christie* (1914) AC 545, 564; Ligertwood, above n 1, 56; Heydon, above n 1, 4.
55 Ibid 483 (emphasis added).
precise formulation of the ‘similar fact evidence rule’ of exclusion. There remains, however, an extremely important corollary of this rule which must be addressed before proceeding to Part IV of our discussion; namely, that the prosecution is not permitted to invoke the rules of joinder as a means of circumventing the ‘similar fact evidence rule’.

The essence of the ‘similar fact evidence rule’ is that the prosecution is prohibited, save for the exceptional circumstances enunciated in Pfennig, from adducing evidence of misconduct other than that which is covered by the indictment or presentment, as circumstantial evidence of guilt.56 Strictly speaking, therefore, the rule does nothing to prohibit the prosecution from charging an accused with multiple offences in the same indictment or presentment, assuming, of course, that joinder of the offences is permitted under the joinder rules of the State or Territory in question. In Victoria, for example, the sixth schedule, rule 2 of the Crimes Act 1958 (Vic) provides that ‘[c]harges for any offences may be joined in the same presentment if those charges are founded on the same facts or form or are part of a series of offences of the same or a similar character’. This provision, however, must be read in conjunction with s 372(3) of the Crimes Act 1958 (Vic) which provides that:

[If] [b]efore trial or at any stage of a trial the court is of the opinion that a person accused may be prejudiced ... in his defence by reason of being charged with more than one offence in the same presentment ... the court may order a separate trial of any count or counts of such presentment.

Suppose, therefore, that an accused is charged with one count of burglary and at trial, the prosecution seeks to adduce evidence that the accused has committed three other burglaries for which he or she has never been tried, albeit with a modus operandi which is quite dissimilar to the offence for which he or she is presently charged. Assuming that this evidence is relevant solely on the basis of a propensity chain of reasoning, it is clear that it would be excluded under the Pfennig test. What is equally clear is that the ‘similar fact evidence’ rule would be emasculated into oblivion if the prosecution could achieve the same objective by opting instead to invoke the sixth schedule, rule 2 of the Crimes Act 1958 (Vic) as a means of joining all four counts in a single presentment. Cognisant of this danger, the High Court has held that unless each of the offences joined would be cross-admissible in a separate trial for any of the others, it is an abuse of discretion resulting in a substantial miscarriage of justice for a trial court to refuse an application for separate trials — provided that a direction to the jury would be inadequate to protect an accused from any unfair prejudice that may result from evidence relating to the other counts through an impermissible propensity chain of reasoning.57 In applying the test of cross-admissibility, each of the offences sought to be joined assumes the character of ‘similar fact evi-

56 Ibid 464–5 (Mason CJ, Deane and Dawson JJ); Heydon, above n 1, 566–7.
57 Suton v The Queen (1984) 152 CLR 528, 531 (Gibbs CJ), 541–2 (Brennan J); De Jesus v The Queen (1987) 68 ALR 1, 4–5 (Gibbs CJ), 9 (Mason and Deane JJ), 12 (Brennan J), 16 (Dawson J); Hoch (1988) 165 CLR 292, 294 (Mason CJ, Wilson and Gaudron JJ), 298 (Brennan and Dawson JJ).
dence' and, as such, is subject to the 'similar fact evidence rule' of exclusion. With this background in mind, attention will now focus on s 398A of the Crimes Act 1958 (Vic), as construed by the Court of Appeal in Best,58 and its impact upon the 'similar fact evidence rule' under present common law doctrine.

IV SECTION 398A AND ITS IMPACT IN THE AFTERMATH OF R v BEST

A The Decision in Hoch v The Queen

In order to fully appreciate the impact of s 398A upon the 'similar fact evidence rule' under present common law doctrine, it is appropriate to begin with an analysis of the High Court's decision in Hoch.59 In Hoch, the accused was charged in a single indictment with three counts of sexual molestation of three young boys who alleged that they had each been violated in a similar manner. The accused made application for separate trials on the basis that the evidence relating to each count was inadmissible under the 'similar fact evidence rule', in essence, that each of the counts joined in the indictment would not have been cross-admissible in a separate trial for any of the others.60 In particular, the accused claimed that an association among the boys, coupled with their animus towards him, created a risk of concoction so substantial that the probative value of the evidence was outweighed by its natural tendency to unfairly prejudice the accused through a prohibited propensity chain of reasoning. The application for separate trials was denied and the accused was convicted on all three counts.61

The accused appealed on the ground, inter alia, that the trial court erred in refusing the application.

In allowing the appeal, the High Court formulated a test, later reaffirmed in Pfennig, for determining when 'similar fact evidence' reaches the threshold level where its probative value exceeds its potential to unfairly prejudice the accused via a propensity chain of reasoning; namely, that such evidence must be excluded if it bears any rational explanation which is consistent with the innocence of the accused.62 In applying this test to the case before them, Mason CJ, Wilson, and Gaudron JJ explained, citing the judgment of Lord Wilberforce in DPP v Boardman,63 that the probative value of the disputed evidence is derived, if at all, from the objective improbability that the three boys would provide such similar accounts of the events at issue unless the events actually occurred; that is, in circumstances such as these, it is fair to say that the accounts given must either be true or, alternatively, have resulted from a collaborative effort to concoct, or from pure coincidence.64 The justices further explained that in instances where

58 (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JJA, 23 July 1998).
60 Ibid 292-3.
61 Ibid 293.
63 (1975) AC 421.
the putative similar accounts are themselves in dispute, as in this case, the probative value of the evidence is derived from the objective improbability of the complainants having concocted similar lies.\(^65\) Accordingly, the justices held that where there exists a possibility of joint concoction, as here, the requisite degree of objective improbability of similar lies is lacking and, consequently, there is a rational view of the ‘similar fact evidence’ which is consistent with the innocence of the accused.\(^66\)

The approach formulated in Hoch and reaffirmed in Pfennig has received its fair share of criticism.\(^67\) One such criticism is that the Hoch-Pfennig approach imposes an excessively strict standard for the admission of ‘similar fact evidence’.\(^68\) In particular, its opponents point out that it effectively requires trial judges to make a finding of guilt beyond reasonable doubt as a condition-precedent to its admissibility.\(^69\) In view of the High Court’s pronouncement in Pfennig that ‘judge[s] must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused’,\(^70\) it is difficult to find fault with this observation. As to whether this standard imposes an unduly onerous burden on the prosecution, there are cogent arguments for and against this view. Opponents of the Hoch-Pfennig approach may raise a legitimate question as to why the voluntariness of confessional evidence, for example, is not determined by the same reasonable doubt standard as a condition-precedent to its admissibility.\(^71\) This argument has considerable force when one considers that confessional evidence is potentially more damaging, unreliable, and misleading than ‘similar fact evidence’. This is especially true in the case of full confessions which, unlike ‘similar fact evidence’, are direct evidence of guilt. On the other hand, proponents of the Hoch-Pfennig approach can argue with equal force that it is precisely for these reasons that questions regarding the voluntariness of confessional evidence ought to be determined by the same strict standard applicable to ‘similar fact evidence’. The argument then follows that the analogy posited by the opponents necessarily assumes, without justification, that the present standard for determining questions of voluntariness is the correct one.

Another criticism is that in certain cases where the similar facts are in dispute, such an approach unjustifiably permits the trial judge to invade the province of the jury in deciding issues of credibility.\(^72\) In cases such as Makin,\(^73\) for example,

\(^{65}\) Ibid.

\(^{66}\) Ibid 296.

\(^{67}\) For criticisms of Hoch, see, eg, Ligertwood, above n 1, 119–20; Heydon, above n 1, 572–3; for criticisms of Pfennig, see, eg, Ligertwood, above n 1, 109–11.

\(^{68}\) Ligertwood, above n 1, 118–20.

\(^{69}\) Ibid. Although neither the court nor Ligertwood expressly state the rule in terms of finding an accused guilty beyond reasonable doubt as a condition-precedent to the admission of ‘similar fact evidence’, the test set forth in Hoch effectively amounts to the same thing.

\(^{70}\) Pfennig (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ).

\(^{71}\) In Australia, the voluntariness of confessional evidence, as a condition-precedent to its admissibility, is determined according to the civil standard of the balance of probabilities: Wendt v The Queen (1963) 109 CLR 559; MacPherson v The Queen (1981) 147 CLR 512.

\(^{72}\) Ligertwood, above n 1, 119.
where the similar facts are not in dispute, the Hoch-Pfennig approach merely requires the trial judge to decide whether the inference of guilt to be drawn therefrom is strong enough to exclude any reasonable hypothesis which is consistent with innocence.74 In cases such as Hoch, however, the necessary inference can only achieve this threshold if one can exclude the possibility that the similarities in the accounts given by the boys were the result of collusion.75 Arguably, this involves an issue of credibility which should be left to the jury — unless the trial judge finds that no reasonable jury could fail to find the presence of collusion.76 Although Hoch did not hold that trial judges are required to make an ultimate determination as to whether collusion existed, a decision to exclude the evidence does remove the issue of credibility from the jury’s consideration.77 If the accounts given by the witnesses are so similar that they would bear no rational explanation consistent with innocence but for the possibility of collusion, what is the justification for taking the issue of credibility away from the jury? Is it not fair to say that juries are routinely entrusted with this responsibility in other contexts where the stakes are equally high? Is the possibility of collusion and its pernicious consequences any less in cases where, for example, two or more prosecution witnesses to the same event provide accounts which are substantially similar?

A final and perhaps most compelling criticism is that in cases such as Hoch, there is nothing, save for honesty and integrity, to prevent an accused from concocting an allegation sufficient to raise the possibility of collusion, thereby depriving the jury of highly probative evidence. It is respectfully submitted that s 398A was enacted, in large measure, to redress this problem. Thus, we now turn our attention to s 398A, as construed by the Court of Appeal in Best, and its impact upon the ‘similar fact evidence rule’ under present common law doctrine.

B Section 398A

By virtue of the Crimes (Amendment) Act 1997 (Vic), s 398A was inserted into the Crimes Act 1958 (Vic). Section 398A provides as follows:

398A. Admissibility of propensity evidence

(1) This section applies to proceedings for an indictable or summary offence.

(2) Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.

72 [1894] AC 57.
73 Ibid.
74 Ibid. above n 1.119.
75 Ibid.
76 Ibid.
77 Ibid.
(3) The possibility of a reasonable explanation consistent with the innocence of the person charged with the offence is not relevant to the admissibility of evidence referred to in subsection (2).

(4) Nothing in this section prevents a court taking into account the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence when considering the weight of the evidence or the credibility of a witness.

(5) This section has effect despite any rule of law to the contrary.

In examining s 398A, three troublesome ambiguities are immediately apparent. Firstly, although the section is titled, '398A. Admissibility of propensity evidence', it fails to define the term 'propensity evidence'. As Victoria is a common law jurisdiction, the assumption is that statutory terms are to be accorded their common law meaning, if any, in the absence of a clear legislative intention to the contrary.78 Applying this principle, s 398A would extend to any evidence which, if accepted, shows that a person has a continuing propensity to behave in a particular manner or with a particular state of mind, unless Parliament has expressed a clear intention to the contrary.79

This raises a question as to whether sub-ss (3) and (4), by virtue of their apparent rejection of the Hoch-Pfennig test, constitute evidence of a clear legislative intent to limit the purview of s 398A to 'similar fact evidence' only. Another possible construction is that Parliament inserted sub-ss (3) and (4) for the more limited purpose of rejecting the Hoch-Pfennig test only in so far as the admissibility of the 'similar fact evidence' species of 'propensity evidence' is concerned. A second ambiguity inheres in sub-s (2) which declares that 'propensity evidence ... is admissible if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.'79 With the apparent repudiation of the Hoch-Pfennig test and the conspicuous absence of any reference in s 398A to a balancing of probative value and potential prejudice, upon what principled basis does a court determine whether the circumstances are such that it is just to admit the evidence notwithstanding any prejudicial effect it may have on the accused? Analogous to the argument adopted by the majority in Pfennig, without specific guidelines for making this determination, the operation of s 398A will be more akin to an exercise of discretion than an application of a rule of exclusion.80 A third ambiguity arises, therefore, as to which of these alternatives was actually intended by Parliament. This is an important distinction, of course, both in terms of who bears the onus of proof on the question of admissibility, and the standard of appellate review to be accorded the trial judge’s decision to admit or exclude the evidence. The principle that statutory ambiguities in a common law jurisdiction must be resolved, in so far as possible, as consistent with common law doctrine — strongly suggests that the law governs...
The admissibility of 'similar fact evidence' must be regarded as an evidentiary rule of exclusion rather than an exercise of discretion.

C R v Best

The Court of Appeal had its first opportunity to address these and various other issues concerning the construction to be accorded s 398A in Best. In Best, the applicant was convicted on six counts of indecently assaulting two young boys and acquitted on twelve additional counts relating to three other young boys. The applicant then appealed on several grounds, one being that the trial judge erred in ruling that the evidence relating to each complainant was admissible as evidence of the applicant's guilt in relation to each of the other complainants under s 398A. Stated differently, the applicant argued that the counts relating to each complainant would not have been cross-admissible in a separate trial for each of the other complainants as 'propensity evidence' under s 398A and thus, it was error and a substantial miscarriage of justice for the judge to refuse his application for separate trials. It should be noted that at the time this case was appealed, the common law rule of cross-admissibility, at least in regard to 'sexual offences', appeared to have been emasculated beyond recognition, if not abrogated altogether, by sub-ss (3AA) and (3AB) of s 372 of the Crimes Act 1958 (Vic), also inserted by way of the Crimes (Amendment) Act 1997 (Vic). In the companion case of R v Bullen, however, the Court arguably read these sections down to such an extent as to render them meaningless. The Bullen decision will be discussed in greater depth in Part V.

The judgment of Callaway JA, with whom Phillips CJ and Buchanan JA concurred, emphasised at the outset that s 398A would not be construed in accordance with the explanatory memorandum or the Attorney-General's second reading speech, but by giving its words their natural meaning in light of pre-existing common law principles. Callaway JA then held that the term 'propensity evidence,' as used in s 398A, denotes 'similar fact evidence' (as defined by this writer in Part II). Callaway JA then turned to the question of how trial judges are to determine whether the circumstances are such that it is just to admit 'similar fact evidence' despite any prejudicial effect it may have on the accused. Callaway JA concluded that sub-s (2) was intended to codify the English test of admissibility enunciated by the House of Lords in DPP v P namely, that 'similar fact evidence' is inadmissible unless its probative value is so substantial

82 (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JJA, 23 July 1998).
83 (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JJA, 23 July 1998) ('Bullen').
84 Best (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JJA, 23 July 1998) 3.
85 Ibid 5–7. There are several passages in Callaway JA's judgment which, although not defining 'similar fact evidence' in the exact words used by this writer in Part II, can fairly be read as consistent with that definition.
as to make it just to receive it notwithstanding its natural tendency to prejudice the accused through a propensity chain of reasoning.\textsuperscript{87} This smacks of the same amorphous balancing approach that for decades bedevilled the 'similar fact evidence rule' by causing it to resemble an exercise of discretion rather than an evidentiary rule of exclusion.\textsuperscript{88} Although the \textit{Hoch-Pfennig} test was formulated in part to redress this problem, sub-ss (3) and (4) purport to reject it in unequivocal terms. Aware of this dilemma, Callaway JA concluded that sub-ss (3) and (4) were also intended as a codification of English law; specifically, the principle set forth by the House of Lords in \textit{R v H}\textsuperscript{89} that the process of balancing probative value and prejudicial effect must be undertaken on the assumption that the 'similar fact evidence' is true.\textsuperscript{90} In further explaining the construction to be accorded these sub-sections, Callaway JA wrote:

Sub-sections (3) and (4) should be understood to refer only to explanations, like collusion and unconscious influence, that affect the truth of the propensity evidence sought to be adduced and not to extend to explanations like coincidence ... Sub-section (2) must be read in harmony with sub-ss (3) and (4), so that 'all the circumstances' bearing on probative value and prejudicial effect are relevant to admissibility but not factors impugning the reliability of the evidence.\textsuperscript{91}

It follows from this construction, therefore, that in cases such as \textit{Makin}\textsuperscript{92} where the similar facts are not in dispute, s 398A will have little or no effect on the admissibility of 'similar fact evidence' under present common law doctrine. That is to say that in these situations, sub-ss (3) and (4) will be inapplicable and the admissibility of the evidence will be determined according to sub-s (2) by a balancing of probative value and prejudicial effect. It is only in cases such as \textit{Hoch}, for example, where the reliability of the similar facts is challenged on the basis of collusion, unconscious influence, or some other means, that s 398A will significantly alter the common law rules governing the admissibility of 'similar fact evidence'. In these instances, sub-s (3) mandates that trial judges undertake the balancing process required under sub-s (2) on the assumption that the 'similar fact evidence' is true. If the trial judge concludes, based upon this assumption, that the probative value is sufficiently great that it is just to admit the evidence notwithstanding its prejudicial effect, then sub-s (4) permits the judge to direct the jury that it may consider, in assessing the weight of such evidence or the credibility of a witness, whether there is a rational view of the evidence which is consistent with the innocence of the accused. Callaway JA further held, in accordance with pre-existing common law doctrine, that where the reliability of the similar facts is disputed on the basis of collusion, unconscious influence or

\textsuperscript{87} Best (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JA, 23 July 1998) 4-5.
\textsuperscript{88} See Pfennig (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ).
\textsuperscript{89} [1995] 2 AC 596.
\textsuperscript{90} Best (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JA, 23 July 1998) 5, 10.
\textsuperscript{91} Ibid 10 (emphasis added).
\textsuperscript{92} [1894] AC 57.
otherwise, the jury should be directed that they are prohibited from using such evidence as part of their reasoning unless they are satisfied beyond reasonable doubt that none of these factors were operating. 93

With the advent of s 398A, an accused in the position of Hoch can no longer obtain separate trials by alleging, whether truthfully or not, that the complainants collaborated to concoct allegations of an identical or similar nature. Rather, the determination of cross-admissibility under s 398A is undertaken by assuming the truth of the allegations and then balancing their probative value and prejudicial effect. In the event that their probative value is so substantial that it is just to admit them despite any prejudicial effect, the evidence is received and the issue of credibility is left for the jury to decide. As noted earlier, this has the salutary effect of preventing an accused from fabricating allegations of collusion and then invoking the Hoch-Pfennig test in order to remove the issue of credibility, as well as highly probative evidence, from the jury's consideration. Also evoking remnants of our earlier discussion is the following passage from the judgment of Callaway JA:

'It is entirely consonant with the common law as understood in Australia to leave the reliability of evidence to a jury. They are able, and in some cases better qualified, than a judge to assess the weight of an argument that evidence has been concocted or is the product of unconscious influence ... That is also a good deal fairer to the witnesses, whether the issue is determined on the basis of the depositions or after a voir dire.' 94

Although the judgment of Callaway JA affords substantial guidance in explicating the cryptic language of s 398A, it is conspicuously devoid of any attempt to address the question of what, if anything, remains of the Hoch-Pfennig test in light of sub-ss (3) and (4). In balancing probative value and prejudicial effect on the assumption that the similar facts are true, are judges now relegated to the pre-Hoch-Pfennig era in which the balancing process, for want of any articulable guiding principle, appears more akin to an exercise of discretion than a rule of exclusion? 95 Given the narrow construction accorded sub-s (3), is there any language in s 398A which evinces a clear legislative intention to discard the Hoch-Pfennig test as the ultimate measure of whether probative value outweighs prejudicial effect? It would appear not. And in common law jurisdictions, is it not true that in the absence of a clear legislative intention to the contrary, statutes are to be construed in accordance with fundamental common law precepts? 96 These factors strongly suggest that the Hoch-Pfennig test is very much alive and that s 398A significantly alters the pre-existing common law only to the extent of sub-s (3)'s mandate that the Hoch-Pfennig test be applied on the assumption that any disputed similar facts are true. This conclusion is not only consonant with the

93 Best (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JJA, 23 July 1998) 20.
94 Ibid 11.
95 See Pfennig (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ).
Propensity Evidence in Victoria

1999

279

aforementioned common law precept, but comports well with the notion that in the absence of the Hoch-Pfennig test or something similar, s 398A will indeed resemble an exercise of discretion rather than an evidentiary rule of exclusion.\(^97\)

Two final points are germane to our analysis of s 398A. The first is that the judgment of Callaway JA never expressly resolves the issue of whether Parliament intended s 398A to operate as an exercise of discretion or a rule of exclusion. However, Callaway JA's discussion of the meaning of 'propensity evidence' for the purposes of this section militates strongly in favour of the latter alternative. In addressing this issue, Callaway JA opined that the type of 'propensity evidence' to which s 398A refers involves an exclusionary rule which is directed not merely at discreditable conduct, but with the impermissible manner in which evidence of the conduct may be used.\(^98\) The second point is whether, in practical terms, s 398A eliminates altogether the possibility that the Christie discretion may be used to exclude evidence which survives the gauntlet of s 398A. The expression 'practical terms' is used to underscore the reality that the Christie discretion involves a balancing process similar to the type used in sub-s (2)\(^99\) and thus, a decision to admit evidence under s 398A would be virtually dispositive of the issue of the Christie discretion as well. In Bullen, the judgment of Callaway JA, with whom Phillips CJ and Buchanan JA also concurred, expressly opted to leave this question for another day.\(^100\)

V SUB-SECTIONS (3AA) AND (3AB) OF SECTION 372 OF THE CRIMES ACT 1958 (Vic) AND-THEIR IMPACT ON THE RULE OF CROSS-ADMISSIBILITY

It was noted earlier that sub-ss (3AA) and (3AB) of s 372 of the Crimes Act 1958 (Vic) were also inserted as part of the Crimes (Amendment) Act 1997 (Vic). It was further noted that these provisions must be read in conjunction with the sixth schedule, rule 2, and s 372(3) of the Crimes Act 1958 (Vic) which relate to joinder and severance of counts charged in the same presentment respectively. Sub-section (3AA) provides that '[d]espite sub-section (3) and any rule of law to the contrary, if, in accordance with this Act, two or more counts charging sexual offences are joined in the same presentment, it is presumed that those counts are triable together.' Sub-section (3AB) then provides that '[t]he presumption created by sub-s (3AA) is not rebutted merely because evidence on one count is inadmissible on another count.'

On its face, this new legislation purports to alter the pre-existing common law rule of cross-admissibility in regard to sexual offences charged in the same presentment. Specifically, it purports to create a rebuttable presumption against severance which cannot be overcome solely on the basis that the evidence

\(^97\) Ibid.

\(^98\) Bullen (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JA, 23 July 1998) 16.

\(^99\) See R v Christie [1914] AC 545, 564; Ligerwood, above n 1, 56; Heydon, above n 1. 4.

\(^100\) Bullen (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JA, 23 July 1998) 16.
relating to each count is not admissible in relation to each of the others. This raises several important questions. Why is the legislation specifically targeted at sexual offences? Under what circumstances will the presumption be rebutted? To what extent, if at all, does the legislation really change the common law rule of cross-admissibility regarding sexual offences?

In *Bullen*, the Court of Appeal addressed each of these issues. The judgment of Callaway JA, with whom Phillips CJ and Buchanan JA concurred, initially focused on the question of whether sub-ss (3AA) and (3AB) remove a judge's discretion, pursuant to sub-s (3), to order that counts charged in the same presentment be tried separately, at least in so far as sexual offences are concerned. Callaway JA held that the new legislation does not remove the discretion, but establishes a prima facie rule governing the manner in which it is to be exercised. As a precursor to his discussion of which factors counsel the exercise of this discretion, Callaway JA opined that the word 'triable', as used in sub-s (3AA), 'means triable consistently with a fair trial of the accused.' Also noteworthy are Callaway JA's comments that 'sub-section (3AB) is unfortunately expressed' and 'I do not stay to consider whether "presumed" and "rebutted" were the technically correct words to use.'

In further construing sub-ss (3AA) and (3AB), Callaway JA turned his attention to the rule of cross-admissibility and its underlying rationale. In particular, he explained that the rule has never been predicated on the notion that separate trials should be ordered merely because evidence relating to each count is not admissible in relation to each of the others. In further elucidating this rule, Callaway JA wrote:

> The true position was, and remains, that where evidence on one count is admissible on another, there is no point in ordering separate trials ... The prejudice to the accused must usually be borne and mitigated, so far as possible, by appropriate directions to the jury. The significance of evidence on one count being inadmissible on another count is that it makes it practicable to order separate trials if there is reason to do so. The reason is not the inadmissibility of the evidence but, in the case of sexual offences, the prejudice to the accused coupled with a doubt about the efficacy of any warning against misuse of the evidence.

Callaway JA then opined that while the rule is typically expressed in terms of the cross-admissibility of 'counts', it has resulted in a rule of practice throughout Australia whereby allegations of sexual offences involving two or more complainants are normally tried separately where the evidence relating to one

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101 Ibid.
102 Ibid 7.
103 Ibid.
104 Ibid.
105 Ibid.
106 Ibid.
107 Ibid 7-8.
109 Ibid 7-8 (emphasis added).
complainant is not admissible in relation to each of the others.\textsuperscript{110} Callaway JA further opined that this rule of practice has now evolved to the point where applications for severance are now routinely granted.\textsuperscript{111} According to Callaway JA, the perceived ‘mischief’ at which these sub-sections are directed is the all but automatic granting of such applications. The dilemma facing the Court, therefore, was how to give effect to the intention of Parliament and, at the same time, preserve a rule of practice which the judiciary regards as indispensable in ensuring an accused’s right to a fair trial. The inherent tension between these considerations is exemplified in Callaway JA’s concession that one or perhaps both would have to be compromised ‘in order to give practical effect’ to the new legislation.\textsuperscript{112} Callaway JA was also careful to point out, however, that ‘[n]either consideration may ... be ignored or wholly displaced.’\textsuperscript{113} That brings us to the question of how the discretion conferred by sub-s (3) is to be exercised in the aftermath of sub-ss (3AA) and (3AB).

In addressing this question, Callaway JA held that the interest in ensuring an accused’s right to a fair trial must be the paramount consideration in the exercise of this discretion.\textsuperscript{114} He further held, therefore, that applications for severance should always be granted in cases where it is ‘both desirable and practicable in order to ensure a fair trial.’\textsuperscript{115} While emphasising that one prerequisite of a fair trial is that judges should take all reasonable measures to prevent the misuse of evidence,\textsuperscript{116} Callaway JA also acknowledged that juries will not always comply with directions that are given to prevent such misuse and any resulting prejudice to the accused.\textsuperscript{117} Callaway JA then opined that the risk of non-compliance is unacceptably high in cases where the evidence relating to one complainant is probative but not admissible in relation to the other(s);\textsuperscript{118} this is particularly true in the case of sexual and other aberrant offences which, because of their repulsive nature, are calculated to inflame the jury.\textsuperscript{119} In concluding this segment of his judgment, Callaway JA wrote:

\begin{quote}
It might be thought that there is a tension between s 398A and the amendments to s 372. If the judge has already decided that the prejudicial effect of the evidence ... against A is so great that it is not just to admit that evidence in relation to the offence against B, how can he or she not conclude that the same prejudice that has led to the evidence being inadmissible also requires severance of the presentment? Experience may show that there are relatively few
\end{quote}
cases of that kind where separate trials should not be ordered. So much appears to be recognized by the Attorney-General in ... her second reading speech.122

The judgment of Callaway JA comes perilously close to an outright reaffirmation of the rule of practice which Parliament perceived as pernicious enough to warrant the remedial measures embodied in sub-ss (3AA) and (3AB). Although the preceding passage leaves open the possibility that severance should be denied in certain cases of this type, the conspicuous absence of any discussion of what factors might justify that result does not augur well for the proponents of the new legislation. For the same reason, proponents should find little solace in Callaway JA's observation that the tension between s 398A and s 372 is not absolute in the scenario postulated in the above-quoted passage.121 The more likely interpretation is that Callaway JA was merely adverting to the fact that severance is only indicated under the common law rule when a direction to the jury would be ineffective in preventing any unfair prejudice that may result from misuse of the evidence. A fair reading of Callaway JA's judgment suggests that a cautionary direction would only be effective where the evidence relating to one complainant has absolutely no probative value in relation to the other(s).122 It is the opinion of this observer, therefore, that the judgment of Callaway JA does nothing more than pay lip service to his earlier statement that legislative intent may not be 'ignored or wholly displaced.'123

VI CONCLUSION

It is axiomatic that an effective system of checks and balances is an essential component of any form of representative government. It is equally clear, at least to this observer, that no system of checks and balances can be effective without an independent judiciary armed with a meaningful power of judicial review. Although the Australian judiciary is independent to the extent of its freedom from direct electoral accountability, the absence of a Bill of Rights in the Australian Constitution raises a serious question as to the efficacy of its power of judicial review and, consequently, the efficacy of our system of checks and balances. It is respectfully submitted that the enactment of s 398A and sub-ss (3AA) and (3AB) — and the narrowing constructions accorded them by the Court of Appeal — are a clear indication of the legitimacy of the foregoing propositions.

No purpose would be served in rehashing all the points raised during the course of this article. Suffice it to say that Callaway JA's judgments in Best and Bullen make it abundantly clear that the Court was prepared to ignore the 'purposive construction of legislation'124 precept in the interest of ensuring an accused's right to a fair trial.125 In Best, for example, Callaway JA commented that s 398A

120 Ibid 15.
121 Ibid 16.
122 Ibid 15.
123 Ibid 12.
124 Ibid
125 Ibid 7-8; Best (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JJA, 23 July 1998) 3.
would be construed by giving its words their natural meaning in light of pre-existing common law principles — as opposed to relying on either 'the explanatory memorandum or the Attorney-General's second reading speech.'

126 Callaway JA expressed similar sentiments in Bullen when he intimated that 'the purposive construction of legislation' precept might have to be subordinated to the interest in ensuring the right to a fair trial.127 Yet is it not black letter law that in the absence of a state or federal constitutional provision to the contrary, the courts must construe legislation in a manner which comports with the clear intentions of Parliament?128 Although the 'narrow construction accorded s 398A in Best arguably represents an improvement over the pre-existing common law, it is all but certain that it flies in the face of what Parliament intended. The same can be said, with even greater conviction, of the construction accorded subss (3AA) and (3AB) in Bullen. How does one explain the rather obvious tension between the legislative and judicial branches of the Victorian government?

With all due respect to Parliament, there is little doubt that the new legislation was intended to emasculate the 'similar fact evidence rule' under present common law doctrine and thereby facilitate convictions, particularly in cases involving sexual offences. While this was undoubtedly the politically correct course to follow, it could not be reconciled with the common law right of an accused to a fair trial.129 Recognising this, and determined to frustrate Parliament's attempt to run roughshod over basic civil liberties, the Court of Appeal resorted to a bit of political chicanery of its own. Acutely aware of Parliament's affinity for political correctness, the Court seized upon the reality that Parliament has not, and for political reasons would not, statutorily abolish the common law right to a fair trial. This effectively allows the courts to interpret legislation, irrespective of the true intentions of Parliament, in a manner which is compatible with the courts' notion of what constitutes a fair trial. The courts are saying, in substance, that if Parliament had intended to abolish the right to a fair trial, it would have done so expressly or by necessary implication. Since it has not done so, any legislation which offends the notion of a fair trial can be flouted on the premise that Parliament could not have intended such a result. The consequence, of course, is that the judiciary will continue to overstep its authority and act as a super legislative body unless and until Parliament summons the courage to clearly express its true intentions. Although the results of such an arrangement may be equitable in many instances, there is no escaping the fact that the doctrine of separation of powers and its system of checks and balances are being stretched to their outer limits. Moreover, can it be assumed that every Australian court will have the determination, much less the desire, to safeguard the right to a fair trial? If the

126 Best (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JJA, 23 July 1998) 3.
128 Union Steamship Company of Australasia Pty Ltd v King (1989) 166 CLR 1, 9; Peter Hanks, Australian Constitutional Law: Materials and Commentary (5th ed, 1994) [3.053]-[3.058].
129 Dietrich v The Queen (1992) 177 CLR 292, 297-8 (Mason CJ and McHugh J), 331-2 (Deane J), 363 (Gaudron J), 353 (Toohey J).
right to a fair trial were to be enshrined in an entrenched Bill of Rights in the Australian Constitution, would this not reduce this type of strain on the separation of powers and its system of checks and balances? Would it not also serve to preserve and enhance the integrity of our political institutions? Although the answers to these questions will continue to be hotly debated, the extent to which the new Victorian legislation brings these issues into focus cannot be ignored. Be that as it may, does the new legislation, as construed in *Best* and *Bullen*, represent a triumph for justice or an affront to civil liberties?

Although the answer to this question is largely in the eyes of the beholder, certain observations can be gleaned from the foregoing discussion. In the aftermath of *Best* and *Bullen*, the ‘similar fact evidence rule’ under the pre-existing common law doctrine is substantially intact. Assuming that the *Hoch-Pfennig* test is still the ultimate criterion in making the determination as to whether the circumstances are such that it is just to admit the evidence under s 398A(2), the only significant change is that the test must now be applied on the supposition that the similar facts are true. In cases where the similar facts are in dispute, this reform must be viewed as positive in at least three respects. The first is that evidence which is sufficiently probative to satisfy the *Hoch-Pfennig* test, save for the possibility of collusion, unconscious influence or other factors impugning its reliability, will no longer be excluded from the jury’s consideration. This restores the function of adjudging the credibility of witnesses to its rightful place with the jury. The second is that an accused is thereby prevented from fabricating allegations of collusion, unconscious influence and the like in order to deprive the jury of highly probative and damaging evidence. While it is true that this will remove the option of severance and force an accused to face all his or her accusers in a single trial, it does not necessarily follow that this is inimical to the interests of justice. If the allegation of collusion or unconscious influence has merit, and especially if it can be substantiated by credible evidence, it may well be to the advantage of an accused to raise this defence in a single trial. One obvious advantage is that it enables an accused to adduce the entire arsenal of legally admissible evidence in support of his or her defence. Another advantage is that it limits the prosecution to one opportunity to convict before a single jury as opposed to several opportunities with different juries. If the allegation of collusion or unconscious influence is spurious, the interests of justice are hardly served by allowing the option of severance and depriving each jury of the benefit of highly probative evidence of guilt. The third positive consequence of the reform is that both the government and the accused will be spared the cost and time of enduring multiple prosecutions.

For at least three reasons, therefore, the new Victorian legislation should be seen as an improvement over the pre-existing common law doctrine regarding the admissibility of ‘similar fact evidence’ in criminal prosecutions. To those who agree with this statement and further subscribe to the view that the ‘similar fact evidence rule’ and the concomitant rule of cross-admissibility are essential components of the common law right to a fair trial, the new legislation represents a significant triumph for justice. It is regrettable that this triumph occurred in
spite of the rather obvious intention of Parliament to mount a frontal assault on civil liberties under the pretext of a get tough on law and order campaign. According to an old proverb, '[w]hen people start giving up a little liberty in order to get a little more security, they will soon have neither.' We are fortunate that the Court of Appeal has both the wisdom to understand this proverb and the will to frustrate the efforts of those who do not.