SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2013 0118

ORDAN VELKOSKI

Applicant

v

THE QUEEN

Respondent

JUDGES	REDLICH, WEINBERG and COGHLAN JJA
WHERE HELD	MELBOURNE
DATE OF HEARING	11 February 2014
DATE OF ORDERS	2 June 2014
DATE OF REASONS	18 June 2014
MEDIUM NEUTRAL CITATION	[2014] VSCA 121 1st revision: 4 September 2014 Catchwords, footnotes 172, 236, 240
JUDGMENT APPEALED FROM	*DPP v Velkoski* (Unreported, County Court of Victoria, Judge Campton, 24 April 2013 (date of conviction))

EVIDENCE – Tendency evidence – Review of intermediate appellate court decisions – Principle to be applied to determine admissibility – *Hoch v The Queen* (1988) 165 CLR 292; *R v Papamitrou* (2004) 7 VR 375; *R v Ellis* (2003) 58 NSWLR 700; *W v The Queen* (2001) 115 FCR 41; *CGL v Director of Public Prosecutions (Vic)* (2010) 24 VR 486; *AE v The Queen* [2008] NSWCCA 52; *PNJ v Director of Public Prosecutions (Vic)* (2010) 27 VR 486; (2005) 156 A Crim R 308; *NAM v The Queen* [2010] VSCA 95; *GBF v The Queen* [2010] VSCA 135; *R v Ford* (2009) 273 ALR 286; *JLS v The Queen* (2010) 28 VR 328; *Director of Public Prosecutions (Vic) v BCR* [2010] VSCA 229; *PG v The Queen* [2010] VSCA 289; *CW v The Queen* [2010] VSCA 288; *KRI v The Queen* (2011) 207 A Crim R 552; *RHB v The Queen* [2011] VSCA 295; *RJP v The Queen* (2011) 215 A Crim R 315; *RR v The Queen* [2011] VSCA 442; *DR v The Queen* [2011] VSCA 440; *CEG v The Queen* [2012] VSCA 55; *Reeves v The Queen* [2013] VSCA 311; *R v PWD* (2010) 205 A Crim R 75; *BSJ v The Queen* (2012) 35 VR 475; *Semaan v The Queen* [2013] VSCA 134; *Murdoch v The Queen* [2013] VSCA 272; *SLS v The Queen* [2014] VSCA 31; *CV v Director of Public Prosecutions (Vic)* [2014] VSCA 58; *Doyle v The Queen* [2014] NSWCCA 4; *Sokolowskyj v The Queen* [2014] NSWCCA 55; *DAO v The Queen* (2011) 81 NSWLR 568; *RH v The Queen* [2014] NSWCCA 55, considered – Cross-admissibility of three complainants' evidence – *Evidence Act 2008* (Vic) s 97.

CRIMINAL LAW – Trial – Failure to object to evidence – Whether tendency evidence – Whether words 'is not admissible' in *Evidence Act 2008* (Vic) s 97 should be construed as 'is not admissible over objection' – *R v Reid* [1999] NSWCCA 258; *Gonzales v The Queen* (2007) 178 A Crim R 232; *FDP v The Queen* (2008) 74 NSWLR 645, considered – Deliberate decision for forensic reasons not

to object – *R v Radford* (1993) 66 A Crim R 210; *Shaw v The Queen* (Unreported, Court of Criminal Appeal (NSW), Gleeson CJ, Dowd and Hidden JJ, 3 April 1996); *R v Gay* [[1976] VR 577, followed – Waiver – *R v Clarke* (2005) 13 VR 75; *R v McCosker* [2011] 2 Qd R 138, followed – Whether trial judge under duty to intervene.

CRIMINAL LAW – Trial – Directions to jury – Inadequate directions as to tendency reasoning – Identification of features of tendency evidence necessary – Explanation necessary as to why tendency evidence makes fact in issue more probable – *RR v The Queen* [2011] VSCA 442; *RJP v The Queen* (2011) 215 A Crim R 315, considered – Inappropriate direction as to sexual interest in complainants as evidence of 'state of mind' – Appeal allowed – Retrial ordered.

EVIDENCE – *Criminal Procedure Act 2009* (Vic) s 377(3) – Exception to hearsay rule – Whether fact asserted in previous representation must be subject of evidence by person who makes assertion – Complainant recants previous assertion – Evidence should therefore have been excluded.

CRIMINAL LAW – Conviction – Appeal – Whether verdicts unsafe or unsatisfactory – Verdict of acquittal entered on Charges 3 and 11.

APPEARANCES:	COUNSEL	SOLICITORS
For the Applicant	Mr P F Tehan QC with Mr D A Langton	Patrick W Dwyer
For the Crown	Mr R A Elston SC	Mr C Hyland, Solicitor for Public Prosecutions

REDLICH JA
WEINBERG JA
COGHLAN JA:

1 After a trial in the County Court of Victoria, the applicant was acquitted of one charge of attempting to commit an indecent act with a child under the age of 16 and convicted of 15 charges of committing an indecent act with a child under 16. The charges related to three complainants. He received a sentence of four years and eight months' imprisonment with a non-parole period of three years. He now seeks leave to appeal against his conviction.

2 The questions with which the appeal is concerned are:

(i) whether the acts relied upon by the prosecution were admissible as tendency evidence;

(ii) the significance of a failure to object to the admissibility of that evidence;

(iii) whether the applicant could now be heard to complain as to the concession made at the commencement of the trial that each of the three complainants' evidence supported tendency reasoning and was therefore cross admissible;

(iv) whether the trial judge had a duty to intervene if inadmissible evidence was introduced;

(iv) whether the directions given to the jury as to tendency reasoning were inadequate so as to occasion a substantial miscarriage of justice;

(v) whether, pursuant to s 377 of the *Criminal Procedure Act 2009* (Vic), the trial judge wrongly admitted evidence of a 'complaint' made by one of the complainants to her parents as evidence of the truth of its content and alternatively whether such evidence rendered the conviction unsafe; and

(vi) whether the verdict on various grounds was unsafe and unsatisfactory.[1]

Summary of conclusions

3 Our conclusions on the grounds concerning the tendency evidence are as follows. First, we have examined the principle which is applied in determining whether tendency evidence is admissible. The principle consistently applied in this Court is that the evidence must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that

[1] Grounds 2 and 3 were abandoned during the hearing.

conduct. Parts of the three complainants' evidence were clearly cross-admissible as tendency evidence while other parts were not.

4 Second, because the applicant through his counsel by a deliberate and conscious decision, and for a rational forensic reason, agreed that each of the complainants' accounts could support tendency reasoning, there was a waiver of an objection to the use of any parts of their evidence in this way. No unfairness in the applicant's trial thereby resulted.

5 Third, the trial judge was not obliged in those circumstances to undertake a review of the parties' decision before the evidence could be so used.

6 Fourth, waiver of any objection by the defence throughout the trial did not relieve the trial judge of the duty to give an adequate direction to the jury as to tendency reasoning. The directions were deficient. No guidance was given as to what the features of the tendency evidence were or why one complainant's evidence on a particular charge could make another complainant's account more probable. As a consequence, the jury may not have correctly employed tendency reasoning in utilising the evidence of one complainant to support the evidence of another, thereby occasioning the risk of a substantial miscarriage of justice.

7 The applicant's contention, that s 377(3) of the *Criminal Procedure Act 2009* (Vic) ('*Criminal Procedure Act*'), as an exception to the hearsay rule, did not permit a witness to give evidence of a fact asserted in a previous representation when that fact is only asserted in the previous representation and not in the complainant's own evidence or testimony, was unsustainable. However, the complainant, during evidence, recanted that assertion thereby rendering the conviction on Charge 3 unsafe. The conviction on Charge 11 was also unsafe. On the remaining charges a retrial should be ordered.

Background

8 The applicant's wife ran a registered family day-care centre at their residential address. The applicant was not a registered carer and was not supposed to supervise the children while in care. The Crown's case was put as follows.

9 The complainant GS was born in 2002 and attended the day-care centre between July 2005 and October 2011. Between 24 September 2011 and 9 October 2011, the applicant grabbed the complainant's penis whilst 'play fighting' (Charge 2). The complainant also gave evidence of uncharged acts alleging that the applicant would always try to touch the complainant's penis when they were playing games together.

10 The complainant MS was born in July 2007 and attended the day-care centre between 10 February 2008 and 10 October 2011. Between 1 January 2011 and 13 September 2011, during nap time, the applicant and his wife put mattresses on the floor in the dining room for the children to lie down on and sleep or rest. The applicant sat next to the complainant's mattress. He asked her to take his penis out of his pants, and when she did not he removed his penis from his pants and cradled it and exposed his penis to her (Charge 3).

11 On Monday 10 October 2011, the complainant MS was in the kitchen of the day-care centre with the applicant while his wife was in the lounge room. The applicant was wearing a pair of grey pyjama pants. He removed his penis from his pants, exposing it to the complainant (Charge 4). He then told her to touch it. She placed her left hand on the applicant's penis and then ran out of the room. The complainant said that the applicant's penis was 'gooey and sticky' and the applicant told her that it was soap from the shower and that he hadn't washed it off properly (Charge 5). Whilst in the bath later that night she told her mother what had happened.

12 The complainant OA was born on 12 October 2002. She attended the family day-care centre between 19 April 2009 and 9 October 2011. Between 12 April 2011 and 26 April 2011, during the term one school holidays, the complainant was by herself in the living room watching television. The applicant walked into the room and told her to 'come here'. The applicant then grabbed the complainant's hand. She tried to pull it away but he kept hold of it and placed it on his penis over the top of the fabric of his pants (Charge 6).

13 Between 5 July 2011 and 14 July 2011 during the term two school holidays, the complainant was in an upstairs room of the house playing on a laptop. The applicant was also

in the room and asked her for a hug so he could warm his hands. He then placed his hand down her pants and underwear and moved his fingers in a circular pattern around the outside of the complainant's vagina (Charge 7). He told her it was so warm. She asked him why he was doing it and the applicant replied that he liked it.

14 On another occasion between 5 July 2011 and 14 July 2011, the complainant was again in the upstairs room of the house. Also present were her brother and GS. The complainant was standing up while playing a computer game. The applicant asked her why she was standing up and got her to sit down. He then grabbed one of her hands and placed it onto his penis over his clothing. The applicant was snorting at the time (Charge 8). On another occasion during this period, the complainant was in the living room and went to walk outside. The applicant grabbed her to stop her from walking outside and placed his hand down her pants and underpants and onto her vagina. The complainant said 'stop' and when he did not stop, she screamed 'stop' and ran outside (Charge 9).

15 On another occasion between 5 July 2011 and 14 July 2011, the complainant was in the dining room trying to walk outside to play with the other children. The applicant grabbed the complainant, placed one hand down the front of her pants, touching her vagina, and placed the other hand down the back of her pants, touching her bottom (Charge 10).

16 The remaining charges occurred during the term three holidays between Tuesday 27 September 2011 and Thursday 6 October 2011. On one occasion the complainant was outside patting the applicant's dog on the back steps. The applicant approached the complainant and placed his hand down the back of her pants on top of her underpants and rested his hand on her bottom (Charge 11). On another occasion during the term three holidays the complainant was sitting playing on the laptop. The applicant told her to sit on his lap. The complainant sat on his lap and the applicant placed his hand down her pants on top of her vagina. The complainant told him to stop and he took his hand out. A short time later the applicant again placed his hand down her pants and touched her vagina (Charges 12 and 13). On another occasion, the complainant was in the living room of the house when the applicant approached her and grabbed her from behind. He turned her around so that they

were facing each other. He then pressed his body against hers and 'humped' her by moving back and forth with his body. She told him to stop (Charge 14).

17 On another occasion during the term three holidays the complainant was in the upstairs room with the applicant. He told her to sit down and when she did so he placed his hand down the back of her pants and touched her bottom (Charge 15). The complainant then got up to leave and the applicant held onto her collar. He grabbed her hand and forced it onto his penis (Charge 16).

18 During cross-examination, OA confirmed that the applicant always put her hands on his penis when he had clothes on. She said that he got her to do it and that he put his hands down her pants. While on holiday in Queensland, MS told her father that she had seen the applicant's penis. After discussing what they were going to do, her parents decided to continue with day-care but instructed MS to tell them or the applicant's wife if anything happened which made her feel uncomfortable. On 10 October 2011, the first day that MS had been back in child care, she disclosed to her mother that she had 'seen [the applicant's] penis again today'. The complainant's parents contacted the police. A Video Audio Recording of Evidence ('VARE') was conducted on 13 October 2011. GS was interviewed by police on 31 October 2011. VAREs were conducted with OA on 13 November 2011 and 17 November 2011. The applicant was interviewed by police on 17 October 2011 in respect of the MS allegations and on 17 November 2011 in respect of the allegations made by OA and GS. He denied all of their allegations.

Ground 4: There has been a substantial miscarriage of justice because tendency evidence was admitted into the trial.

19 The applicant submits that there has been a substantial miscarriage of justice because the evidence of each complainant was permitted to be used as tendency evidence when considering each charge on the indictment.

20 Section 97 of the *Evidence Act 2008* (Vic) ('*Evidence Act*') relevantly provides:

(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.

21 By the tendency notice issued under s 97(1), the prosecution sought to rely upon evidence of each of the charges on the indictment as tendency evidence, such that the evidence for each of the charges would be cross-admissible. The notice had a number of unsatisfactory features. It identified the evidence of conduct in each of the 16 charges which was said to demonstrate tendency (the tendency evidence) and the facts from each charge which were in issue and to which that tendency evidence related. The generality of such a tendency statement was the subject of explicit criticism in *CGL v Director of Public Prosecutions (Vic)*.[2]

22 The tendency notice further stated that the tendency of the applicant was 'to act in a particular way' and with a 'particular state of mind,' namely 'that the accused had a sexual interest in young children attending the day-care centre run by his wife' and 'that the accused was willing to act on that sexual interest by engaging in sexual acts with the complainants'. The notice thus conflated the tendency evidence and the conclusions to be drawn from that evidence by suggesting that the tendency was the applicant's willingness to act upon his sexual interest and commit the sexual acts alleged by the complainants, and in so doing went beyond the purpose and scope of the notice. The notice must be confined to the particular manner or circumstances in which the applicant has previously acted or his state of mind on occasions other than that the subject of the charge. It is those other occasions which are relied upon to make more likely the occurrence of the act alleged by the complainant in the subject charge. The notice should not assert and the jury must not be instructed (as it was in this case) that the tendency is that the accused had a sexual interest in the complainants and that he acted upon his sexual interest by engaging in the sexual acts alleged by the

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2 (2010) 24 VR 486, 496–7, [37]–[40] ('*CGL*').

complainants. That may be the conclusion which the jury ultimately reaches as a result of reasoning from the evidence of tendency.

23 It was announced on the second day of the trial that an agreement had been reached between the parties, whereby the defence would accede to the complainants' evidence being treated as tendency evidence and the Crown would abandon its application to lead coincidence evidence of which it had also given notice. The trial was thereafter conducted on that basis.

24 The applicant now argues that this concession, arising from the agreement reached with the prosecution, amounted to a serious error, and that the treatment of the complainants' evidence as tendency evidence resulted in a substantial miscarriage of justice.

When will tendency evidence satisfy the threshold requirements of admissibility? What are the relevant legal principles?

25 Regrettably, the law regarding the admissibility of 'tendency' and 'coincidence' evidence, pursuant to ss 97 and 98 of the *Evidence Act*, is regarded as being in an unsettled state. In part, that arises from the fact that, in both this State and New South Wales, many of the decisions regarding these provisions were interlocutory appeals which, of necessity, had to be determined speedily, and often without the benefit of full and carefully prepared argument.

26 It is remarkable that the current edition of Stephen Odgers' *Uniform Evidence Law in Victoria*[3] requires some 80 pages of closely typed and heavily footnoted material to deal with this subject. That is so notwithstanding that these provisions have only been in force in this State for some five years or so.

27 Previously, classic texts, such as *Cross on Evidence*,[4] managed to address the whole of the law in this area, covering a century or more of common law development in only a handful of pages.

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3 (Lawbook, 2nd ed, 2013) 457–538.

4 JA Gobbo (ed), *Cross on Evidence* (Butterworths, Australian ed, 1970).

28 That is not to say that the subject was always easy to grasp. However, one thing was clear. The substantial array of case law dealing with 'similar fact' evidence was concerned almost exclusively with questions of admissibility. Very little, if anything, was said about jury directions in relation to such evidence, a situation that no longer prevails.

29 Perhaps the reason why so little needed to be said by way of direction regarding evidence of that kind was because, once it passed the extraordinarily high threshold for admissibility applicable at common law, its probative value was self-evident.

30 The fact that evidence of prior acts of misconduct was generally regarded as inadmissible, and only received in wholly exceptional cases, meant that applications for severance, particularly in cases involving sexual offences, were frequently made, and almost as frequently granted. Certainly, that was so where there were multiple complainants, perhaps each alleging multiple offences, and it could not be said that their evidence was, in modern terms, 'cross-admissible'.

31 This high threshold meant that, in many cases, juries were left to consider the evidence concerning each alleged victim in isolation, without ever being made aware of the fact that allegations of a similar kind had been made by other complainants. Such cases often involved allegations that went back many years, and sometimes came down to a consideration of oath against oath. The result, in a great many cases, was a series of acquittals, whereas, had the evidence been made available, the outcome would almost certainly have been different.

32 From about the latter part of the 1980s, this state of affairs began to change. The High Court, in a series of cases, began to reformulate the test for cross-admissibility. Law reform bodies, too, were given the task of developing a new, and more principled, approach to this area. Their recommendations led to a series of legislative reforms, many of them designed, so it would seem, to make it easier to procure convictions in such cases.

33 Unfortunately, there was a price to be paid for all of this. That price is still being paid today. Under the law as it stood in this State prior to the enactment of the *Evidence Act*, and under the *Evidence Act* itself, the entire subject broadly encompassed by the term 'similar fact

evidence', has become exceedingly complex and extraordinarily difficult to apply. The situation is not helped when, as will be demonstrated, appellate courts fail to speak with one voice on this topic.

34 Currently there are undoubted differences between the decisions of this Court and the New South Wales Court of Criminal Appeal as to whether similarity of features need be present in order for evidence to be admissible as tendency evidence. A review of the decisions in this Court shows that though there have been perceived differences in approach in a small number of cases, upon analysis those differences may be more apparent than real. As the following review shows, they are largely to be explained as differences arising from the application of established principle to the facts of the particular case. In a few cases dicta may be found voicing differing views as to the degree of similarity that the tendency evidence must possess before it may be admitted as tendency evidence.

The position at common law

35 Before turning to the authorities dealing with tendency and coincidence under ss 97 and 98 of the *Evidence Act*, it is perhaps worth saying something, briefly, about the position at common law.

36 It was recognised, from an early stage, that the admission of evidence of prior acts of misconduct was likely to be highly prejudicial, and fraught with danger. Self-evidently, the fact that an accused may have behaved discreditably in the past can all too easily lead a jury astray in assessing the weight to be accorded to the evidence in relation to the specific charge under consideration. In addition, any time such evidence is led, there is the potential for a host of collateral issues to arise.

37 For these reasons, a rule developed at common law under which evidence of prior acts of misconduct had to be excluded if it was relevant only as suggesting that he or she had a particular tendency, and was likely, therefore, to have acted in accordance with that tendency in relation to the specific offence charged.

38 Of course, it was recognised from an early stage that improper conduct could be

relevant otherwise than via propensity. Evidence would be received if it were shown to be substantially relevant on some basis other than mere propensity.

39 Professor Cross, adapting what Lord Herschell LC famously had said in *Makin v Attorney-General (NSW),*[5] formulated the common law position as follows:

> [T]he rule is best regarded as an absolute prohibition on the adduction of evidence of misconduct on other occasions for the purpose of establishing wrongdoing on the occasion under investigation by means of an argument based solely on a disposition towards wrongdoing in general, or the commission of the particular wrong with which the court is concerned.[6]

40 This is not the occasion to analyse the substantial body of case law that developed in relation to similar fact evidence.[7] We simply make the point that, at least until comparatively recently, the principles to be applied when considering the admissibility of similar fact evidence were regarded as reasonably well-settled, and capable of straightforward application.

41 It was always understood that the threshold for admissibility of such evidence was a high one. The prosecution could not adduce evidence of improper conduct by the accused on other occasions if its only relevance was to show that he or she was a person of bad disposition, and his or her disposition was not highly relevant to an issue raised at the trial.

42 This principle is well illustrated by reference to the decision of the House of Lords in *Director of Public Prosecutions v Boardman.*[8] Their Lordships required, as a condition of such admissibility, that evidence that the accused had been guilty of other offences demonstrated a sharing of features of such an 'unusual nature', and 'striking similarity', that it would be 'an affront to common sense' to assert that the similarity was explicable on the basis of coincidence. The analysis was not improved by reference to some extreme examples of what might be sufficient to overcome the exclusionary rule.[9]

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5 [1894] AC 57, 65.

6 Gobbo (ed), *Cross on Evidence*, above n 4, 380.

7 The leading English cases on the subject include: *R v Ball* [1911] AC 47; *R v Smith* [1914–15] All ER 262 (the 'Brides in the Bath' case); *Thompson v The King* [1918] AC 221; *R v Sims* [1946] KB 531; *Noor Mohamed v The King* [1949] AC 182; *R v Straffen* [1952] 2 QB 911; *Harris v DPP* [1952] AC 694; *DPP v Boardman* [1975] AC 421.

8 [1975] AC 421 ('*Boardman*').

43 In effect, *Boardman*[10] held that, in such cases, the question of cross-admissibility would be determined by whether the particular criminal acts sought to be relied upon were so 'strikingly similar' to the offence under consideration that the prejudice to the accused of admitting that evidence was outweighed by its probative force.

44 *Boardman*[11] was what we today would describe as a 'coincidence' case. It would fall to be determined under s 98 of the *Evidence Act*. That was because no 'tendency' could be established unless, and until, the jury were satisfied that the accused had committed at least some of the offences charged. That fell to be determined by 'coincidence' reasoning, and not by 'tendency' reasoning.

45 For a number of years, this highly restrictive approach to the admissibility of 'similar fact evidence' was adopted in this country. Eventually, however, as previously indicated, the threshold came to be altered.

46 The catalyst for this change was the decision of the High Court in *Hoch v The Queen.*[12] There the accused was charged with having committed sexual offences against three boys. The issue arose as to whether the evidence admissible in respect of indecent dealing, concerning each boy, was also admissible in respect of the other two alleged victims.

47 Mason CJ, Wilson and Gaudron JJ, in a joint judgment, explained:

> The basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency by reason that it reveals a pattern of activity such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged …
>
> Assuming similar fact evidence to be relevant to some issue in the trial, the criterion of admissibility is the strength of its probative force … That strength lies in the fact that the evidence reveals 'striking similarities', 'unusual features', 'underlying unity', 'system' or 'pattern' such that it raises, as a matter of common sense and experience,

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9 Lord Hailsham posited that whilst it would certainly not be enough to identify the culprit in a series of burglaries that he climbed in through a ground floor window, the fact that he left the same humorous limerick on the walls of the sitting room, or an esoteric symbol written in lipstick on the mirror, 'might well be enough'. His Lordship added that, in a case involving sexual offending, whilst a repeated homosexual act by itself might be quite insufficient to admit the evidence, the fact that it was alleged to have been performed wearing 'the ceremonial head-dress of a Red Indian chief or other eccentric garb might well in appropriate circumstances suffice': ibid 454.

10 [1975] AC 421.

11 Ibid.

12 (1988) 165 CLR 292 ('*Hoch*').

> the objective improbability of some event having occurred other than as alleged by the prosecution.[13]

48 That formulation did little more than elucidate the test laid down in *Boardman*.[14] However, their Honours did not stop there. They went on to say, it seems for the first time, that a second condition had to be met in order for the evidence to be cross-admissible. They concluded that what they termed 'propensity evidence', being nothing more than a species of circumstantial evidence, could not be admitted if

> there is a rational view of the evidence that is inconsistent with the guilt of the accused …
>
> The evidence, being circumstantial evidence, has probative value only if it bears no reasonable explanation other than the happening of the events in question.[15]

49 In effect, their Honours took the direction classically given to juries in relation to circumstantial evidence (and the drawing of inferences)[16] and converted it into an additional condition of admissibility. They provided no explanation as to why the two tests should be so conflated, and the reason is not self-evident. After all, the fact that there may be a reasonable hypothesis consistent with innocence has never, on its own, been sufficient to warrant the exclusion of any single piece of circumstantial evidence upon which the prosecution relies.

50 It should be noted that *Hoch*[17] also endorsed a discrete principle (to which the House of Lords in *Boardman*[18] had earlier alluded). It was said that where there was a 'real possibility' that the complainants in a case involving sexual offending had collaborated, their evidence would not be accepted as cross-admissible.

51 Several years later, in *Pfennig v The Queen,*[19] the High Court elaborated upon what had earlier been said in *Hoch*.[20] A majority in *Pfennig* observed that the probative force of similar fact evidence should meet the following test:

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13 Ibid 294–5 (citations omitted).

14 [1975] AC 421.

15 *Hoch* (1988) 165 CLR 292, 296.

16 See *R v Hodge* (1838) 2 Lewin CC 227; 168 ER 1136.

17 (1988) 165 CLR 292**.**

18 [1975] AC 421.

19 (1995) 182 CLR 461 ('*Pfennig*').

20 (1988) 165 CLR 292**.**

> 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. Here 'rational' must be taken to mean 'reasonable' and the trial judge must ask himself or herself 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 that 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.[21]

52 This passage explained, for the first time, precisely why the directions normally given to a jury in relation to circumstantial evidence had been transformed into a key aspect of the test for admissibility of similar fact evidence.

53 To some minds, the *Pfennig*[22] approach to similar fact evidence was seen as even more restrictive than the *Boardman*[23] test. For that reason, it was seen as unduly favourable to the accused.

54 The history of what happened next is set out, in some detail, in the judgment of Winneke P in *R v Papamitrou.*[24] His Honour referred to a series of High Court decisions, prior to *Hoch*[25] and *Pfennig*,[26] in which *Boardman*[27] had been explicitly followed. He noted the changes brought about by *Pfennig*, in particular. He referred to various decisions of the Full Court, and then the Court of Appeal, in which first *Boardman*, and later *Pfennig*, had been applied.[28]

55 The President then drew attention to the various amendments to the *Crimes Act 1958* (Vic) ('*Crimes Act*') that had been introduced in 1997. He referred first to the amendments made to s 372 by which sub-ss (3AA) and (3AB) were enacted. These new provisions had

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21 (1995) 182 CLR 461, 482–3 (Mason CJ, Deane and Dawson JJ) (citations omitted).

22 (1995) 182 CLR 461.

23 [1975] AC 421.

24 (2004) 7 VR 375 ('*Papamitrou*').

25 (1988) 165 CLR 292**.**

26 (1995) 182 CLR 461.

27 [1975] AC 421.

28 *Papamitrou* (2004) 7 VR 375, 389–90.

the effect that, from that time, it would be presumed that two or more counts charging sexual offences joined in the same presentment would be tried together. Indeed, it was expressly stated that this presumption would not be rebutted merely because evidence on one count was inadmissible on another.[29]

56 His Honour noted that this change to the law governing the trial of sexual offences was highly detrimental to the interests of those charged with such offences. Those who drafted the amendments presumably thought that any prejudice arising as a result of their introduction could be overcome, or at least ameliorated, by the giving of appropriate directions.

57 His Honour also noted that the same statute that introduced the amendments to s 372 radically altered the test for the admissibility of similar fact evidence. Section 398A(2) provided that 'propensity evidence relevant to facts in issue in a proceeding for an offence' would be admissible if the court considered that, in all the circumstances, it would be 'just to admit it despite any prejudicial effect it may have upon the person charged with the offence'. Section 398A(3) provided that 'the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence' was 'not relevant to the admissibility of evidence referred to in sub-section (2)'.[30]

58 The rationale for these amendments was unmistakable. It was to lower the threshold for admissibility of similar fact evidence by abolishing both the *Boardman*[31] and *Pfennig*[32] tests.

59 This was confirmed in *R v Best*,[33] where it was said that the intention behind the introduction of s 398A had been to bring the law in this State into line with what the House of Lords had done, some years earlier, in *Director of Public Prosecutions v P*.[34] In that case,

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29 Ibid 388.

30 Ibid 398.

31 [1975] AC 421.

32 (1995) 182 CLR 461.

33 [1998] 4 VR 603, 607.

34 [1991] 2 AC 447 ('*DPP v P*').

their Lordships had rejected, as too narrow, both the 'striking similarity' test previously laid down in *Boardman*,[35] and what they regarded as the equally unsatisfactory, and perhaps heretical, approach taken by the High Court in *Hoch*.[36]

60 From the time of its enactment, in 1997, until the *Evidence Act* came into force in 2009, s 398A of the *Crimes Act* governed the admissibility of similar fact evidence in this State. However, lest it be thought that the law regarding such evidence operated harshly or oppressively throughout that period, it should be noted that there were a number of balancing, or compensatory, factors at play.

61 First, as Winneke P observed in *Papamitrou*,[37] the significantly lower threshold for admissibility that operated under the new regime required trial judges to give far more extensive directions to juries as to the manner in which such evidence could be used. This led, over time, to the development of a body of case law that insisted upon scrupulous adherence to the need for such directions to be given.

62 In particular, trial judges were required to direct juries as to how such evidence, when led, could be used, and perhaps more importantly, how it could not be used. In particular, it became necessary for juries to be told that, whatever else they could do with evidence of this kind, they could not engage in 'pure propensity reasoning'. In other words, they could not reason from a finding that the accused had previously committed an offence, even if it was of the same type as that which they were presently considering, that he or she was therefore the 'kind of person' likely to have committed the offence in question.

63 The President made it clear that the *Boardman*[38] test no longer had any application in this State. A trial judge was not required, in a case involving multiple complainants, to direct a jury that they could only use the evidence of one complainant in support of the evidence of another if satisfied that there was an 'underlying unity', or a 'strong similarity', or a 'common pattern or thread' between their evidence.[39]

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35 [1975] AC 421.

36 (1988) 165 CLR 292.

37 (2004) 7 VR 375.

38 [1975] AC 421.

64 Secondly, and importantly, his Honour articulated very clearly the basis upon which the amendments to s 372 of the *Crimes Act* should be viewed. Despite the 'presumption' that all sexual offences properly joined should be tried together, he said:

> Nevertheless, it seems to me to remain a sound approach in cases such as the present for the trial judge, in exercising the discretion given by s 372(3), to determine whether the evidence of the several complainants is cross-admissible because such a determination will — in most cases — be a powerful factor influencing the discretion. The capacity to ensure a fair trial for the accused must always be the dominant consideration governing the exercise of the discretion; and the more complainants there are whose evidence is not admissible in the trials affecting other complainants, the more difficult it will be for adequate directions to be given by the trial judge to avoid prejudice occurring to the accused. To that extent, the views expressed by the High Court in *De Jesus* and *Sutton* … will remain influential in this State.[40]

The effect of the introduction of ss 97 and 98 of the Evidence Act

65 In the early years, after the enactment of the *Evidence Act 1995* (NSW), the question of how to deal with tendency and coincidence evidence frequently arose.

66 In *R v Ellis,*[41] the New South Wales Court of Criminal Appeal made it clear that the various tests propounded at common law for the admission of similar fact evidence had been entirely abrogated, and replaced by the enactment of ss 97 and 98.

67 That left, for consideration, the meaning to be given to those provisions. In particular, the first question to be addressed concerned the meaning in those sections of the expression 'significant probative value'. Though tendency evidence need not be 'strikingly similar', it has sometimes been said, and frequently implied, that common law concepts such as 'underlying unity', 'pattern of conduct' and 'modus operandi,' which were employed for the purpose of 'similar fact' reasoning, continue to inform the question whether the evidence has a degree of similarity sufficient to support tendency reasoning.[42]

68 One of the earliest attempts at an answer to that question was provided by the Full

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39 *Papamitrou* (2004) 7 VR 375, 394.

40 Ibid 388.

41 (2003) 58 NSWLR 700 ('*Ellis*').

42 *Australian Competition and Consumer Affairs Commission v* CC (NSW) Pty Ltd (No 8) (1999) 92 FCR 375, 401 [101]; *Jacara Pty Ltd v Auto-Bake Pty Ltd* [1999] FCA 417 [10]–[11]; *GBF v The Queen* [2010] VSCA 135, [32] ('*GBF*'). See also the authorities cited below in which those concepts have been used for the purpose of tendency reasoning under the *Evidence Act*.

Federal Court sitting as a court of appeal in the Australian Capital Territory. In *W v The Queen,*[43] (which was, of course, decided before *Ellis*[44]) Madgwick J concluded that the requirements of ss 97 and 98 were best understood as reflecting the views expressed by McHugh J in *Pfennig*,[45] as to the common law. Madgwick J said:

> In *Pfennig* [(1995) 182 CLR 461] at 528–531, McHugh J attempted a re-statement of the common law. His Honour did not carry a majority of the High Court with him. Nevertheless, in my respectful opinion, the experience and rational considerations that underlay the common law, however formulated, were clearly expounded by his Honour. There is a great deal to be said for now using McHugh J's approach as a basis for making the value judgments called for by ss 97(l)(b), 98(l)(b) and 101, and by s 137, in the area of 'similar fact' evidence, whether in its tendency, coincidence or other forms of relevance. Although his Honour's remarks must be taken not to represent the pre-existing common law, that now furnishes no obstacle to resorting to them for guidance. Accordingly, I venture to include the following lengthy quotation from his Honour's judgment:
>
> > ... upon what basis should [tendency] reasoning be admitted? Plainly, it cannot be admitted merely because it has probative or even strong probative value. The risk of an unfair trial through the use of [tendency] reasoning is too great to allow such a low threshold of admissibility. Consequently, this Court has insisted that as a matter of law and not discretion the probative value of the evidence must outweigh or transcend its prejudicial effect ...
> >
> > Nevertheless, the proposition that the probative value of the evidence must outweigh its prejudicial effect is one that can be easily misunderstood. The use of the term 'outweigh' suggests an almost arithmetical computation. But prejudicial effect and probative value are incommensurables. They have no standard of comparison. The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial. In criminal trials, the prejudicial effect of evidence is not concerned with the cogency of its proof but with the risk that the jury will use the evidence or be affected by it in a way that the law does not permit. ... In my view, evidence that discloses the criminal or discreditable [tendency] of the accused is admitted ... because the interests of justice require its admission despite the risk, or in some cases the inevitability, that the fair trial of the charge will be prejudiced.
> >
> > If there is a real risk that the admission of such evidence may prejudice the fair trial of the criminal charge before the court, the interests of justice require the trial judge to make a value judgment, not a mathematical calculation ... Admitting the evidence will serve the interests of justice only if the judge concludes that the probative force of the evidence compared to the degree of risk of an unfair trial is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.
> >
> > If the evidence does no more than prove a mere [tendency] to commit crimes of the kind in question, it will never have sufficient probative force to make it admissible. If it does have the required degree of probative force, it will be

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43 (2001) 115 FCR 41 ('*W*').

44 (2003) 58 NSWLR 700.

45 (1995) 182 CLR 461.

because it is relevant for a reason other than proof of [tendency] or because it colours one's perception of the other evidence to such an extent that it can be confidently inferred that the accused gave effect to the [tendency] on the occasion in question. Evidence of a striking similarity between the commission of the crime and the method used by the accused will frequently be sufficient to prove that inference. But striking similarity is not the exclusive test. The circumstantial force of the other evidence together with the [tendency] evidence may prove the inference ... For [tendency] evidence to be admissible, however, it will need to have 'specific probative value in relation to the crime charged' ... Even then, [tendency] evidence will not be admitted if the prejudicial value of the evidence makes it contrary to the interests of justice to admit it.

If the risk of an unfair trial is very high, the probative value of evidence disclosing criminal [tendency] may need to be so cogent that it makes the guilt of the accused a virtual certainty. In cases where the risk of an unfair trial is very small, however, the evidence may be admitted although it is merely probative of the accused's guilt. Each case turns on its own facts. But the judge must bear in mind that the admission of evidence *revealing* criminal [tendency] is exceptional. …

Thus, where the prosecution case depends entirely on [tendency] reasoning ... the evidence will need to be very cogent to be admitted. When [tendency] reasoning is relied upon, the danger is high that the tribunal will convict simply because of the accused's [tendency] instead of using it as an evidentiary factor. Consequently, in such a case the evidence will need to be so cogent that, when related to the other evidence, there is no rational explanation of the prosecution case that is consistent with the innocence of the accused. However, I do not think that evidence disclosing or tending to prove other criminal or wrongful conduct, and consequently the criminal or discreditable [tendency] of the accused, must always meet this high standard. In the relationship cases, for example, [tendency] reasoning may simply reinforce or explain other evidence that directly implicates the accused. In such cases, it would be contrary to both the practice of the criminal courts and the interests of justice to use the no rational explanation test as the condition of admissibility of such evidence. In other cases, particularly those where the evidence is admissible for a reason other than the accused's [tendency], the risk of prejudice may be so small that justice both to the accused and to the prosecution can be done by admitting evidence that is probative of guilt and warning the jury that they must not use the evidence in the way that is likely to create prejudice.

It follows that in each case where evidence is tendered that discloses, directly or indirectly, the criminal [tendencies] of the accused, it is necessary to identify the nature of the risk, if any, to which the admission of the evidence gives rise. In similar fact cases, for example, evidence is often admitted for the reason that the association of the accused with so many similar deaths, injuries or losses, as the case may be, makes it highly improbable that there is any innocent explanation for the accused's involvement in the matter ... In these cases, the [tendency] of the accused will usually only be established by the verdict ...

Makin [v *Attorney-General* [1894] AC 57] is the classic example. It was a case involving objective improbability reasoning, not [tendency] reasoning ... The [tendency] of the accused to kill the babies was only established by the conclusion that it was probable to the point of certainty that so many babies including the baby the subject of the indictment could not have died by accident. Accordingly, they must have been murdered by the Makins. It was

> the verdict that established the accused's [tendency] .... The risk of prejudice in [such] true similar fact cases is not from [tendency] reasoning but from the fact, as Murphy J pointed out in *Perry* [v *The Queen* (1982) 150 CLR 580 at 594] ... that '(c)ommon assumptions about improbability of sequences are often wrong'. A jury may wrongly give the similar fact evidence far more weight than it deserves.
>
> In other cases involving similar facts, however, the accused may have admitted the facts of a similar incident or the facts of a similar incident may clearly point to wrongdoing on the part of the accused in relation to that incident. In such cases, there is a risk that, instead of relying on probability reasoning, the jury will simply rely on the [tendency] of the accused as revealed by the incident that is admitted or proved. It follows that the nature of the prejudice and the degree of risk of an unfair trial will always depend on the facts of each case.
>
> It also follows that I am unable to agree ... that evidence that discloses the criminal [tendency] of the accused cannot be admitted unless that evidence together with the other evidence denies any rational explanation of the accused's conduct that is consistent with his or her innocence. That rule will be generally applicable when the Crown is relying on the accused's criminal [tendency] because the risk of prejudice from [tendency] reasoning is so high. But in the relationship cases, for example, where evidence of [tendency] is relied on as confirmatory or explanatory of evidence implicating the accused, I do not think that such a high standard is either required or appropriate. Similarly, in cases where the accused's [tendency] is disclosed, but is not the basis of any reasoning process, a standard of proof lower than the no rational explanation standard may suffice for admission.[46]

69 As *Ellis*[47] showed, the approach favoured by Madgwick J did not find favour in New South Wales. Nor has it been adopted in this State.[48]

The early Victorian cases dealing with tendency and coincidence

70 The principles governing tendency and coincidence evidence were first considered by this Court in *CGL*.[49] The case concerned an interlocutory appeal against the refusal to sever certain counts. The appeal succeeded. The Court held that the trial judge had erred in admitting, under the rubric of both tendency and coincidence, the evidence sought to be led.

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46 Ibid 71–3 (emphasis in original).

47 (2003) 58 NSWLR 700.

48 The approach taken by Madgwick J in *W* (2001) 115 FCR 41 was of course followed by Gray J in *R v Gibbs* (2004) 154 ACTR 1. It must be borne in mind, however, that the provisions of the Uniform Evidence Law, at that time, differed from those currently in force, having previously required the related events to be 'substantially and relevantly similar'. That is no longer stipulated. It should be noted that the balancing test, favoured by McHugh J in *Pfennig* (1995) 182 CLR 461, is reflected in part in s 101 of the Act insofar as that section requires, in addition to 'significant probative value' under ss 97 or 98, that the probative value of the evidence 'substantially outweighs any prejudicial effect it may have on the accused'.

49 (2010) 24 VR 486 (Maxwell P, Buchanan and Bongiorno JJA).

It concluded that none of the evidence relating to any of the complainants had the requisite 'significant probative value' to meet the threshold for admissibility under either ss 97 or 98. It was unnecessary, in the circumstances, to consider whether, pursuant to s 101(2), that evidence substantially outweighed 'any prejudicial effect it may have on the accused'.

71 Importantly, the Court observed that the deficiency, so far as the potential admissibility of this evidence as 'coincidence' was concerned, was that the purported similarities upon which the Crown relied fell short of what would be required to satisfy the test for 'significant probative value' under s 98.

72 It should be noted that, in *CGL*,[50] the Crown approached the matter on the basis that the probative significance of the asserted similarities was to be determined in accordance with the principles laid down by Winneke P in *Papamitrou*.[51] It did so notwithstanding the fact that *Papamitrou* itself predated the introduction of the *Evidence Act,* and was decided in accordance with the statutory regime that then stood under s 398A of the *Crimes Act.*

73 In *CGL*,[52] the Court treated the prosecutor's submission, that *Papamitrou*[53] governed the construction of the new provisions, as having substance. The Court quoted Winneke P's statement, in *Papamitrou*, that it was not necessary to show 'striking similarities' in order to satisfy the test then applicable for the admissibility of propensity evidence, but that what was required was 'a sufficient connection in time or circumstance between the acts alleged to have been committed against each complainant to render the evidence' cross-admissible.[54] Their Honours went on to say, in relation to the test to be applied:

> Adopting [Winneke P's] language, we were not persuaded that any of the alleged similarities could be said to illustrate an 'underlying unity' or a common 'modus operandi' or a 'pattern of conduct'. There was no sufficient connection, in either time or circumstance, between the acts alleged to raise any issue of the improbability of coincidence.
>
> For the most part, what were said to be similarities were features which would characterise almost any allegation of sexual offending against a young girl, or were so

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50 Ibid.

51 (2004) 7 VR 375.

52 (2010) 24 VR 486.

53 (2004) 7 VR 375.

54 (2010) 24 VR 486, 494 [29].

> non-specific ('allegations of touching/rubbing of the vaginal area') as to reveal nothing distinctive about any particular alleged act. They were 'in reality, unremarkable circumstances that are common to sexual offences against children'.[55]

74 The last sentence of this passage was drawn from the decision of the New South Wales Court of Appeal in *AE v The Queen*[56] to which we shall later make reference. That phrase has been employed in subsequent decisions.[57] The Court in *CGL* then said:

> Even where some particular feature could be said to be common to two cases — for example, the fact that the offending against complainant B and also against complainant C took place while the accused was living with the complainant's mother — there was otherwise no similarity in the nature of the alleged offending. In the case of complainant B, the prosecution allege a long-term sexual relationship involving sustained sexual abuse and sexual penetration, whereas in the case of complainant C the allegation is that the accused on a single occasion prevailed on the complainant to massage him while he masturbated. Complainant B was aged between 13 and 18. Complainant C was aged between 10 and 12. The cases could hardly be more different.
>
> To take another example, the allegation made by complainant A is that the touching occurred in a private house, with only one other person present. Complainant D, however, alleges that the sexual assault occurred during a public event, attended by many other young people. The indecent assault alleged by complainant A is the rubbing of her vaginal area on the outside of her clothes, whereas complainant D alleges that the applicant rubbed her vaginal area *under* her clothing. The only similarity is that both allegations involve touching in the genital area, which is a commonplace in such cases.[58]

75 In *CGL*, the prosecution relied on the same identified similarities to establish the relevant tendency under s 97 as it had for coincidence evidence under s 98. Their Honours referred, with apparent approval, to the defence submission that 'absent relevant similarities, the evidence would be 'pure propensity evidence'.[59]

76 They added:

> Part of the difficulty lies, once again, with the degree of generality in the notices. When s 97(1) speaks of a tendency 'to act in a particular way', we hardly think that Parliament had in mind a tendency which would be expressed as generally as 'a tendency to act upon sexual attraction to young girls aged between eight and 13 years'.
>
> As a general rule, the greater the degree of specificity with which the similarities can

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55 Ibid 495–6 [30]–[31] (citations omitted)

56 [2008] NSWCCA 52 [42] ('*AE*').

57 *PNJ* (2010) 27 VR 146, 151 [22] ('*PNJ*'); *NAM v The Queen* [2010] VSCA 95, [11] ('*NAM*'); *GBF* [2010] VSCA 135, [36], [42], [45].

58 (2010) 24 VR 486, 495–6 [32]–[34] (citations omitted) (emphasis in original).

59 Ibid 497 [38]. See also *GBF* [2010] VSCA 135 [31].

> be identified, the more likely it is that the evidence will be probative of a tendency to act in a distinctive way or to do acts of a distinctive kind. Conversely, the greater the degree of generality, the more difficult it will be to demonstrate that the evidence in question has 'significant' probative value and — even more so — to demonstrate that its probative value 'substantially outweighs' the very real prejudicial effect of evidence of this kind.[60]

77 A month or so later, a second case concerning coincidence evidence came before this Court. In *PNJ v Director of Public Prosecutions (Vic),*[61] the Court allowed an interlocutory appeal against a ruling by a trial judge that evidence in respect of three teenage boys who resided at a youth training centre (at which the accused worked in a supervisory role) was 'cross-admissible' as coincidence evidence. The Court held that the asserted similarities, namely that the assaults were perpetrated by a person in authority over the victims, all of whom happened to be of a similar age, and were effectively 'captive', were insufficient to meet the threshold requirement of 'significant probative value'.

78 The Court said:

> It is, in our view, a mistake to treat as relevant similarities for this purpose features of the alleged offending which reflect circumstances outside the accused's control. In this case, a number of the asserted similarities simply reflected the setting in which the offending occurred. Each of the complainants was detained in the centre. The limited age range of those eligible for such detention accounts for the similarity in ages, as counsel for the applicant pointed out. Likewise, the location of the alleged offending — either in the bedroom of the complainant or in the applicant's bedroom — reflected the custodial setting.The present case is quite different from that dealt with by Winneke P in *Papamitrou* [(2004) 7 VR 375], where the accused was able to choose the various locations for the individual sexual acts, and used 'pretexts to isolate the girls from the company of others'.
>
> To qualify as a relevant similarity in circumstances such as these, there must be something distinctive about the way in which the accused allegedly took advantage of the setting or context. In the present case, senior counsel for the Crown did not seek to identify any such distinctive behaviour, and we were not persuaded that there was any.[62]

79 It should be noted that, as it had in *CGL*,[63] the Court referred to Winneke P's observation in *Papamitrou*[64] to the effect that it was not necessary, in order to establish cross-admissibility, to demonstrate 'striking similarity.[65] Indeed, the Court approved Winneke P's

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60 *CGL* (2010) 24 VR 486, 497 [39]–[40].

61 (2010) 27 VR 146 (Maxwell P, Buchanan and Bongiorno JJA) ('*PNJ*').

62 Ibid 151 [19]–[20] (citations omitted).

63 (2010) 24 VR 486.

64 (2004) 7 VR 375.

further comment that

> it was 'of little consequence' whether the asserted similarities were said to provide an 'underlying unity' or a common 'modus operandi' or a 'pattern of conduct'.[66]

80 The Court referred to *R v Fletcher,*[67] a decision of the New South Wales Court of Criminal Appeal. In *Fletcher*, the Court recognised that *Boardman*[68] (and for that matter *Hoch*[69] as well) were not entirely apposite when dealing with questions of the admissibility of tendency and coincidence evidence. Simpson J, who delivered the lead judgment, said that *Boardman*[70] could nonetheless play a significant role in determining admissibility under ss 97 and 98. She referred specifically to 'striking similarities, underlying unity, system or pattern' as being relevant to the admissibility of tendency evidence.[71]

81 *CGL*[72] and *PNJ*[73] were followed in *NAM*[74] where it was held that the complainants' accounts were 'strikingly similar' and that it was 'highly improbable, to the point of impossibility, that the similarity in [those] accounts could be explained by coincidence'.[75] It should not be thought, however, that *NAM* stipulated 'striking similarity' as a necessary condition for cross-admissibility, rather that the particular facts of the case managed to achieve that high threshold.

82 These three cases put the law in this State on essentially the same path as had been charted by Winneke P in *Papamitrou*.[76] Subsequently, these decisions have sometimes been incorrectly understood as having reinstated the principle in *Boardman*[77] as the basis for the

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65 *PNJ* (2010) 27 VR 146, 149 [12].

66 Ibid.

67 (2005) 156 A Crim R 308 (Simpson J, McClellan CJ at CL agreeing) ('*Fletcher*').

68 [1975] AC 421.

69 (1988) 165 CLR 292

70 [1975] AC 421.

71 *Fletcher* (2005) 156 A Crim R 308, 322 [60].

72 (2010) 24 VR 486.

73 (2010) 27 VR 146.

74 [2010] VSCA 95.

75 Ibid [12] (Maxwell P, Buchanan and Nettle JJA agreeing).

76 (2004) 7 VR 375.

77 [1975] AC 421.

operation of tendency and coincidence evidence. The requirement of 'underlying unity', 'modus operandi', 'pattern of conduct' or 'commonality of features' applies to similarities that cannot be described as 'striking'. These concepts continue to be regularly used to provide guidance as to the strength of the tendency evidence. They are to be found in the preponderance of authority from this Court and permeate its decisions. They remain, in our view rightly, a primary guide to the resolution of questions of admissibility. Because each of these concepts rests upon the existence of some degree of similarity of features between the previous acts and the offences charged, the law in Victoria now follows a somewhat different path to that currently followed by the New South Wales Court of Criminal Appeal.

83 This early approach to tendency and coincidence was adopted by this Court in *GBF*.[78] There, the Court allowed an interlocutory appeal from a ruling of a trial judge holding that evidence of two complainants, designated C1 and C2, was cross-admissible. Reference was made to *R v Ford,*[79] at that stage a relatively recent decision of the New South Wales Court of Criminal Appeal, where Campbell JA seemed to have departed somewhat from the approach earlier taken by Simpson J in *Fletcher*,[80] and observed that:

> In my view there is no need for there to be a '*striking pattern of similarity between the incidents*'. All that is necessary is that the disputed evidence should make more likely to a significant extent, the facts that make up the elements of the offence charged …[81]

84 The Court in *GBF* said of Campbell JA's statement of principle:

> With great respect, his Honour was surely correct. But in view of some of the observations of the judge in this case, we add that it is important to understand the context in which Campbell JA was speaking. In *Ford* [(2009) 273 ALR 286] the court was concerned with a case in which the tendency sought to be proved was one to act in a particular way, namely, sexually to assault young women who: (1) had stayed over at the accused's house after attending a party there, (2) had consumed a significant amount of alcohol, (3) were asleep, and (4) where there was a risk of the applicant's offending being discovered by others. In effect, it was a case in which the evidence revealed a *modus operandi* that was substantially probative of the offence alleged. One argument put against that conclusion was that the sexual offences alleged were unremarkable, and thus lacking such striking similarity as to make offending on one occasion probative of offending on the other. Campbell JA rightly rejected the argument on the basis that the *modus operandi* was capable in itself of

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78 [2010] VSCA 135 (Nettle and Harper JJA and Hansen AJA) [27], [36], [45].

79 (2009) 273 ALR 286 ('*Ford*').

80 (2005) 156 A Crim R 308.

81 *Ford* (2009) 273 ALR 286, 316 [125] (emphasis added).

> being sufficiently probative of the offending in issue. As his Honour noted, the way in which it was put by one of the two judges who had considered the problem at first instance, and whose treatment of the problem was approved of on appeal, was that the evidence established a tendency on the part of the accused *'to do something unusual, that is to indecently assault women who are asleep at his place after having attended a party there'*. In that context, Campbell JA's statement does not suggest that his Honour had in mind any departure from previous authority. To the contrary, we see his Honour's analysis as an affirmation of established principles as they applied to the facts at hand.[82]

85 It should be noted that in *GBF* the Court accepted that assistance could be gained, in construing s 97, from common law formulations. It said that:

> [O]ne is loath to accept that offending on one occasion is significantly probative of offending on another unless there are significant or remarkable similarities as between previous acts and the act in question, or as between the circumstances in which previous acts were committed and the circumstances in which the act in question was committed or, more compendiously, unless the evidence reveals a pattern of conduct, *modus operandi* or some other underlying unity, which logically implies that, because the accused committed the previous acts or committed them in particular circumstances, he or she is likely to have committed the act in issue.[83]

86 These considerations were referred to by Redlich JA (with whom Hansen JA agreed) in *RR v The Queen*:

> [R]elevant similarities must be present otherwise the evidence would be 'pure propensity evidence' and would not demonstrate 'underlying unity' or a 'common modus operandi' or a 'pattern of conduct' which would justify cross-admissibility.[84]

87 What is of interest in *GBF*[85] is that, although it was accepted that a number of the charges were cross-admissible, so that the evidence of C2 might support the account given by C1, and vice versa, there were other charges where the criteria for cross-admissibility had not been met, and to that extent the trial judge's ruling had been erroneous.

88 The Court concluded that notwithstanding the cross-admissibility of some counts, the trial judge ought, in the circumstances of the case, to have severed the C1 counts from those involving C2. It did so on the basis that any jury, faced with complex directions regarding some counts that were cross-admissible and others that were not, would find it difficult, if not

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82 [2010] VSCA 135 [29] (citations omitted) (emphasis in original).

83 Ibid [27] (citations omitted) (emphasis in original). It should be noted that this passage conforms broadly with the test propounded in *CGL* (2010) 24 VR 486 and *PNJ* (2010) 27 VR 146 insofar as it speaks of a pattern of conduct, modus operandi or some other underlying unity.

84 [2011] VSCA 442, [40] ('*RR*').

85 [2010] VSCA 135.

impossible, to comply with those instructions. The Court came to that conclusion, despite the existence of the presumption, by then contained in s 194(2) of the *Criminal Procedure Act*, that sexual offences should be tried together, irrespective of whether the criteria for cross-admissibility had been met. In essence, the Court applied that particular aspect of *Papamitrou*[86] to the facts in the case.

Later Victorian cases

89 This Court has considered the operation of ss 97 and 98 on more than 50 occasions since the *Evidence Act* came into force.[87] As previously indicated, in a number of these cases, the point was dealt with by way of interlocutory appeal, and without any real discussion of principle.

90 We will focus predominantly, in this summary of the current position in this State, upon only those cases that articulate the test to be applied when considering whether the evidence to be led has 'significant probative value'.

91 In broad terms, the analysis demonstrates that in the early judgments of this Court, it came to be understood that a *Papamitrou*[88]-like approach should be taken to the construction of that term. More recent cases, particularly those decided by New South Wales Court of Criminal Appeal, have given rise to a perception that in the application of principle to the facts, the threshold for admissibility of both tendency and coincidence evidence has been lowered. In Victoria, analysis shows any lowering of the threshold for admissibility may be more apparent than real.

92 In *JLS v The Queen,*[89] the Court dismissed an interlocutory appeal against a ruling that determined, in part, that certain tendency evidence could be led. It is noteworthy that

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86 (2004) 7 VR 375.

87 A computer search indicates that in nearly 20 years of decision making, the New South Wales Court of Criminal Appeal has made reference to the principles governing tendency and coincidence on no fewer than 340 occasions. Similar searches for both Tasmania and the Australian Capital Territory returned only a handful of cases. No comprehensive statement of principle is to be extracted from those decisions.

88 (2004) 7 VR 375.

89 (2010) 28 VR 328 (Redlich, Mandie and Bongiorno JJA) ('*JLS*').

throughout the entire judgment, not a single word was said about any need for 'striking similarity' or 'underlying unity'.

93 *JLS* treated both *CGL*[90] and *PNJ*[91] as distinguishable, on the basis set out below:[92]

> The trial judge was referred to the recent interlocutory appeals of *CGL v Director of Public Prosecutions* [(2010) 24 VR 486] and *PNJ v Director of Public Prosecutions* [(2010) 27 VR 146]. Relying upon those decisions it appears to have been submitted that the evidence of other sexual acts did not have any 'distinctive feature' and could not therefore support tendency reasoning. In ruling the evidence of other sexual misconduct admissible as tendency evidence, the trial judge rightly distinguished those decisions. Both were concerned with a single presentment containing multiple counts which gave rise to the question whether the evidence of a number of complainants was cross-admissible as co-incidence evidence or tendency evidence. In both cases, the court held that the evidence of the complainants did not contain such similarities as would make their evidence cross-admissible. In the present case there was only one complainant and one count. Her Honour held that the evidence of other sexual misconduct was relevant to the fact in issue in that it would:
>
> > … render it more probable that [the applicant] did commit at least three sexual offences relied on as the particulars of maintaining a sexual relationship, and that he had a sexual interest in [the complainant] and on the occasions referred to in the particulars in the charge of maintaining a relationship, was willing to act on this sexual interest.

94 In *Director of Public Prosecutions (Vic) v BCR,*[93] the Director of Public Prosecutions brought an interlocutory appeal against a trial judge's ruling refusing to admit certain tendency and coincidence evidence. The Director argued that the

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90 (2010) 24 VR 486.

91 (2010) 27 VR 146.

92 (2010) 28 VR 328, 332 [13] (citations omitted).

93 [2010] VSCA 229 (Neave and Weinberg JJA and T Forrest AJA) ('*BCR*').

trial judge had incorrectly applied *CGL*,[94] *PNJ*[95] and *NAM*.[96] He submitted, in the alternative, that those cases were all in direct conflict with New South Wales authority, and were wrongly decided.

95 In support of that latter submission, the Director referred first to *R v Lockyer*,[97] a decision by Hunt CJ at CL during the course of a trial. The facts were unusual. This was an application by the accused to admit tendency evidence from which it could be inferred that his de facto partner was responsible for having brought about the death of the child that the accused was charged with having murdered. Not surprisingly, in that regard, a low threshold was set for the admissibility of that evidence.

96 The other New South Wales cases cited were *Fletcher*,[98] *Ford*[99] and *R v Joiner.*[100] We have earlier commented upon the former two cases. In *Joiner,* the accused was charged with the murder of his wife. He admitted having struck her, but claimed that he had not intended to injure her seriously. The Crown sought to lead tendency evidence of his violence towards three other women, during the course of prior relationships, including a tendency to attack the head of each partner at the slightest provocation. It was held on appeal that evidence of his inability to control anger, and a tendency to respond to minor irritations with violence against women satisfied the requirements of both ss 97 and 101. It was said to be at least strongly arguable that a different conclusion would have been reached under the approach taken by this Court in *CGL*[101] and *PNJ*.[102]

97 The Court in *BCR* refused leave to appeal. It noted that the trial judge, in his ruling refusing to admit the evidence as tendency or coincidence, had approached the matter in the

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94 (2010) 24 VR 486.

95 (2010) 27 VR 146.

96 [2010] VSCA 95.

97 (1996) 89 A Crim R 457 ('*Lockyer*').

98 (2005) 156 A Crim R 308.

99 (2009) 273 ALR 286.

100 (2002) 133 A Crim R 90 ('*Joiner*').

101 (2010) 24 VR 486.

102 (2010) 27 VR 146.

following way:[103]

> His Honour said that not all the evidence on which the Crown sought to rely demonstrated this tendency. Although some of the alleged conduct involved indecent touching while comforting students who had been injured playing sport, others involved alleged touching after punishment of students and touching after comforting students who had not been injured, and therefore lacked the distinctive feature of 'comforting after injury'.
>
> After applying a similar analysis to the evidence relied upon in other tendency notices, his Honour concluded that there was an insufficient identifiable pattern of similarities in the circumstances of the offending 'to make out a tendency, which is significantly probative of the relevant fact in issue concerning any count'.

98 The Court noted that the decisions under challenge by the Director, *CGL*,[104] *PNJ*[105] and *NAM*,[106] were all recent. In those circumstances, the Director would have to overcome the considerable hurdle of demonstrating that these cases were not merely 'wrongly decided', but 'plainly wrong'. In rejecting the Director's application the Court observed that it was not persuaded that the decisions of this Court were obviously wrong.[107]

99 The Court also stated that the Director's application for leave to appeal was in one sense premature, given that the question of severance had not yet been determined and added, for good measure, that 'an appeal against an interlocutory decision would only be an appropriate vehicle for challenging an existing line of authority in exceptional circumstances'.[108]

100 In *PG v The Queen,*[109] the Court allowed, in part, an interlocutory appeal against certain rulings of a trial judge allowing tendency and coincidence evidence to be led. In dealing with the specificity, or distinctiveness, of the conduct required to be admissible, Nettle JA said:

> Sometimes, it will be a matter of striking similarity as between one act and another which bespeaks the underlying unity that makes evidence of the former admissible in proof of the latter. Sometimes, there will be something peculiar about the acts which

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103 *BCR* [2010] VSCA 229 [21]–[22] (citations omitted).

104 (2010) 24 VR 486.

105 (2010) 27 VR 146.

106 [2010] VSCA 95.

107 *BCR* [2010] VSCA 229, [46].

108 Ibid [44].

109 [2010] VSCA 289 (Nettle, Neave and Harper JJA) ('*PG*').

> makes evidence of one admissible in proof of the commission of the other. Sometimes, it will be the circumstances of the offending which makes evidence of one act admissible in proof of the other, and examples can be multiplied. In short, it is a question to be assessed in all the circumstances of the case, bearing in mind what has been said in previously decided cases as to what is sufficient in kindred circumstances.[110]

101 *CW v The Queen*[111] was a case that involved arson rather than sexual offending. It concerned the existence of relationships which uniquely linked the accused with two or more victims of similar crimes. The Court endorsed the approach taken in *PG*,[112] and once again eschewed any requirement that there be 'striking similarity' as a condition for admissibility. The Court said (as it had done earlier):

> Counsel for the applicant contended, further, that it was necessary for the prosecution to show some 'striking similarity' in the circumstances, before it could be concluded that the evidence had significant probative value. He relied for this purpose on statements in the authorities that, where what was in issue was not whether a crime had been committed but the identity of the perpetrator, a stringent requirement of similarity should be applied. With respect, this submission is misconceived. As we have already explained, the basis of the coincidence reasoning in a case such as the present is quite different. It relies on the existence of a relationship which uniquely links the accused person with two or more victims of similar crimes. There is no separate requirement of 'striking similarity'.
>
> As mentioned earlier, the prosecution did rely on certain similarities in the fire events, as follows:
>
> - each fire was deliberately lit by spreading an accelerant;
> - each fire was lit in commercial premises;
> - each fire was started at or near the entrance door to the premises;
> - all of the fires occurred on the same evening, within a four hour period; and
> - all of the fires were in the same suburb.
>
> The argument for the applicant was that the use of an accelerant was 'the stock-in-trade of the arsonist' and that, likewise, there was nothing distinctive about fires being lit at the front door of commercial premises. We accept that, by themselves, these features might be insufficient to give the evidence significant probative value. The close proximity in time is of more significance, at least in pointing to the improbability of there having been more than one arsonist active on this particular night. But nothing further need be said on this aspect since, as we have said, what gave the evidence its significant probative value was the link between the accused and each intended victim.[113]

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110 Ibid [71].

111 [2010] VSCA 288 (Maxwell P, Buchanan and Neave JJA).

112 [2010] VSCA 289.

113 *CW v The Queen* [2010] VSCA 288, [22]–[24] (citations omitted).

102 As has been seen, by the end of 2010, ss 97 and 98 had been considered by this Court on a significant number of occasions. The emphasis upon *Papamitrou*[114] reasoning was no longer so apparent. 'Striking similarity' continued to be eschewed as a precondition to admissibility, or cross-admissibility, formulations. Concepts such as 'underlying unity' or 'pattern of conduct' continued to be employed to emphasise the need for sufficient similarity or distinctiveness in the features of the proposed tendency evidence.

103 Throughout the following years, up to the present, the Court has been confronted with a vast array of challenges to rulings on the admissibility of tendency and coincidence evidence. Some cases stand out.

104 In *KRI v The Queen,*[115] the Court dismissed an application for leave to appeal against an interlocutory decision in which the trial judge had admitted certain evidence as both tendency and coincidence.

105 Hansen JA, who delivered the leading judgment, noted that the applicant relied heavily upon *PNJ*[116] in relation to both tendency and coincidence, arguing that the allegations made by the complainants were not sufficiently similar to warrant cross-admissibility. His Honour rejected that submission and in the course of doing so, distinguished *PNJ*. He said:

> I do not consider that the case of *PNJ v Director of Public Prosecutions (Vic)* [(2010) 27 VR 146] compels a contrary conclusion. It is important to bear in mind that each case is a decision on its own facts. In *PNJ* the Court considered as critical the fact that the complainants came to the Youth Training Centre as inmates where the accused worked in a supervisory role as a youth officer, and that the boys' presence at that place and in those circumstances was something outside the accused's control. In short the Court considered that there was a lack of distinctiveness about the way in which the accused took advantage of the setting or context to engage in the alleged sexual activity with the complainants, the location merely reflecting the custodial setting, and the acts being otherwise unremarkable. There being no distinctive feature, or pattern, the evidence was considered not to constitute tendency or coincidence evidence. It was in reliance on this decision that the applicant submitted that a critical feature in the present case was the lack of 'control' of the applicant in relation to the presence of the complainants at his house. That is, they came voluntarily to see his son, X, and not in any way under or in virtue of any control, direction or plan of his. Accordingly, the alleged offences were to be seen, as in *PNJ*, as lacking any distinctiveness or pattern. As I have said, each case is to be decided on its own facts, the question being whether the evidence proposed to be adduced is

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114 (2004) 7 VR 375.

115 (2011) 207 A Crim R 552 (Buchanan, Hansen and Tate JJA) ('*KRI*').

116 (2010) 27 VR 146.

> tendency or coincidence evidence as stated in s 97(1) and s 98(1). In my opinion the evidence proposed to be adduced in the present case does establish a modus operandi or pattern of conduct and a state of mind sufficient to bring it within the terms of s 97(1).[117]

106 His Honour formulated the test for admissibility, in relation to tendency evidence, in the following terms:

> The question is whether the evidence shows such a sufficiency of commonality in acting in relation to young boys staying over in his home as to be able to establish a tendency in the applicant to act in a particular way or to have a particular state of mind.[118]

107 Hansen JA said, in relation to coincidence, there was a sufficient degree

> of similarity in the complainant's evidence as to the alleged offending and the circumstances in which it occurred to conclude that it was improbable that the events occurred coincidentally.[119]

108 In *RHB v The Queen,*[120] another interlocutory appeal involving tendency and coincidence evidence, the applicant yet again relied upon *PNJ*.[121] In rejecting the applicant's submission, Nettle JA, openly expressed doubts as to the correctness of that decision. His Honour said:

> With great respect, I am not sure that *PNJ* [(2010) 27 VR 146] was correctly decided. But, accepting for present purposes that it should be followed, it was concerned with a question of coincidence evidence and thus, as it was held, whether there was sufficient similarities between the several incidents of offending as to make proof of one significantly probative of the proof of another. In this case we are concerned with tendency evidence, which is to say evidence which establishes that the appellant had a tendency to commit a particular kind of act or to commit an act in a particular way, and the question is whether the degree of peculiarity (for want of a better term), either in the acts themselves, or in the circumstances in which they were committed or in nature or identity of the persons against whom they were committed or by reason of a combination of those and possibly other considerations, are such that the [evidence] has significant probative value. The two are not the same, albeit that in some cases there may be a large degree of overlap.[122]

109 Nettle JA added:

> As Hansen JA observed in *KRI v R* [(2011) 207 A Crim R 552], the test for the

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117 *KRI* (2011) 207 A Crim R 552, 564 [58] (citations omitted).

118 Ibid 563 [57].

119 Ibid 564 [61].

120 [2011] VSCA 295 ('*RHB*').

121 (2010) 27 VR 146.

122 *RHB* [2011] VSCA 295, [17] (citations omitted).

> admissibility of tendency evidence is one of fact and degree to be assessed in light of the facts and circumstances of the particular case. And in the facts and circumstances of this case, I am not persuaded there is room for doubt about it. As the judge held, it is a remarkable thing for a man to commit sexual acts against his female lineal descendants. It is still more remarkable when, in each case, the nature of the acts is similar if not identical, even if they are commonplace sexual acts. It is even more remarkable that in each case the acts were committed in the home while the victim was in the applicant's care, while other adults were close by and the risk of detection was significant. It follows that, if accepted, the evidence of the applicant's prior offending against his daughters would demonstrate that he had a tendency to be sexually attracted to his young female descendants and to act upon that attraction in similar ways at different times, when the victims were in his home under his care and thus vulnerable to his advances. As such, as the judge held, it would be capable of rationally affecting the assessment of the probability of the applicant having had a sexual interest in his granddaughter and giving effect to it by committing the offence alleged.[123]

110 It is clear enough from the reasoning of Nettle JA in *RHB*,[124] and other decisions, that it was not so much the principle applied in *PNJ*[125] that was in doubt but rather the manner of its application to the particular facts of the case. The significance of *RHB* lies in Nettle JA's analysis of the combination of the unusual and distinctive features associated with a tendency to be attracted to the applicant's young female descendants, and his having acted upon that attraction in similar ways, and in similar circumstances. The language and approach in *RHB* reflects that in *PNJ*,[126] *NAM*[127] and *GBF*.[128] As will be seen, these cases are not easily reconciled with the reasoning that appears to have actuated the New South Wales Court of Criminal Appeal in its treatment of tendency and coincidence.

111 In *RJP v The Queen,*[129] an appeal against conviction for sexual offences, the test of cross-admissibility was approached in a somewhat different manner. Coghlan JA, who delivered the lead judgment,[130] was prepared to treat 'underlying unity' as an indispensible condition of admissibility in a coincidence case. However, as the Court had previously done, he distinguished that notion from any requirement that there be 'striking similarity'. His

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123 Ibid [18] (citations omitted).

124 [2011] VSCA 295.

125 (2010) 27 VR 146.

126 (2010) 27 VR 146.

127 [2010] VSCA 95.

128 [2010] VSCA 135.

129 (2011) 215 A Crim R 315 ('*RJP*').

130 Redlich JA and Macaulay AJA agreeing.

Honour said:

> The difference between coincidence evidence at common law and similar fact evidence is that coincidence evidence at common law depended upon underlying unity or modus operandi, not upon striking similarity. Under the *Evidence Act 2008* (Vic) coincidence evidence pursuant to s 98 of that Act does, in terms, depend upon similarity. Tendency evidence does not, although the view has been taken that tendency evidence in most cases will only be significantly probative if the evidence between various complainants shows underlying unity.[131]

112 In *RR*,[132] Redlich JA (with whom Hansen JA agreed) affirmed the approach in *GBF*[133] that for tendency evidence to have the necessary probative value the offending on a previous occasion must possess such similarities common to the acts charged or the circumstances in which they were committed as to demonstrate 'underlying unity' or a 'common modus operandi' or a 'pattern of conduct' which would justify cross-admissibility.

113 In *DR v The Queen,*[134] the Court considered the correctness of a trial judge's ruling as to the admissibility of tendency and coincidence evidence in a case involving alleged incest against two step-daughters. The Court said, in relation to s 98:

> The criterion for determining whether the evidence is admissible is the similarity of the circumstances in which the offending occurred or of the offences themselves. Whether the evidence had significant probative value as coincidence evidence is a question of fact, which can only be determined by reference to the facts and circumstances of the particular case. It follows that reference to other decisions on this issue is of limited assistance.[135]

114 The Court went on to say:

> It does not seem to us that the sexual abuse of a child, step child or grand child by their parent, step parent or grandparent is such a common occurrence that it should be regarded as having limited probative value in relation to an allegation that the applicant has abused another child, step child or grandchild. As Hodgson JA said in *BP v R* [[2010] NSWCCA 303], 'it is unusual for a parent or grandparent to do acts of the kind described by each witness'. We would therefore be inclined to hold that evidence that a person had committed sexual offences against a child, stepchild or grandchild has significant probative value as evidence of a tendency to offend against other children in the family. But in the circumstances of this case, it is not necessary to go so far.[136]

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131 *RJP* (2011) 215 A Crim R 315, 335 [113].

132 [2011] VSCA 442, [40].

133 [2010] VSCA 135.

134 [2011] VSCA 440 (Neave and Hansen JJA and Beach AJA).

135 Ibid [58] (citations omitted).

136 Ibid [88] (citations omitted).

115 The dicta in this passage is that incestuous behaviour is itself such an uncommon occurrence as to render evidence by more than one complainant admissible without any need for a distinctive pattern of offending to be shown, or any similarity in the background circumstances surrounding the offending. It might be thought, with respect, that this case comes close to adopting the approach which seems to have recently commended itself to the New South Wales Court of Criminal Appeal, and would lower the threshold of admissibility in a way inconsistent with the weight of authority in this Court.

116 In *CEG v The Queen*,[137] the Court was concerned with tendency evidence only. In dealing with *RHB*,[138] the Court noted that there were differences between the two cases. It said:

> To start with, in *RHB* [2011] VSCA 295], there was not just one previous occasion on which the perpetrator was alleged to have offended against another complainant, but three. And as was said then:
>
> > … It does not follow from the fact that, because in this case there are three occasions of prior offending which are regarded as relevant to and probative of the charged act, in another case one previous act of offending would be regarded as relevant and probative of the act which is charged in that case.
>
> Secondly, in *RHB* the relevance of the prior offending was not just that the perpetrator had in the past offended against his female lineal descendants but that he had done so in a particular way, albeit perhaps that it was not particularly striking. Here, there is not the same degree of particularity as there was [in] *RHB*, if only because in this case there was penetration of one complainant but not of the other.
>
> Thirdly, in *RHB* the perpetrator's modus operandi of approach to each complainant was virtually identical, whereas in this case one incident of the alleged offending arose out of what might otherwise have been seen as an innocent act of parental care and the other incident occurred in a different and more inexplicable context.
>
> As Redlich JA warned in *RR v R*, when it comes to the admissibility of propensity evidence, one must be careful to ensure that the features of commonality or peculiarity which are relied upon are significant enough logically to imply that because the offender committed previous acts or committed them in particular circumstances, he or she is likely to have committed the act or acts in issue. Otherwise, there is the danger of admitting evidence as tendency evidence simply because that evidence suggests that the accused is or was the sort of person who is more likely to commit the kind of offence with which he is charged.
>
> On the other hand, as it emerged in the course of oral argument this morning, there are two, perhaps three, further aspects of the evidence which also bear on the question of cross-admissibility and which tend to add some weight to the judge's decision. The first is that the Crown intends to call evidence from the complainants' mother

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137 [2012] VSCA 55 (Nettle and Harper JJA and Hollingworth AJA) ('*CEG*').

138 [2011] VSCA 295.

> that, when the applicant returned 'K' to her custody the day after the alleged offending against 'K', the applicant volunteered that there had been some sort of incident between him and 'K', which 'K' would likely speak to her about, during which he had removed 'K's' pants, rubbed her back and possibly also her buttocks. Secondly, according to the complainant's mother, the applicant said that he had been drinking at the time of the incident with 'K', and did not remember much about the episode, other than that he was seeking to alleviate 'K's' suffering from a skin disorder to which it was known that she was subject. Thirdly, there is some evidence that the applicant was affected by alcohol at the time of the alleged offending against 'I'.
>
> If all that evidence is accepted, and for present purposes its reliability may perhaps be assumed, it could be thought to amount to a partial admission of what is alleged against the applicant in relation to 'K' and also to demonstrate an additional degree of commonality as between the circumstances of offending in each instance: inasmuch as it shows that the applicant, while affected by alcohol, took improper, opportunistic advantage of the need to treat one of his children for a skin disorder.[139]

117 *Reeves v The Queen,*[140] to which we shall shortly refer, was the appeal against conviction following the interlocutory appeal of *CEG*.[141] The majority in *Reeves* concluded, consistently with the view expressed on the interlocutory appeal, that the tendency evidence had been properly admitted.

118 The Court in *CEG*[142] referred to *R v PWD,*[143] a decision of the New South Wales Court of Criminal Appeal, for the purpose of emphasising the difference in the character of the evidence required for tendency and coincidence reasoning. In that case, Beazley JA said, in relation to both tendency and coincidence evidence:

> The authorities are clear that for evidence to be admissible under s 97 there does not have to be striking similarities, *or even closely similar behaviour*. By contrast, coincidence evidence is based upon similarities. Section 98 provides in terms that two or more events occurring is not admissible to prove that a person did a particular act, on the basis that, *having regard to any similarities* in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless, the evidence has significant probative value.[144]

119 The Court in *CEG*, while not persuaded that the judge was wrong, was concerned that the judge had pressed the analogy with *RHB*[145] too far.[146]

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139 Ibid [11]–[16] (citations omitted).

140 [2013] VSCA 311 ('*Reeves*').

141 [2012] VSCA 55.

142 Ibid.

143 (2010) 205 A Crim R 75 ('*PWD*').

144 Ibid 91 [79] (emphasis altered).

120 The words highlighted in the passage set out above from *PWD*[147] are difficult to reconcile with both the early decisions of this Court dealing with tendency and coincidence evidence and later cases such as *GBF*.[148] It reduces the threshold for admissibility, in relation to tendency evidence, to behaviour that need not even be 'closely similar'. Distinctiveness, underlying unity, and the need for a pattern of behaviour would, it appears, be put to one side.

121 In *BSJ v The Queen*[149] the Court, in dismissing an application for leave to appeal against conviction for multiple acts of incest against a number of complainants, considered whether the trial judge had erred in concluding that there were sufficient similarities in the allegations made to render the complainants' evidence cross-admissible. The Court endorsed the directions given by the trial judge to the effect that if the jury found 'similarities in the evidence, such that accounts of the complainants [were] so similar that they [could not] be explained by coincidence',[150] they could rely on that evidence in their decision-making in relation to another complainant. The Court was of the view that 'those directions were apt to ensure that the jury only considered *sufficiently similar* evidence in relation to particular counts'.[151]

122 In *Semaan v The Queen*,[152] an appeal against conviction for dangerous driving causing death, as well as dangerous driving causing serious injury, the Court considered what Priest JA described as 'the high threshold of admissibility' demanded by s 97. In holding that the incidents of earlier driving sought to be relied upon as tendency evidence were so separated in time and circumstance as to be lacking the necessary degree of probative value to be admissible, his Honour outlined a number of non-exhaustive factors which bore upon whether evidence had 'significant probative value' in proof of an alleged tendency. These included:

> the number of occasions that the conduct displaying the alleged tendency have

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145 [2011] VSCA 295.

146 *CEG* [2012] VSCA 55, [23].

147 (2010) 205 A Crim R 75.

148 [2010] VSCA 135.

149 (2012) 35 VR 475 (Maxwell P, Buchanan and Hansen JJA).

150 Ibid 481 [32].

151 Ibid 481 [33] (emphasis added).

152 [2013] VSCA 134 (Priest JA, Buchanan and Ashley JJA agreeing) ('*Semaan*').

> occurred; the temporal (and, perhaps, geographical) connection of such conduct with the charged conduct; the degree of similarity between the evidence of tendency and the charged conduct on the various occasions alleged (for example, its distinctiveness, such as showing a particular pattern or modus operandi); and whether the circumstances of occurrence of the conduct and charged conduct are similar.[153]

123 The issue of 'significant probative value' arose again in *Murdoch v The Queen*.[154] The case involved an appeal against conviction on a re-trial for multiple counts of incest. In considering whether the trial judge had erred in admitting tendency and coincidence evidence (where there was evidence to suggest that there had been concoction, collusion and contamination on the part of the various complainants), Priest JA noted that:

> the common law in Australia following *Hoch* [(1988) 165 CLR 292] and *Pfennig* [(1995) 182 CLR 461] was that the possibility of collusion was sufficient to render similar fact evidence — a species of propensity evidence — inadmissible.[155]

124 His Honour observed that s 398A of the *Crimes Act* had expressly stipulated that the possibility of collusion, unconscious inference or the like was not to bear on admissibility. However, in his Honour's view, the introduction of ss 97 and 98 had restored the position, as regards collusion and contamination, to the common law as it had stood in *Hoch*.[156]

125 Priest JA then continued:

> There is a considerable and ongoing controversy as to the precise reach of both s 97 and s 98. It seems plain enough that they cover the field to the exclusion of the common law. Whether they in all cases cover the same territory as was embraced by the common law similar fact rule, or that of the former s 398A of the *Crimes Act 1958*, remains unclear. What can be said with certainty is that s 101(2) departs from the common law requirement that there be no reasonable view of the evidence available which is consistent with the innocence of the accused. And it should also be noted that in *CGL* [(2010) 24 VR 486] it was held that the same approach to assuming probative value should be adopted as was adopted by this Court in *Papamitrou* [(2004) 7 VR 375] under the since repealed s 398A of the *Crimes Act 1958*.[157]

126 His Honour went on to say:

> In my opinion, relationship evidence — including context evidence — should be seen for what it is. It is tendency evidence. As such it owes its admissibility to ss 97 and

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153 Ibid [40] (citations omitted). This passage correlates closely with the analysis of the factors relevant to whether the inference of tendency is of sufficient strength to warrant admissibility as set out in Odgers, above n 3, 466–7.

154 [2013] VSCA 272 ('*Murdoch*').

155 Ibid [71].

156 (1988) 165 CLR 292.

157 *Murdoch* [2013] VSCA 272, [82] (citations omitted).

> 101 of the Act. Thus, notwithstanding the manner in which distinctions with respect to relationship evidence have been recognised and maintained by courts interstate, a more satisfactory approach would be to treat the admissibility of relationship evidence in the same manner as other tendency evidence. Were such an approach adopted, it might bring some coherence to an otherwise somewhat confused landscape.[158]

127 One problem with this aspiration is that it would be difficult to reconcile with a number of this Court's own pronouncements to the effect that a distinction should be drawn between, on the one hand, tendency and coincidence, and on the other, relationship and context. Indeed, that distinction lies at the heart of s 95, which provides that evidence that would otherwise be proscribed may be admissible if not tendered for a tendency or coincidence purpose.[159]

128 Redlich and Coghlan JJA declined to address the views expressed by Priest JA concerning 'context' and 'relationship' evidence as the issues had not been raised by the grounds of appeal or explored by the parties. They considered that to depart from previous decisions of this Court or from the line of authority of the New South Wales Court of Criminal Appeal to which his Honour referred on matters concerning the *Evidence Act*, or its application to those particular types of evidence, would require a Court constituted by five judges to be satisfied that such previous authority was plainly wrong, and ought not to be followed.[160]

129 Finally, Priest JA observed:

> There can be no doubt that in determining whether evidence of tendency or coincidence has significant probative value — which is the key to admissibility — a trial judge is required to take into account the possibility of concoction, collaboration or contamination. …
>
> In my opinion, where there is a real possibility of contamination — concoction, collusion, unconscious influence and the like — evidence of tendency and coincidence will fall at the threshold, since it will not possess the significant probative value which is necessary to its reception. It will be inadmissible.[161]

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158 Ibid [93].

159 See generally Odgers, above n 3, 473, where the learned author distinguishes between tendency evidence and evidence of 'relationship' (where the evidence is not relied on for a tendency inference). Note also *R v Cakovski* (2004) 149 A Crim R 21, where the New South Wales Court of Criminal Appeal was divided on the question whether the evidence led should be treated as tendency evidence or as relevant by way of context.

160 *Murdoch* [2013] VSCA 272, [12].

161 Ibid [95], [99].

130 His Honour went on to say that, even without the 'real possibility of contamination' which existed, the evidence relied upon in *Murdoch*[162] could not be regarded as possessing significant probative value. Factors such as similarity in age of the complainants, the fact that they were the appellant's daughters, the conduct complained of, the fact that the offending occurred in the bedroom, and that it took place when the mother was away, all fell short of demonstrating the kind of 'distinctive or unusual' features which would have justified admissibility as tendency evidence. They would also, for the same reason, have fallen short of demonstrating the similarities necessary for admission as coincidence evidence. He cited *CGL*[163] which in turn had cited *AE*[164] as authority for the conclusion that:

> For the most part, what were said to be similarities were features which would characterise almost any allegation of sexual offending against a young girl, or were so non-specific ... as to reveal nothing distinctive about any particular alleged act. They were 'in reality, unremarkable circumstances that are common to sexual offences against children'.[165]

131 Priest JA also doubted that the jury were directed sufficiently to scrutinise the evidence relied upon as tendency to determine whether it demonstrated a pattern of conduct, or possessed an underlying unity, for the appellant to act in a particular way or have a particular state of mind.[166]

132 Redlich and Coghlan JJA agreed with the conclusion of Priest JA that the complainants' accounts lacked the requisite degree of similarity to satisfy either coincidence or tendency reasoning and that the direction to the jury as to tendency reasoning was insufficient.[167]

133 In *Reeves*,[168] the Court, by majority, treated *GBF*[169] as having correctly propounded the law regarding tendency evidence under s 97. Maxwell ACJ with whom Coghlan JA

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162 [2013] VSCA 272.

163 (2010) 24 VR 486.

164 [2008] NSWCCA 52.

165 *Murdoch* [2013] VSCA 272, [102] (citations omitted).

166 Ibid [136].

167 Ibid [8]–[9].

168 [2013] VSCA 311 (Maxwell ACJ and Coghlan JA).

169 [2010] VSCA 135.

agreed referred to frequently used terms such as 'remarkable', 'unusual', 'improbable' and 'peculiar' that characterise the subject of tendency evidence. His Honour reaffirmed that it is the 'degree of peculiarity', or 'features of commonality' or the extent to which the conduct can be said to be 'remarkable', which will guide the assessment of probative value.[170] Priest JA dissented, though not as to principle but with regard to its application to the facts. He did not consider the evidence as having a high degree of cogency as it was 'unremarkable', and 'is a commonplace in sexual offending of this kind, and cannot be said to distinguish the applicant's offending from that of any other such offender'.[171]

134 The most recent consideration, in any depth, by this Court of tendency and coincidence evidence is to be found in the presently restricted judgment, concerning the interlocutory appeal that succeeded in *SLS v The Queen.*[172]

135 The Court dealt, inter alia, with a challenge to a ruling by a trial judge that evidence of three complainants, in a case involving multiple sexual offending, was cross-admissible. The main point of that challenge concerned the possibility of collusion or contamination. The judgment allowing the appeal in relation to the tendency and coincidence ruling turned primarily upon that issue. There was little, said about the broader question of the threshold of admissibility, separate from the collusion or contamination question.

136 Shortly after *SLS*[173] was decided, in *CV v Director of Public Prosecutions (Vic)*,[174] an interlocutory appeal concerning cross-admissibility and coincidence evidence, the Court said:

> Although coincidence reasoning — the improbability that different events occurred coincidentally having regard to the similarities in the events or in the circumstances in which they occurred — owes its origins to similar fact reasoning at common law, which required the evidence to possess 'striking similarity', it is not necessary that the evidence possess that specific characteristic. The probative value of evidence may not lie in it displaying a 'striking similarity', 'system' or 'pattern', all of which might require the identification of points of similarity or in there being an 'underlying unity' in the events relied upon. …
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> There may be such a relationship between the events in purpose, circumstances and

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170 *Reeves* [2013] VSCA 311 [53], [56].

171 Ibid [94].

172 [2014] VSCA 31 (Ashley, Redlich and Priest JJA) ('*SLS*').

173 Ibid.

174 [2014] VSCA 58 ('*CV*').

> mode of conduct that coincidence reasoning will be open. The necessary relationship is not confined to events, each of which possesses unusual characteristics in its execution. The evidence of each may provide strong support for the others, making it just to admit them all notwithstanding the prejudicial effect of admitting the evidence.[175]

137 Finally, on 29 April 2014, in *R v Rapson,*[176] Nettle JA determined an application for leave to appeal against conviction. The applicant, a priest who served as a teacher and deputy headmaster at a secondary school, was convicted of a number of charges of rape and indecent assault, against nine boys under his care, relating to two periods, the first in the mid-1970s and the second in the late 1980s. The sole proposed ground of appeal was that the judge erred in treating the evidence of each complainant as cross-admissible, pursuant to s 97 of the *Evidence Act*.

138 The applicant had submitted that, in accordance with Priest JA's observations in *Murdoch*,[177] the alleged sexual offences in this case were not remarkable, distinctive or unusual but rather of kinds which are common among sexual offending against children. He further contended that the trial judge had erred in treating the possibility of a priest committing sexual offences against young men in his charge as being as extraordinary and remarkable as a man engaging in sexual activity with his pre-pubescent daughters and granddaughters (as discussed by Nettle JA in *RHB*[178]).

139 In granting the applicant leave to appeal, Nettle JA observed that '[o]ver the last few years, a great deal has been written about ss 97 and 98 of the … Act and, regrettably, much of it is not very helpful to the trial judges whose task is to apply the legislation'.[179] His Honour went on to say:

> The problem lies with the legislation. When similar fact and propensity evidence were governed by common law principles, the rules were determined by a few decisions of the highest authority and they were tolerably clear. Since the passage of the legislation, we have had myriad decisions of intermediate courts of appeal going in different directions, and many of them are not clear. This case is an example of the problem.[180]

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175 Ibid [9]–[10] (citations omitted).

176 (Unreported, Victorian Court of Appeal, Nettle JA, 29 April 2014) ('*Rapson*'). Judgment appealed from *DPP v Rapson* (Unreported, County Court of Victoria, Judge Gaynor, 17 October 2013).

177 [2013] VSCA 272.

178 [2011] VSCA 295.

179 *Rapson* (Unreported, Victorian Court of Appeal, Nettle JA, 29 April 2014) [8].

140 Nettle JA then said that, for present purposes, he would take the law on tendency evidence in this State to be as had been stated in *GBF*.[181] As we have indicated, the test as reflected in *GBF* and other cases we have referred to, fixes a much higher threshold than that fixed by the New South Wales Court of Criminal Appeal in cases such as *PWD*[182] and more recent decisions which have followed it.

141 On that basis, Nettle JA granted leave to appeal, concluding that it was reasonably arguable that some, but not all, of the evidence relating to a number of the charges was cross-admissible. The evidence that failed to meet the threshold test lacked 'sufficient similarity or other underlying unity'.[183]

The New South Wales position

142 As has been indicated, the position in New South Wales regarding that threshold issue has also fluctuated over the years. The New South Wales Court of Criminal Appeal has, on occasion, taken a narrow, almost *Boardman*[184]-like approach to tendency evidence.[185] That Court has, at other times, and particularly more recently, approached this issue in a far less restrictive manner.[186]

143 The view expressed in *CGL*,[187] *PNJ*[188] and *NAM*[189] was substantially the same as the approach earlier taken by the New South Wales Court of Criminal Appeal as to tendency reasoning and the possibility of joint concoction. In *AE* the Court (Bell JA, Hulme and Latham JJ) said:

> The assault on CNE occurred when she was 11 years old. The allegation was of

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180 Ibid.

181 [2010] VSCA 135, [25]–[30].

182 (2010) 205 A Crim R 75.

183 *Rapson* (Unreported, Victorian Court of Appeal, Nettle JA, 29 April 2014) [12].

184 [1975] AC 421.

185 *Fletcher* (2005) 156 A Crim R 308 (Simpson J, McClellan CJ at CL agreeing).

186 *PWD* (2010) 205 A Crim R 75 (Beazley JA).

187 (2010) 24 VR 486.

188 (2010) 27 VR 146.

189 [2010] VSCA 95.

indecent touching in the area of the breasts and digital penetration of the vagina on an occasion when the appellant was lying on his bed and CNE was the only other person at home. PNE described a history of sexual molestation commencing when she was aged nine years. The first assault occurred when the appellant came into her bedroom at night when the other members of the household were asleep and touched her on the outside of her underwear in the area of her vagina. The second count involving PNE was of a similar incident. The remaining counts arising out of her complaint involved acts of penile/vaginal intercourse, which largely occurred at locations away from the family home. The similarities that the Judge identified were, in reality, unremarkable circumstances that are common to sexual offences against children.

The Crown Prosecutor on the appeal did not maintain that PNE's evidence was admissible under s 98 to prove the appellant's guilt on the counts relating to CNE on the basis of the improbability of the events occurring coincidentally. This was a realistic concession that the allegations made by PNE were not of events that were substantially and relevantly similar to the allegations made by CNE nor were the circumstances in which they occurred substantially similar. It was an error to admit the evidence of PNE at the trial of the counts involving CNE under the coincidence rule. …

If the possibility of joint concoction cannot be excluded the evidence does not possess the same probative value since there exists another explanation for the circumstance that each complainant has made like allegations. *Hoch* [(1988) 165 CLR 292] was concerned with the admission of similar fact evidence under the common law and propounded the 'no other rational view' test that was adopted in *Pfennig v The Queen* (1995) 182 CLR 461 at 482–483 per Mason CJ, Deane J and Dawson J. This is not the test for the admission of tendency or coincidence evidence under the Act; *R v Ellis* [2003] NSWCCA 319. However, it was not an error to consider the possibility of joint concoction in assessing the probative value of the evidence. To the extent that his Honour did so, it was an error to find that there was no possibility of joint concoction: The complainants were sisters and were in contact with one another at the time each made her complaint. Insofar as the Judge assessed the probative value of PNE's allegations as being substantial in proof of the allegation that the appellant assaulted CNE his Honour erred.

The evidence of the assaults on PNE was not admissible on the trial of the counts involving CNE unless its probative value substantially outweighed any prejudicial effect that it may have had on the appellant. The prejudicial effect is likely to have been great. This is so notwithstanding that the jury acquitted the appellant on 12 of the counts which depended on PNE's evidence. The jury may have accepted PNE as truthful but considered that her recall of the offences was not sufficiently reliable to establish beyond reasonable doubt the happening of the events as they were particularised in the indictment. The risk that the jury would be overwhelmed by the evidence of the long course of sexual misconduct against PNE in considering whether the Crown had proved the counts charging offences against CNE was real. *We consider that the Judge erred in concluding that the probative value of PNE's allegations as evidencing a tendency to sexually molest young female members of the appellant's household substantially outweighed any prejudicial effect the evidence might have on the appellant's case.*

It was an error to admit the whole of PNE's evidence as tendency or coincidence evidence on the trial of the counts relating to CNE.[190]

144 While the approach in *AE*,[191] and that endorsed by Simpson J in *Fletcher*,[192] continues

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190 [2008] NSWCCA 52, [42]–[46] (emphasis added).

to be reflected in Victorian decisions, the view that seems to have now found acceptance in New South Wales is more closely aligned to that expressed by Beazley JA in *PWD*[193] than that expressed in *Fletcher*[194] or *AE*.[195]

145 One has only to consider the recent decision of the New South Wales Court of Criminal Appeal in *Doyle v The Queen.*[196]

146 The appellant was arraigned on 38 counts alleging sexual offences against five different male complainants, during different periods ranging from 1980 until 2003. At his first trial the jury were unable to agree. At his retrial he was convicted on all 38 counts.

147 The Crown alleged that each of the complainants, with the exception of one, had been boys who had been befriended by the appellant while he was the proprietor of a cinema. Some of the offences were said to have been committed in the projection booth of the theatre where some of the complainants worked, while others were said to have taken place at the appellant's unit, in his swimming pool and en route to the unit in the appellant's car. The offending involved acts of sexual intercourse, mutual masturbation, fondling, posing for photographs and watching pornographic films.

148 What is surprising, at least from the perspective of the law as it is understood to operate in Victoria, is that despite the appellant having filed numerous grounds of appeal, he did not elect to challenge the trial judge's ruling that the Crown could rely upon the evidence of each complainant as tendency evidence, thereby making all of the counts cross-admissible.

149 The tendency notice filed by the Crown alleged that the appellant had a tendency to have a sexual interest in young male employees, to engage in sexual activities with them, and to use his position of authority to obtain access to those employees for that purpose.

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191 [2008] NSWCCA 52.

192 (2005) 156 A Crim R 308.

193 (2010) 205 A Crim R 75.

194 (2009) 273 ALR 286.

195 [2008] NSWCCA 52.

196 [2014] NSWCCA 4 ('*Doyle*').

150 Predictably, at trial, defence counsel applied for severance of the counts as the evidence did not meet the threshold requirement of 'significant probative value'. Counsel also submitted, essentially for the same reason, that there should be a separate trial in relation to each complainant.

151 The judge in the first trial ruled against the application for severance. That ruling was not re-visited at the re-trial. Nor, as we have said, did it form the basis of any ground of appeal. That meant that the Court of Criminal Appeal was not required to, and did not, express a view as to whether the original tendency ruling had been correct.

152 We have little doubt that had this trial been conducted in this State, and had the trial judge ruled that the evidence was cross-admissible, this would have provoked an interlocutory appeal. As the law stands in this State, taking into account the dissimilarity between the acts forming the basis of each offence, and the period of time between those occasions of offending, there would have been reasonable prospects of success on that appeal.

153 Less than two months after *Doyle*[197] was decided, the New South Wales Court of Criminal Appeal decided *Sokolowskyj v The Queen.*[198] The issue was whether tendency evidence was properly admitted at the trial of a man accused of touching the vagina of an eight year old child in his care in the parent's room of a shopping centre.

154 At trial, the Crown was allowed to rely on three convictions, from 2000 to 2003, as showing that the accused had a tendency to 'have sexual urges and to act on them in public in circumstances where there was a reasonable likelihood of detection'. The first of those convictions involved the appellant exposing his penis to a 15 year old girl. The second and third convictions involved the appellant masturbating in public.

155 Hoeben CJ at CL ultimately concluded that the tendency evidence admitted at trial did not reach the standard required for it to have 'significant probative value' due to the 'high level of generality of the tendency relied upon'.[199] His Honour noted, however, that the

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197 [2014] NSWCCA 4.

198 [2014] NSWCCA 55 (Hoeben CJ at CL, with Adams and Hall JJ agreeing) ('*Sokolowskyj*').

199 Ibid [40].

parties had both accepted the position, as enunciated in *Ford*,[200] that for the tendency to have 'probative value' there was no need for the tendency to be to commit acts 'closely similar' to those that constituted the crime charged. His Honour then went on to consider whether the tendency evidence had 'significant probative value' by reference to the discussion of *Lockyer*[201] and *R v Lock*[202] in *Ford*.[203] He also referred to the decision of *DAO v The Queen*[204] in which Simpson J, by now seemingly having retreated somewhat from the position that she had earlier espoused in *Fletcher*,[205] in which she said that *Boardman*[206] could play a 'significant role' in assessing the probative value of tendency and coincidence evidence, recast the test to one of mere similarity or dissimilarity.

156 In *DAO*, her Honour said:

> Similarity or dissimilarity in the nature of the conduct alleged is relevant to the assessment of both whether the evidence has probative value, and, if so, whether it is significant. If the evidence has significant probative value (and, in a criminal case, subject to s 101) it is admissible.[207]

157 Less than a month after *Sokolowskyj*[208] was decided, the New South Wales Court of Criminal Appeal delivered judgment in *RH v The Queen,*[209] a case involving sexual offending by a foster father against a child in his care. During a voir dire in advance of the trial, details emerged of a further complaint by another child against the appellant. The appellant had, by that stage, already pleaded guilty to a number of charges of sexual offending against a third child.

158 The Crown sought to adduce evidence in relation to tendency on the part of the appellant to have a sexual interest in girls aged between eight and 13, to sexually and

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200 (2009) 273 ALR 286.

201 (1996) 89 A Crim R 457.

202 (1997) 91 A Crim R 356.

203 (2009) 273 ALR 286.

204 (2011) 81 NSWLR 568 ('*DAO*').

205 (2009) 273 ALR 286.

206 [1975] AC 421.

207 (2011) 81 NSWLR 568, 603 [181].

208 [2014] NSWCCA 55.

209 [2014] NSWCCA 71 (Ward JA, with Harrison and R A Hulme JJ agreeing) ('*RH*').

indecently assault young girls in his care until they reached puberty, and to use his authority as a foster carer to gain access to them for this purpose. The trial judge permitted the Crown to adduce evidence from both complainants and the child to whom the earlier convictions related.

159 Counsel for the appellant contended that there was evidence of concoction between the three child witnesses. The trial judge expressed doubt as to the position enunciated in *Hoch*[210] and followed the reasoning of Hodgson JA in *BP v The Queen*[211] (affirming *Ford*[212] and *PWD*[213]).

160 The appellant took no issue with the test applied by the trial judge for the admission of tendency evidence. Nor was any complaint made as to the content or adequacy of the directions ultimately given by the trial judge. The appellant's complaint was that the trial judge erred in concluding that the probative value of that evidence substantially outweighed any prejudicial effect its admission might have on the appellant.

161 Ward JA, in dismissing the appeal, referred to Beazley JA's comments (set out above) in *PWD*.[214] She concluded that the evidence of admitted conduct against one of the children in the appellant's care was 'not something that could be dismissed as not having significant probative value'.[215] That evidence was not so 'removed in a factual or temporal context from the earlier acts' as to render it inadmissible, nor were the different ages of the complainants throughout the periods of offending so dissimilar as to deprive the evidence of significant probative value.[216]

Conclusion

162 The provisions of the *Evidence Act* dealing with tendency and coincidence evidence

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210 (1988) 165 CLR 292.

211 [2010] NSWCCA 303, [106]–[111] ('*BP*').

212 (2009) 273 ALR 286.

213 (2010) 205 A Crim R 75.

214 Ibid.

215 *RH* [2014] NSWCCA 71 [129], [135].

216 Ibid.

should be viewed as a code. None of the common law principles that formerly governed this branch of the law are any longer binding in this area.[217]

163 Where there is an absence of remarkable or distinctive features in the manner in which the offences are committed, the difference in the law as stated by this Court and the New South Wales Court of Criminal Appeal has left the law in a state of uncertainty as to the degree of similarity in the commission of the offences or the circumstances which surround the commission of the offences that is necessary to support tendency reasoning. One line of authority has held that some degree of similarity in the acts or surrounding circumstances is necessary before it will be sufficient to support tendency reasoning.[218] Another line of New South Wales authority, that has not been followed in Victoria, has emphasised that tendency reasoning is not 'based upon similarities,' and evidence of such a character need not be present.[219] These lines of authority within each Court are not readily reconcilable.

164 Section 97(1)(b) is intended to address the risk of an unfair trial through the use of tendency reasoning by ensuring a sufficiently high threshold of admissibility. We consider the approach currently taken by the New South Wales Court of Criminal Appeal to tendency and coincidence goes too far in lowering the threshold to admissibility. To remove any requirement of similarity or commonality of features does not in our respectful opinion give effect to what is inherent in the notion of 'significant probative value.' If the evidence does no more than prove a disposition to commit crimes of the kind in question, it will not have sufficient probative force to make it admissible. This view, we think, clearly represents the present position of our Court reflected in the long line of authority to which we have referred.

165 It is unfortunate that the law regarding tendency and coincidence evidence appears to have developed along divergent paths in New South Wales and Victoria. In the meantime, and recognising that much of what we have said may be of historical interest only, it might be of use to trial judges in this State if we formulate the principles that we think govern the

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217 That is not to say that older authority will necessarily be unhelpful. See, for example, the reference by the Court in *CV* [2014] VSCA 58, [9] to the reasoning of the High Court in *Phillips* (2006) 225 CLR 303, notwithstanding the fact that the High Court was dealing with common law principles.

218 *RHB* [2011] VSCA 295; *DR v The Queen* [2011] VSCA 440; *CEG* [2012] VSCA 55.

219 *PWD* (2010) 205 A Crim R 75 [79]; *BP* [2010] NSWCCA 303; *KRI* (2011) 207 A Crim R 552.

operation of ss 97 and 98 in Victoria.

166 In relation to tendency evidence, it remains necessary to identify and assess the strength of the features of the acts relied upon as supporting tendency reasoning. Odgers, in his *Uniform Evidence Law in Victoria*[220] sets out a list of features which include the following:

(i) the number of occasions upon which the particular conduct relied upon is said to have occurred;[221]

(ii) the time gap between those occasions;[222]

(iii) the degree of similarity between the conduct on those occasions;[223]

(iv) the degree of similarity of the circumstances in which that conduct took place;[224]

(v) whether the tendency evidence is disputed,[225] and

(vi) the issue to which the evidence is relevant.[226]

167 As to the last matter, it has been suggested that tendency evidence may have greater probative value in proving conduct than in identifying an offender.[227]

168 We have not included the relationship between offender and victims amongst the relevant operative features. Save where all the tendency evidence and charged acts relate to the same victim, the circumstance will be most unusual in which the relationship between the offender and the victims could by itself be sufficient to amount to tendency evidence. The exception may be where the nature of the relationship between the offender and the victims is so entirely remarkable and out of the ordinary (in which case the evidence would also support coincidence reasoning). But in the not so uncommon situations of parent and child or teacher

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220 Odgers, above n 3, 466–7.

221 *RHB* [2011] VSCA 295, [20]. Cf *GBF* [2010] VSCA 135, [34].

222 Cf *Doyle* [2014] NSWCCA 4, [92], where the offences were said to have been committed many years apart.

223 *Fletcher* (2005) 156 A Crim R 308, 321 [57], 324 [68].

224 *Fletcher* (2005) 156 A Crim R 308*; PWD* (2010) 205 A Crim R 75*; BP* [2010] NSWCCA 303, [112]; *GBF* [2010] VSCA 135, [27].

225 *AE* [2008] NSWCCA 52, [44].

226 *Bryant* v *The Queen* [2011] NSWCCA 26, [79].

227 Odgers, above n 3, 467.

and pupil, some other features of similarity must be present. Commonality of relationship between offender and victim will not ordinarily be sufficient.[228]

169 Neither tendency nor coincidence evidence requires proof, as a condition of admissibility, of 'striking similarity'. Nor should a trial judge ask whether it would be 'an affront to common sense' to withhold evidence of that kind from the jury. Such expressions, taken from the common law, are unduly restrictive when it comes to the construction of the relevant provisions of the *Evidence Act*.

170 Nonetheless, some cases may meet even that higher threshold test. In that event, the task for the trial judge is likely to be relatively straightforward. The evidence will certainly satisfy the requirements of ss 97 and 98. It will almost certainly also satisfy the requirements of s 101.

171 The features relied upon must in combination possess significant probative value which requires far more than 'mere relevance'. In order to determine whether the features of the acts relied upon permit tendency reasoning, it remains apposite and desirable to assess whether those features reveal 'underlying unity', a 'pattern of conduct', 'modus operandi', or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely. It is the degree of similarity of the operative features that gives the tendency evidence its relative strength.

172 The decisions of this Court dealing with these provisions, and particularly *CGL*,[229] *PNJ*,[230] *NAM*[231] and *Murdoch*[232] should not be misunderstood. We see no material difference in the principle applied in those cases and the approach expressed in *GBF*[233] and the other decisions which adopt the same approach. Any perceived difference lies in the application of the principles to the facts.

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228 *NAM* [2010] VSCA 95, [8]. See also *CGL* (2010) 24 VR 486; *PNJ* (2010) 27 VR 146.

229 (2010) 24 VR 486.

230 (2010) 27 VR 146.

231 [2010] VSCA 95.

232 [2013] VSCA 272.

233 [2010] VSCA 135.

173 It seems to us that a number of further principles can be distilled from the authorities.

(a) The test laid down in *Hoch*[234] and *Pfennig*[235] (to the effect that similar fact evidence will only be admitted if there is no reasonable explanation for such evidence other than 'the inculpation of the accused in the offence charged') has no application to the admissibility of tendency or coincidence evidence under the *Evidence Act*.

(b) Neither s 97 nor s 98 of the *Evidence Act* should be interpreted as having reinstated the test formerly laid down by the House of Lords in *DPP v P,* or by the Victorian Parliament in s 398A of the *Crimes Act.*

(c) As the law currently stands,[236] the finding, in any case involving multiple complainants, that it is 'reasonably possible' that there may have been 'concoction', 'collusion', 'collaboration' or 'contamination' among them renders tendency or coincidence evidence inadmissible.[237] If contamination or concoction is to be relied upon, it should, of course, be raised, on behalf of the accused, before the trial judge.[238] There must be a basis, in the evidence, for any such conclusion, beyond mere opportunity for it to have occurred. Mere 'speculative suggestion' will not afford any such foundation.[239]

(d) Where the issue of 'concoction', 'collusion', 'collaboration' or 'contamination' relevantly arises and has been raised by evidence, the Crown bears the onus of negating any such reasonable possibility.[240]

(e) The presumption in s 194(2) of the *Criminal Procedure Act*, that sexual offences should be tried together, is of course to be given full weight.

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234 (1988) 165 CLR 292.

235 (1995) 182 CLR 461.

236 *SLS* [2014] VSCA 31, [170].

237 *KRI* (2011) 207 A Crim R 552, 559 [33], 563 [56]; *CEG* [2012] VSCA 55, [24]–[27].

238 *SPA v The Queen* [2011] VSCA 306 [11].

239 Ibid.

240 *SLS* [2014] VSCA 31, [173].

However, that presumption is rebuttable. The principles governing severance, notwithstanding that presumption, are those laid down by this Court in *GBF*.[241]

(f) The offender's state of mind is frequently relied upon in the Crown's notice of tendency evidence to cover the offender's interest in particular victims and his willingness to act upon that interest. That the offender has such a state of mind discloses only rank propensity which is not admissible as tendency evidence. It shows only that he is the kind of person who is disposed to and commits crimes of the type charged. Resort to that particular state of mind to support tendency reasoning is impermissible, highly prejudicial and unnecessary. Once the jury is satisfied that the acts relied upon as tendency have been committed, the offender's state of mind adds nothing. Reference to it is calculated to divert the jury from focussing upon the extent to which the similar features of the previous acts render the occurrence of the offence charged more likely. We shall amplify our concerns regarding the direction in the present appeal in reasons that follow.

174 In the case of coincidence evidence, the relevant principles are, in many respects, the same. Plainly, coincidence reasoning can be invoked if there are similarities in the conduct of the accused on different occasions which reveal a pattern from which it may be inferred that he or she did a particular act or had a particular state of mind. Such reasoning can, for example, apply to render it improbable that a series of events occurred by accident, or by sheer coincidence.[242]

175 Such reasoning can also be invoked where there are similarities in the accounts given by two or more witnesses regarding the conduct of the accused which make it improbable, in the absence of concoction or contamination, that the witnesses are telling lies.

176 The greater the number of such witnesses, the less need there will be for their evidence to be 'distinctive', still less, 'strikingly similar'. It must be remembered, however,

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241 [2010] VSCA 135, [51]–[55].

242 See, eg, *Perry v The Queen* (1982) 150 CLR 580.

that it is a pre-requisite to the use of coincidence reasoning that there be such 'similarities' between the accounts given by the various witnesses (whether as to the events themselves, or the circumstances in which they occurred), that it is 'improbable that the events occurred coincidentally'. In addition, of course, it must be shown that the evidence sought to be adduced will, either by itself, or having regard to other evidence, have 'significant probative value'.

177 Of course, one needs to bear in mind at all times the issues raised in the trial. In that regard, it is worth bearing in mind the decision of the High Court in *Phillips v The Queen,*[243] albeit a case decided under the common law, and not s 98. There, the fact that five separate complainants all claimed to have been sexually assaulted by the accused, but in ways that were not particularly distinctive, did not render the evidence cross-admissible. However, that was said in the context of a case where the issue in relation to each complainant was whether there had been consent. As the Court observed:

> It is impossible to see how, on the question of whether one complainant consented, the other complainants' evidence that they did not consent has any probative value.[244]

178 Had the defence been one of accidental contact, for example, the case for cross-admissibility may have been considerably more powerful.

179 There are other areas of uncertainty associated with tendency and coincidence evidence. These include, in particular, whether a court should assume both the truthfulness, and reliability, of the evidence in question when assessing its probative value. There is a difference, it would seem, between the position in New South Wales[245] (and Tasmania) on the one hand, and Victoria on the other. In New South Wales, questions of credibility and reliability are said to play no role in the assessment of the probative value of the evidence sought to be led. In Victoria, this Court's decision in *Dupas v The Queen*[246] (albeit dealing with s 137 rather than ss 97 or 98) suggests that reliability, at least, is part of the equation

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243 (2006) 225 CLR 303 ('*Phillips*').

244 Ibid 318 [47].

245 *R v Sood* [2007] NSWCCA 214, [36]. This is consistent with the approach taken in New South Wales in relation to s 137. See also *R v Shamouil* (2006) 66 NSWLR 228.

246 [2012] VSCA 328.

when making the relevant assessment.

What parts of the complainants' evidence were cross-admissible?

180 In this case the Crown contended that there was a uniformity to the applicant's conduct in both the mode in which the offences were committed and the circumstances in which they took place which gave the complainants' evidence significant probative value. The common circumstances relied upon were that during the course of the day at the day-care centre, when the applicant was assisting his wife in supervising and caring for young children, and whilst occupying a position of authority, the applicant opportunistically exploited the trust reposed in him to pursue and act upon a sexual interest in these young children. It submitted that the manner in which a number of the sexual acts alleged by each complainant were committed had common distinctive features which we have set out in the following paragraph. The similarity of the circumstances in which the offences were alleged to have been committed together with distinctive behaviour of the applicant on some of the charges concerning each complainant constituted a pattern of behaviour sufficient to support tendency reasoning on those charges.

181 The common feature of the evidence on those charges was that the applicant encouraged each complainant to touch his penis or exposed it to the complainant. Under Charge 1, of which the applicant was acquitted, it was alleged that the applicant pointed to his genital area and asked the complainant GS to 'touch this'. Under Charge 3 it was alleged that the applicant asked the complainant MS to take his penis out of his pants, and exposed it to her when she refused. Under Charges 4 and 5, the applicant exposed his penis to MS and took her hand and placed it on his penis. Charges 6 and 8 involved the applicant grabbing the complainant OA's hand and placing it on his penis on the outside of his clothing. Finally, under Charge 16, it was alleged that the applicant grabbed OA's hand and forced it onto his penis. Each of these offences was a sexual offence committed on a young child in the applicant's home while he was assisting his wife with the running of the day-care centre. In respect of those charges there was a distinct pattern of behaviour committed in similar circumstances that could attract coincidence and tendency reasoning.

182 When pressed during oral argument, senior counsel for the applicant all but acknowledged that evidence on Charges 1, 3, 4, 5, 6, 8 and 16 possessed distinctive features that supported tendency reasoning. On the basis that there was force in the proposition that tendency reasoning was rightly applied in respect of those charges, counsel for the applicant advanced a new argument during the hearing. It was now said that the trial judge should have directed the jury that tendency reasoning could not be employed with respect to those charges where the evidence of the complainant lacked those particular distinctive features as the similarities in surrounding circumstances would not by themselves be sufficient to support tendency reasoning. Toward the end of oral argument the applicant thus sought leave to add another ground of appeal in these terms:

> 5. The learned trial judge erred in failing to direct the jury that they could not use tendency reasoning in relation to their determination of charges 2, 7, 9, 10, 11, 12, 13, 14 and 15.

183 The trial judge was not requested to consider whether any of the evidence should not be treated as cross-admissible as tendency evidence. Her Honour was not asked to give the direction now suggested. The appeal was not directly concerned with these questions, and they were not explored in any detail. The focus was rather on the consequence of trial counsel's error in conceding that the complainants' evidence could support tendency reasoning on each charge.

184 We agree that on charges 2, 7, 9, 10, 11, 12, 13, 14 and 15 the manner of the applicant's offending conduct did not possess any distinctive or similar feature of the kind necessary to satisfy tendency reasoning. Applying the principle we have discussed above, we do not think there are present such features of similarity as show a pattern of conduct or modus operandi concerning either the previous acts, or the circumstances in which they were committed that logically and to a significant degree implies that it is more probable that he committed the act or acts in issue.[247]

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247 *RR* [2011] VSCA 442.

185 The evidence of the complainants that could support tendency reasoning should have been confined to those charges which possessed sufficient common or distinctive features with the charge in issue and which thus demonstrated a pattern of conduct that cogently increased the likelihood of the occurrence of the charge in issue.

Agreement with Crown that complainants' evidence supports tendency but not coincidence reasoning

186 We turn then to the significance of the defence agreement to permit all the evidence of the complainants to be used as tendency evidence.

187 No application was made for severance of the charges of each complainant but as the applicant conceded, given the presumption against severance any such application would have been unlikely to succeed. Following negotiations with the Crown, defence counsel made a deliberate decision to raise no objection to the cross -admissibility of the complainants' evidence. This was a forensic decision which had a rational basis. Defence counsel had reached agreement with the Crown that in exchange for the Crown being permitted to treat each complainant's evidence as tendency evidence, such evidence would not be used by the Crown to support coincidence reasoning. First, the Crown's abandonment of coincidence reasoning — when such reasoning was clearly open with respect to a number of charges — would have provided the Crown with an arguably more potent form of reasoning as to why each complainant's account made the account of the others more probable. The withdrawal of coincidence reasoning was a considerable benefit to the defence. Second, it was said in the written case of the applicant that the defence wished to demonstrate that each complainant's account had been innocently infected by knowledge of the complaints made by others.

Forensic advantage — Defence of innocent infection or contamination of complainants' accounts

188 In trial counsel's written case for the appeal, he did not seek to rebut the inference that there may have been some tactical advantage sought by not taking objection to tendency

reasoning. On the contrary, the forensic benefits were alluded to. Yet in oral argument on appeal, senior counsel, who now appeared for the applicant, asserted for the first time that there was no discernable forensic benefit in entering such an agreement with the Crown. He submitted that there had been nothing to be gained by conceding tendency reasoning was available. Senior counsel went further. In a written submission provided after the hearing of the appeal, he contended that 'innocent infection' had not been advanced by the defence as an explanation for the content of each young child's complaints. That submission contradicted the written case prepared and lodged by the applicant's trial counsel, who had made the proper and frank acknowledgement that the defence had sought to gain a forensic advantage from the joinder of the charges as it wished to explain how the initial complaint had influenced the making of the subsequent complaints. Trial counsel had further stated in the written case that '[t]he defence was essentially that there had been an "innocent infection" of the complainant's evidence'. In the charge to the jury, the trial judge referred to the defence that there had been some sort of innocent infection of the complainants' accounts. The submission made on appeal is without merit and should not have been advanced.

189 The transcript reflects the fact that the defence did seek to demonstrate that the initial complaint by MS gave rise to the other two children coming forward. It was suggested during the trial that the knowledge of each complainant and their parents about the fact that other children were also making complaints concerning the applicant's conduct at the day-care centre resulted in the parents, perhaps unwittingly, creating an environment in which the complainants were encouraged to make untruthful allegations.

190 The complaints of OA and GS only emerged after the initial allegation made by MS. It was evident from defence counsel's line of questioning that he was seeking to establish that these complainants were only drawn into making allegations against the applicant as a result of having heard about the allegations of MS from either their parents or other children. Some reference to the evidence is illustrative of the defence attempt to demonstrate that the content of each complainant's allegations were contaminated by their knowledge of the allegations made by the others.

191 The complainant OA was cross-examined extensively on how well she knew MS and the extent to which she knew of MS's allegations against the applicant prior to making her own statement:

DEFENCE COUNSEL:	Do you know MS?
OA:	She's in school and she's Prep. She's in Prep and I see her around because my buddy is in a Prep area and, yeah.
DEFENCE COUNSEL:	And do you know that MS has said things about [the applicant] as well?
OA:	Yes.
DEFENCE COUNSEL:	And?
OA:	Well I'm not — I'm not sure what she said but I have heard.
DEFENCE COUNSEL:	I don't really want you to go guessing about what she said or didn't say, but you just know that she's made allegations, you know that, don't you?
OA:	I've heard that.
DEFENCE COUNSEL:	And how long ago did you hear that or can you remember?
OA:	No, sorry.

DEFENCE COUNSEL: But you've known about that for a while, haven't you?

OA: If you're asking me if that worries me, no.

DEFENCE COUNSEL: No, I'm not asking you if it worries you at all. I'm just saying you've known about MS and MS's making allegations for quite a long time, haven't you?

OA: I don't even think — when I heard it I think it just stayed in my mind for just a couple of minutes and I never remembered it unless someone tells me or remembers it for me so, no, I haven't, I haven't thought about it anyway, so I would say —

DEFENCE COUNSEL: Have you ever talked to [MS's brother] about [the applicant]?

OA: No.

DEFENCE COUNSEL: Have you ever talked to [MS's brother] about MS?

OA: No.

DEFENCE COUNSEL: But you do know that MS has said things about [the applicant], that much you do know, is that right?

OA: Um, can you repeat that, sorry?

DEFENCE COUNSEL: Sure. You know about MS making allegations, don't you?

OA: I've heard — I'm trying to make things clear but —

DEFENCE COUNSEL: All right. If I can ask you another question. Who did you hear that from?

OA: I don't know. All I just know is — it's actually, it's my mum's private business, so I don't know. I don't know what you mean.

DEFENCE COUNSEL: The police obviously did speak to you twice, didn't they, and that's what you've watched this morning on the tapes?

OA: Yes, then they told me nothing about — they asked me no questions about someone else. I'm sure they didn't.

DEFENCE COUNSEL: But around that time you did know that other children had said things about [the applicant], didn't you?

OA: Yes.

DEFENCE COUNSEL: And who did you hear about that from, was it the police or was it?

OA:	Yes.
DEFENCE COUNSEL:	Your parents?
OA:	That's when MS dropped in. Now I'm getting your question and now I actually have an answer to your other question. The day I was about to tell things, just like I said, my parents already knew and they said how they got the information other kids have told their parents and including MS, she heard MS has also told her parents and that's how I knew but it's never bothered me though.

192 Defence counsel also examined the complainants' parents as to how much they discussed the allegations with the complainant and their other children. MS's father stated that he had discussed the matter with his wife and family friends they had been staying with in Queensland when MS first made the allegation. He also confirmed that on more than one occasion, he and his wife had spoken with their other three children, who had also attended the same day-care centre, and asked them if they'd ever seen anything at the day-care centre that made them feel uncomfortable.

193 Defence counsel asked MS's mother about her interactions with OA's mother, who had asked why MS had been taken out of day-care. It was put to MS's mother that she had explained the details of MS's allegations against the applicant. MS's mother stated that she had merely said that there had been an 'inappropriate incident'. During cross-examination of GS's mother, defence counsel put to her that she had been 'put on notice' about the allegations made by MS by another woman she knew from day-care. Counsel also raised the fact that GS's brother had been at a party with OA's brother. It was put that, after police had contacted her, GS's mother had 'pressed' her son for information about the issue.

194 The manner in which the complainants and their parents were cross-examined shows that the explanation of innocent infection was pursued. The submission now made that it was not part of the defence is without any merit. It was plainly at odds with the statements of trial counsel in his written case on the appeal, which properly acknowledged that the explanation of cross-infection had been pursued. It was inconsistent with the trial judge's instruction to the jury as to the nature of the defence.

195 As the charges of the three complainants were to be heard together, pursuit of the defence of innocent infection might have been explored without conceding that the complainants' evidence was cross-admissible. We simply do not know what considerations led to that course. As Gleeson CJ observed in *Nudd v The Queen*,[248] the Court of Appeal is an unsatisfactory forum in which to assess the decisions and performance of trial counsel. Appellate courts, recognising that difficulty, do not seek to make such assessment unless it is unavoidable.

Did the failure to object affect the admissibility of the evidence?

196 The Crown contends no miscarriage of justice arose as there was no objection to the cross-admissibility of the evidence and its use in the trial for the purpose of tendency reasoning.[249] It further contended that the jury was rightly instructed that each complainant's evidence could support tendency reasoning on each charge on the indictment, but that even if parts of their evidence were not admissible on some charges, in the absence of objection, all their evidence was cross-admissible.

197 Section 97 of the *Evidence Act* states that evidence is not admissible as tendency evidence unless certain things occur. In New South Wales, a line of authority, commencing with *R v Reid*[250] is to the effect that evidentiary provisions which state that evidence 'is not admissible' should be taken to mean only that evidence 'is not admissible over objection'. In *Reid*, Spigelman CJ in considering the meaning of s 424A(2) of the *Crimes Act 1900* (NSW) said:

> The operative words in s 424A(2) are 'Evidence of an admission is not admissible unless ...'. The submission was made that this provision operated in accordance with its literal meaning, and accordingly, should be given effect even though no objection to the admission of the evidence was taken on behalf of the accused at the trial.
>
> The Parliament was well aware, particularly in the context of legislation cognate with the general amendments to the scheme of evidence contained in the *Evidence Act 1995*, that the usual course of proceedings in trials under the adversary system requires objection to be taken to evidence. The words 'is not admissible' should be

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248 (2006) 80 ALJR 614, 619.

249 See also *R v LRG* (2006) 16 VR 89, 92 [13] (Callaway JA).

250 [1999] NSWCCA 258 ('*Reid*').

> construed as meaning 'is not admissible over objection'. The usual practice in the course of trials was part of the total context in which Parliament used these words and the narrow literal interpretation propounded on behalf of the Appellant is not appropriate.[251]

198 This line of authority and its relevance to the *Evidence Act* was affirmed in *Gonzales v The Queen*[252] and *FDP v The Queen.*[253] In *Gonzales*, Giles JA (with whom Howie and Fullerton JJ agreed) said:

> The prior question is whether the admissions in the statement were inadmissible in the absence of an objection to their admissibility. *R v Reid* [1999] NSWCCA 258 was concerned with s 424A of the *Crimes Act 1900* (NSW), the predecessor to s 281 and although differently structured using the same key words that 'evidence of an admission is not admissible unless … '. Spigelman CJ held at [5] that 'is not admissible' should be construed as meaning 'is not admissible over objection', saying that the usual course of proceedings in trials under the adversary system requires objection to be taken to evidence and that the usual practice was 'part of the total context in which Parliament used these words'. The reasons of Smart AJ were less explicit, but at [61] his Honour said that s 424A was 'enacted against the long-standing and well-known practice of the Court generally not to reject evidence led by a party until a legitimate objection is taken by the other party'; his Honour went on to point out that the parties were generally left to conduct their own cases and they should know, which the Court did not, whether there was a reasonable excuse why a tape recording could not be made. Greg James J at [11] agreed with Smart AJ, and also with the 'matters raised by the Chief Justice'. …
>
> The prior question is not one of use of inadmissible evidence which was not objected to, but of construction of s 281. It does not concern s 281 alone. The *Evidence Act 1995* (NSW) uses the words 'is not admissible' in relation to hearsay evidence (s 59), opinion evidence (s 76) tendency evidence (s 97), coincidence evidence (s 98), credibility evidence (s 102) and visual identification evidence (s 114), amongst other provisions. The words are to be contrasted with 'is not to be adduced' in ss 118 and 119 and similar directory words in other provisions. Strong forms of words are found in s 137, 'must refuse to admit evidence', and s 138, 'is not to be admitted'. In *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at [149] Spigelman CJ said that ordinarily 'not admissible' in the *Evidence Act* means 'not admissible over objection'.
>
> On the other hand, s 190 of the *Evidence Act* (under the heading 'Waiver of rules of evidence') provides for the court to dispense by order with the application of many provisions of the Act if the parties consent, which at first sight is not consistent with the provisions being inapplicable if they are not invoked by a party objecting to evidence. In particular, by s 190(c) in criminal proceedings a defendant's consent is not effective unless the defendant has been advised to consent by his lawyer or the court is satisfied that the defendant understands the consequences of giving the consent.
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> However, the Chief Justice's construction of 'is not admissible' in *R v Reid* has been adopted in this Court in *R v Spathis* [2001] NSWCCA 476 at [416]–[417] (Carruthers AJ, Heydon JA and Smart AJ agreeing), *R v Lyberopoulos* [2002] NSWCCA 280 at

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251 Ibid [4]–[5].

252 (2007) 178 A Crim R 232 ('*Gonzales*').

253 (2008) 74 NSWLR 645 (McLellan CJ at CL, Grove and Howie JJ).

> [41] (Hulme J, Mason P and Simpson J agreeing) and *R v Kaddour* (2005) 156 A Crim R 11 at [62] (the Court). The appellant submitted that *R v Reid* should be reconsidered in the light of the rationale for equivalents to s 281 explained, and the purposive construction given, in some of the judgments in *Kelly v The Queen* (2004) 218 CLR 216 and *Nicholls v The Queen* (2005) 219 CLR 196, but the High Court was not concerned with the present question. In the absence of proper argument to the contrary, the decisions should be followed. Accordingly, the ground of appeal fails in limine because, in the absence of objection, the statement was not inadmissible and was not wrongly admitted.[254]

199 This mode of construction of 'is not admissible' that adds the words 'over objection' before the evidence becomes inadmissible is the subject of criticism by Odgers in *Uniform Evidence Law in Victoria*.[255] This criticism appears to have some force. Research has not disclosed that this question has received any attention in this Court. The Crown did not explicitly rely upon this construction, but the effect of its contention was that the failure to object deprived the applicant of the right to dispute its admissibility.

200 The decisions of another intermediate appellate court on the identical provision in uniform legislation must be given great weight, but in the absence of full and considered argument by this Court, we would be reluctant to construe the term 'is not admissible' in s 97 (and other provisions of the *Evidence Act* to the same effect) as meaning that the evidence was admissible in the absence of objection. For the reasons that follow, it is unnecessary that we express a concluded view as to this question.

The absence of objection and a miscarriage of justice

201 Assuming that the evidence did not become admissible as a result of the absence of objection by the defence, the question arises as to whether the applicant can maintain that there has been a miscarriage of justice in the absence of objection to the admission or use of the evidence for the intended purpose.

202 There are ample instances of courts in the context of civil litigation having treated hearsay evidence as evidence of the facts asserted therein once it was admitted without objection.[256] It was undoubtedly the case that in the absence of objection, evidence not

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254 (2007) 178 A Crim R 232, 243–4 [22]–[26].

255 Above n 3, 236–9 [1.3.290].

256 *In Re Lilley* [1953] VLR 98; *Walker v Walker* (1937) 57 CLR 630; *Re Miller* [1979] VR 381; *Jones v*

legally admissible in proof of any issue could, once in, be used 'as proof to the extent of whatever rational persuasive power it may have'[257] for all relevant purposes.[258]

203 In *R v Radford*,[259] the Court of Criminal Appeal held it appropriate to apply the principle espoused in civil cases to a criminal trial where there had been a deliberate decision to refrain from objecting and the trial thereafter proceeded on the basis that the jury could act upon the truth of the assertions contained in the hearsay facts.

204 There are, however, differing lines of authority on the question of how a court should deal with a trial counsel's failure to object to inadmissible evidence or the impermissible use of admissible evidence in a criminal trial.[260] The majority (Dixon, McTiernan, Webb and Kitto JJ) stated in *Shaw v The Queen*[261] that 'the failure of counsel to object to inadmissible evidence may provide ground for an inference that the reception of the evidence can give rise to no substantial miscarriage of justice'.[262] To similar effect were the observations of Gleeson CJ in *R v Meier*,[263] that a failure to object to the admission of evidence at trial will be assumed to be 'the result of a deliberate decision made for reasons which a trial judge cannot investigate'.[264] But there is no universal rule that dictates that the failure to make timely objection to the improper admission of evidence will prevent the point being raised on appeal.[265] Indeed, it is not uncommon for a ground of appeal to be entertained that the trial miscarried because inadmissible evidence was admitted notwithstanding that no objection was taken to it.[266]

Sutherland Shire Council [1979] 2 NSWLR 206.

257 *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206, 219.

258 *Shaw v The Queen* (1952) 85 CLR 365, 376 (Dixon, McTiernan, Webb and Kitto JJ) ('*Shaw*'). See JD Heydon, *Cross on Evidence* (Butterworths, 9th Australian ed, 2013) 123 [1675].

259 (1993) 66 A Crim R 210, 232–3 (Phillips CJ and Eames J, Harper J agreeing) ('*Radford*').

260 See Adrian Lawrence, 'Failure to Object: The Death of Evidential Rules' (1996) 15 *Australian Bar Review* 137, 140–3.

261 (1952) 85 CLR 365.

262 Ibid 381.

263 (Unreported, Court of Criminal Appeal (NSW), Gleeson CJ, Dowd and Hidden JJ, 3 April 1996).

264 Ibid 19.

265 *Stirland v DPP* [1944] AC 315, 327–8.

266 *R v Chai* [2002] NSWCCA 512, [41] (Mason P, Sperling and Bergin JJ).

205 In *R v Gay,*[267] the Full Court dealt with a failure to object to the admission of evidence.

> Although it was said in *R v Ellis* [1910] 2 KB 746, at p 764; [1908–10] All ER Rep 488 that a judge presiding over a criminal trial ought not to wait for objections to evidence, but should himself stop questions which would elicit inadmissible answers, it was held in *R v Sanders* [1919] 1 KB 550 that the Court of Criminal Appeal will not entertain an appeal based upon the wrongful reception of evidence if no objection to it was taken at the trial. But although the latter case seems clear and unequivocal it was not applied in its full rigour in *R v O'Brien* (1920) 20 SR (NSW) 486, per Wade J, at p 493, where however it was said that where no objection was taken to evidence the admission of which is afterwards made a ground of appeal, the Court should require some strong reason to be shown why that course was adopted. In *Stirland v DPP* [1944] AC 315, at pp 327–8 Viscount Simon, LC, after referring to *R v Ellis*, supra, said: 'If that be the judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt, as was said in the same case, the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal, but where, as here, the reception or rejection of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice. There is nothing in the Act of 1898 to suggest that such an objection is necessarily invalid unless taken at the time, and in other branches of the law the right to object on appeal that evidence was inadmissible is not necessarily forfeited by the failure to object when the evidence was given. The object of British law, whether civil or criminal, is to secure, as far as possible, that justice is done according to law, and, if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by counsel at the trial is not necessarily conclusive.' (Cf *McLellan v Taylor* [1966] 2 NSWR 185 and *R v Oliver* [1968] VR 243, at p 247.)[268]

206 When an accused person has been convicted, and appeals, there is often an attempt to present the defence case in a new way. This appeal provides an example of the necessity, when evaluating criticisms of the trial process and the trial judge's directions to a jury, to relate those criticisms to the manner in which the trial was conducted.[269] The course followed by the defence throughout the trial has a profound bearing upon the evaluation of the complaints now made concerning the trial.

207 Whether a failure to object proves critical to the application of the proviso will thus depend upon all of the circumstances in which the evidence was admitted and the significance

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267 [1976] VR 577 (Young CJ, Gillard and Murray JJ) ('*Gay*').

268 Ibid 584.

269 *Doggett v The Queen* (2001) 208 CLR 343, 346 ('*Doggett*').

of that course in the trial.[270] Where it is proper to characterise the course followed by the defence as a failure to object to the admission or use of evidence, the applicant would need to demonstrate that there was no tactical advantage to the applicant and that it presented a very obvious and overwhelming prejudice to the applicant before it could be said that a miscarriage of justice had been occasioned.[271] Where it can be shown that there was not merely a failure to object, but a decision not to object for apparently sound forensic reasons, different considerations will arise.

Waiver — agreement that complainants' evidence cross-admissible

208 The *Evidence Act* applies in an adversarial context in which the parties, and their counsel, define the issues at trial, select the witnesses, and choose the evidence that they will lead, and to which they will take objection.[272] To put aside the defence's considered concession that the evidence of the complainants should be treated as cross-admissible would be to ignore how the trial was run and the context in which that evidence was led. As Gleeson CJ said in *Doggett*:

> The manner in which a trial is conducted, and in which the issues are shaped, especially where … an accused is represented by experienced and competent counsel, has a major influence upon the way in which the case is ultimately left to the jury, and upon the directions, comments and warnings, from the trial judge to the jury, that may be appropriate or necessary. Directions are not ritualistic formalities. Their purpose is to assist the jury in the practical task of resolving fairly the issues which have been presented to them by the parties.[273]

209 When there is a deliberate decision not to object rather than a failure to do so, it will be very difficult to assert that the trial was unfair or that unfairness can be said to arise in holding the applicant to that deliberate decision.

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270 See Mark Weinberg, 'The Consequences of Failure to Object to Inadmissible Evidence in Criminal Cases' (1978) 11 *Melbourne University Law Review* 408, 424–6; *R v Soma* (2003) 196 ALR 421, 423–4 [11].

271 *Papakosmas v The Queen* (1999) 196 CLR 297, 319 (McHugh J); *FDP v The Queen* (2008) 74 NSWLR 645, 648–9.

272 *Dhanhoa v The Queen* (2003) 217 CLR 1, 9 [20] (Gleeson CJ and Hayne J).

273 (2001) 208 CLR 343, 346.

210 It has long been understood that even in the case of criminal prosecutions, where the public is directly interested in the outcome, a party may waive an objection. Thus, Isaacs J, in *Dickason v Edwards*,[274] found in the case of a claim of bias first made against the tribunal after trial that the applicant, having waived objection, could not thereafter be heard to complain.[275]

211 The joint judgment in *Gay* also drew the distinction between a mere failure to object and a conscious decision not to object.

> It appears from the subsequent case of *R v Cutter* (1944) 30 Cr App R 107; [1944] 2 All ER 337 that a distinction is to be drawn between a mere failure to object to evidence so that it is received as it were *per incuriam* and a conscious decision by counsel whether to object or not to object. As has already been shown it is quite clear that in the present case there was a conscious decision by counsel not to object to the reception of Sergeant Daly's notebook and that decision was taken after consultation with the accused. It was suggested to us that counsel might have refrained from objecting because there were matters in the notebook which could prove favourable to the defence. We have been unable to see any substance in the suggestion. However, it may reasonably be inferred from counsel's conduct at the trial that counsel did not object to the reception of the notebook because he was fully conscious that he had suggested to Sergeant Daly that his evidence was a recent invention. He did not merely fail to object, he made a conscious decision not to object and expressly stated that he had no objection. Moreover, the applicant in his statement from the dock in effect admitted that he had been interviewed by Sergeant Daly. Accordingly, we are of the opinion that the conviction cannot now be impugned upon the basis of the reception of the pages relating to Sergeant Daly's interview with the applicant.[276]

212 The concept of a 'conscious decision' not to object as amounting to waiver is reflected in other jurisdictions. For example, in the United States, it is described as 'knowing and intelligent waiver'.[277]

213 There are numerous authorities that support the view that the doctrine of waiver may apply in a criminal trial.[278] It is necessary only to refer to the more recent of those cases. In *Radford*,[279] Phillips CJ and Eames J found that the Crown had introduced hearsay evidence

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274 (1910) 10 CLR 243, 260.

275 See also *R v The Cheltenham Commissioners* (1841) 1 QB 467; *The Vernon* (1864) 1 QSCR 119; *Raven v Burnett* (1895) 6 QLJ 166; *R v Byles; Ex parte Hollidge* (1912) 108 LT 270; *R v Essex Justices; Ex parte Perkins* (1927) 2 KB 475; *In the Marriage of Murphy and Armstrong* (1978) 35 FLR 482; *Nickelseekers Ltd v Vance* (1985) 1 Qd R 266.

276 [1976] VR 577, 584–5.

277 *Argersinger v Hamlin*, 407 US 25 (1972); *Scott v Illinois*, 440 US 367 (1979).

278 See Heydon, *Cross on Evidence*, above n 258, 123 [1675] n 1.

'deliberately and in full knowledge' that the accused, far from objecting, would rely upon it to support his defence. Thereafter, the Crown did not object to the defence introducing further such evidence and the Crown continued to lead such evidence. The trial was conducted on the basis that the jury act upon the truth of the facts asserted in all of that hearsay evidence. The joint reasons observe that the Crown, having led the accused to believe that the evidence could be so used, was precluded from objecting to its use for that purpose on appeal.[280]

214 In *R v Clarke*,[281] the applicant, on appeal, claimed that certain expert evidence introduced at his trial had been wrongly admitted as it rested upon hearsay facts which were not proved by admissible evidence and was inadmissible hearsay. The defence had taken no objection to that opinion being introduced until after the defence had closed. Maxwell P, referring to *Radford*,[282] applied the principle that hearsay evidence, once admitted in a criminal trial without objection, may be treated as evidence of the facts asserted. The President observed:

> With respect, I think that the doctrine of waiver is properly applicable in a case such as this. My conclusion is strengthened by the very significant changes in criminal trial procedure which have taken place since that article was written. Given that the defence has both the opportunity and, to some extent at least, the obligation to identify in advance any disputes over admissibility, I think it can properly be said that there has been waiver when (as here) the point is not raised before trial or in the course of the evidence, and there is no cogent explanation for the failure.[283]

215 Although Charles and Nettle JA differed from the President as to whether on the facts there had been a waiver, Charles JA agreed with the conclusion of the President that the doctrine of waiver was properly applicable in criminal proceedings.[284] He considered that where defence counsel makes a deliberate choice not to object to hearsay evidence adduced by the prosecution, there could be little ground for a later objection on appeal that the

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279 (1993) 66 A Crim R 210.

280 Ibid 231.

281 (2005) 13 VR 75.

282 (1993) 66 A Crim R 210

283 (2005) 13 VR 75, 81.

284 . Ibid 82.

evidence was inadmissible. Nettle JA also took the view that an objection may be waived where counsel makes a deliberate choice to refrain from objecting and does not raise an objection at any later stage of the trial.[285] Charles and Nettle JJA each considered that the reasoning in *Radford*[286] was compelling in this respect. Furthermore, Charles JA considered[287] the correctness of the conclusions in *Radford* was reinforced by the changes in criminal trial procedure described by the President and the observations of Gleeson CJ in *Doggett*.[288]

216 In *R v McCosker*,[289] the Court addressed the issue of whether a defendant in a criminal trial may waive the requirement that all members of the jury be seen to be impartial. Of present relevance, Keane JA said:

> Use of the terminology of waiver by way of a shorthand description of the legal consequences of an accused person allowing a trial to proceed without taking a point about a procedural irregularity may tend to blur the focus on the point that the principle in issue is concerned with the fairness of the trial. Where a party knows of a procedural irregularity, but knowingly stands by and takes his or her chances with the verdict, rather than calling a halt to the proceeding, there is nothing unfair in holding that party to his conduct.[290]

217 This was a clear case of waiver. The defence agreed to the use of evidence in a particular way in exchange for which the prosecution abandoned the use of the evidence in another way. That decision to agree to the use of the complainants' evidence as supporting tendency reasoning was a conscious, rational and deliberate one, made for forensic gain. It is in our opinion to be properly characterised as a case of waiver of the right to object to the evidence being treated as tendency evidence. The course followed by the defence at trial precludes an argument that the trial was unfair if there was error as to the permissible use of the evidence. We would refuse leave to appeal on Ground 4. We would therefore also refuse leave to add proposed new Ground 5 as it was not suggested to the trial judge that tendency reasoning could not apply to those charges specified in the proposed ground. The defence

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285 Ibid 83.

286 (2005) 13 VR 75.

287 *R v Clarke* (2005) 13 VR 75, 82.

288 (2001) 208 CLR 343.

289 [2011] 2 Qd R 138.

290 Ibid 144.

had waived any objection on that basis and cannot now be heard to say that the trial judge should have distinguished between the charges in the way now suggested.

The trial judge's obligations with respect to evidence that may be inadmissible

218 Before leaving the question of waiver, something should be said as to the trial judge's obligations in such circumstances. In *Semaan,*[291] Priest JA referred to s 101(2) of the *Evidence Act* and the need for it to be shown that the tendency evidence carries a high degree of cogency before it is admitted. The probative value of the evidence must 'substantially [outweigh] any prejudicial effect' it may have'.[292] Implicit in the applicant's contentions is the suggestion that although no request was made that the judge exclude tendency reasoning, the trial judge was bound to consider the question for herself and thus refuse to allow the evidence to be so treated.

219 In *Stirland v Director of Public Prosecutions*,[293] Viscount Simon LC, with whom the other members of the House of Lords agreed, outlined the role of the judge in situations where no objection is taken to evidence that on its face is inadmissible:

> It has been said more than once that a judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself: see *Rex v Ellis* [1910] 2 KB 746, 764. If that be the judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter … The object of British law, whether civil or criminal, is to secure, as far as possible, that justice is done according to law, and, if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by counsel at the trial is not necessarily conclusive.[294]

220 To similar effect are the observations of Gleeson CJ in *R v Meier*:

> [T]he authorities recognise that there are obligations upon a trial judge which may, on occasion, necessitate intervention even if counsel remains inactive. In *R v Pemble* (1971) 124 CLR 107 at 117 Barwick CJ said: 'Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interests of his client, the trial judge must be astute to secure for the accused a fair, trial according to law.'[295]

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291 [2013] VSCA 134.

292 Ibid [39].

293 [1944] AC 315.

294 Ibid 327–8.

221 When irrelevant or inadmissible evidence emerges during the examination of a witness, a trial judge may have to intervene, unless it becomes plain that the course is one agreed to by the parties, and that it will not create the risk of an unfair trial. There will be other circumstances in which the trial judge, in the interests of ensuring a fair trial, will be obliged to question the admissibility of evidence although no objection is taken.[296] The present case was not such a case. The trial judge had no obligation to intervene when the parties had reached what would have appeared to be a sensible agreement as to the permissible uses of evidence which was already admissible in the trial. Much of the complainants' evidence was obviously capable of supporting tendency reasoning. In the face of agreement and a deliberate decision by defence counsel, the trial judge was under no duty to examine the basis for the agreement or satisfy herself that the forensic reasons justified that course. To suggest otherwise would impose an unnecessary duty upon the trial judge that she was not required to discharge. The course proposed by the parties here gave the trial judge no cause to consider that a fair trial might be put at risk. Thus, the obligation to intervene was not enlivened.

The adequacy of the trial judge's directions

222 Following the hearing, the applicant, with leave, was permitted to file a supplementary written submission in which he sought leave to add a further additional ground, namely that:

> 6. The verdicts on charges 2, 7, 9, 10, 11, 12, 13, 14 and 15 are unsafe because the jury may have employed tendency reasoning in their determination of those charges when such reasoning was not open.

223 This proposed ground, belatedly raised, now invites the Court to assess the adequacy of the judge's directions and to do so without regard to the manner in which the trial was conducted.[297] It had not been suggested at trial that tendency reasoning could apply to

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295 (Unreported, Court of Criminal Appeal (NSW), Gleeson CJ, Dowd and Hidden JJ, 3 April 1996) 20.

296 *R v Slack* (2003) 139 A Crim R 314, 324–5 [37] (Sheller JA, Wood CJ at CL and Smart AJ agreeing); *R v Lewis* [2003] NSWCCA 180, [68] (Buddin J, Santow JA agreeing); *Gonzales* (2007) 178 A Crim R 232, 243 [23].

297 *Doggett* (2001) 208 CLR 343.

evidence of each complainant on only some of the charges. At trial, all the evidence of each complainant on each charge was said to be evidence which could be used to support tendency reasoning.

224 The Crown contends that in the setting in which the trial was conducted, the trial judge was not required to distinguish between the charges in her direction. Given the way the trial was conducted, it was said her Honour was required only to ensure the jury understood that they had to determine whether the applicant's conduct demonstrated a pattern of behaviour and that where those features of commonality or underlying unity were present in one complainant's evidence, it could be used to make more probable the evidence of another complainant on another charge containing such features. So much may be accepted. Having regard to the way in which the trial was conducted, the trial judge was not obliged to distinguish between the charges as the applicant suggests and instruct the jury that the evidence on some charges could not support tendency reasoning. But, the trial judge was, as the Crown accepts, obliged to provide the jury with adequate directions to enable them to determine for themselves whether tendency reasoning would assist them on each particular charge.

225 Her Honour gave the jury a conventional separate consideration direction and a warning against propensity reasoning. She instructed them to consider only the evidence relevant to each charge. Her Honour then gave the following directions as to how the complainants' evidence could be used to support each other:

> You will note that I said you must consider each charge in light only of the evidence which applies to it. This is because some of the evidence you have heard in this case is only relevant to one charge or another. Keeping in mind the separate consideration direction I have just given you I am now going to move on to explain to you how the prosecution has relied on the evidence of the complainants as being supportive of each.
>
> This is the evidence of one complainant being supportive of another complainant. The prosecution case is that the evidence of the complainants — and when I say this I am talking about the evidence of each of the complainants in relation to the charges on the indictment, and that is Charges 1 and 2 in relation to GS and Charges 3 and 4 in relation to MS Charges 6, 7, 12, 13, 8, 10, 15 and 14 in relation to OA.
>
> The prosecution case is that the evidence the different complainants gave show that the accused had a tendency to act in a particular way and to have a particular state of mind. That is that he had a sexual interest in the young children attending the day

care run by his wife in their residence at Thornbury and that he was willing to act on that sexual interest by engaging in the indecent acts with MS, GS and OA.

While the evidence on each charge must be considered separately as I have just informed you, you may also use the evidence of one charge if you are satisfied beyond a reasonable doubt that it is proven in support of another charge. You may only use the evidence of one charge in consideration of another charge in the following two ways.

First if you accept that the evidence may place the alleged offence in a complete realistic context and setting, for example, it could assist you to understand the complainant's alleged conduct or state of mind such as why the complainant you are then dealing with might be submitting to the accused's demands or why that complainant did not complain about it.

It could help you to understand the accused's conduct or state of mind of the offences such as why he felt he could act in a particularly brazen way, for example, if you were satisfied beyond reasonable doubt that he committed an indecent act against one of the complainants without being discovered or without that complainant telling an adult about it, it might explain why he felt able to do the same with another complainant on another occasion.

The circumstances of the alleged offence are also relied upon for context such as to show you that the complainants do not say that the offences occurred out of the blue.

Secondly the prosecution has led the evidence to prove that the accused had a sexual interest in the complainants. If you find that the accused was sexually attracted to the complainants and was willing to act on that attraction you may use that finding in determining whether the accused committed the offences charged.

The prosecution case is that the accused had a pattern of behaviour towards these children which shows a particular state of mind. That is that he had a sexual interest in them. I direct you that this is a legitimate form of reasoning. If you accept the evidence you may infer that the accused had the tendency, and you may further infer that it makes it more likely that he committed the alleged offences.

You will remember what I just said about drawing inferences, and you have to apply the test I gave you about drawing inferences to the evidence before relying on it in this way. So you are entitled to consider the evidence of one complainant if you accept it makes it more probably [sic] that the other is telling the truth.

For example, if you accepted beyond reasonable doubt what GS said, then you might consider it makes it more probable that OA is telling the truth. However, if you are not satisfied beyond reasonable doubt of the evidence of a particular charge, or you do not think that the evidence on one charge makes it any more likely that the accused committed the alleged act on another charge or charges, then you must disregard the evidence on that particular charge. …

It is important that you only use this evidence for the two purposes I have referred to, and only if you are satisfied beyond reasonable doubt that it is true and it helps you to explain the main issue in this case, that is whether or not the offences occurred. If you are not satisfied of the evidence beyond reasonable doubt, or if you do not think it makes it any more likely that the accused committed the alleged acts, then you must disregard it.

226 One must take account of the fact that no exception was taken to these general directions concerning tendency reasoning. The trial judge was not asked to identify the tendency evidence, or to explain how it might assist the jury when considering individual charges. The Court does not know whether the defence saw some benefit in the absence of directions which should have made explicit reference to the distinctive features of the complainants' accounts. The absence of any exception must be taken as some indication that trial counsel saw no injustice or error in the course that was followed.[298]

227 Notwithstanding these powerful considerations and the waiver by the defence to any objection to the use of the evidence as tendency evidence, the trial judge was not relieved of the obligation to adequately direct the jury as to tendency reasoning.[299] The directions were, in our respectful view, unsatisfactory. It is highly unlikely that the jury could properly have employed tendency reasoning.

228 Some of the deficiencies in the present direction are much the same as those discussed in *RR*.[300] Although *RR* was concerned with a coincidence evidence direction, in which there had been a failure to identify the evidence supporting such reasoning and which focussed upon whether the acts had a sexual connotation, the observations made in *RR* are pertinent to the present direction. The direction which the trial judge gave in *RR* would not have enabled the jury to recognise whether the evidence had the necessary quality to permit coincidence reasoning. It amounted to an instruction that the jury might reason that if the applicant had the tendency to commit an act of a sexual nature with one child, then it was more likely that he committed the sexual acts alleged by the complainants. It was noted in *RR,* that even if the evidence possessed a commonality of features or underlying unity 'the concept of probability reasoning had to be sufficiently explained to the jury so that the basis for drawing the inference was understood'. The direction referred to a 'consistency of pattern', earlier explained as 'a pattern of systemic sexual conduct' that made it improbable that the evidence of the complainant was not true. The jury had been left with the erroneous impression that if

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298 *R v Wright* [1999] 3 VR 355, 356.

299 See *R v DCC* (2004) 11 VR 129.

300 [2011] VSCA 442.

they accepted that the evidence established that there was a sexual connotation, then the sexual acts alleged by the complainants were rendered more likely.[301] These criticisms are germane to the present direction.

229 The following observations of Coghlan JA in *RJP*,[302] whilst concerned with coincidence reasoning at common law, are also apposite as they emphasise the need to identify for the jury the features of the evidence which enable the form of reasoning which the Crown relies upon, and the danger of impermissible reasoning in the absence of such an instruction.

> Even assuming there was underlying unity, the charge which dealt with cross admissibility was deficient in that it only summarised the way the crown case was put. It was incumbent upon the trial judge to identify the features in each complainant's account which, as a matter of law, were capable of being used to support each other. The charge should have directed the jury that if they were satisfied as to that underlying jury, they may use such evidence in determining whether a complainant's evidence on a particular count was truthful.
>
> There is a reluctance in cases similar to the present case to go into detail about the counts but proper instructions about underlying unity can only be given after some detailed analysis of the counts has occurred.
>
> The lack of particularity in his Honour's charge left open to the jury that it was appropriate to reason from the relationship evidence, the opportunistic nature of the offending and the position of authority of the applicant that there was an improbability of coincidence on all of the counts. That possibility is unacceptable and has given rise to a miscarriage of justice.[303]

230 The directions were inadequate, and those given contained serious errors. First, as the model direction in the Charge Book sets out, the trial judge should identify the evidence upon which the prosecution relies as constituting tendency evidence. The trial judge was obliged to identify the particular evidence set out in the tendency notice referred to at paragraph [21] above, and to instruct the jury to consider whether such similarities or common features of the offence or the circumstances in which it was committed as they found existed increased the probability of the act the subject of the charge they were then considering. The trial judge did not identify the evidence of pattern or similarity, or the circumstances that constituted the tendency. Her Honour's reference to a 'pattern of behaviour' was linked only to the particular

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301 Ibid [43]–[44] (Redlich JA, Neave and Hansen JJA agreeing).

302 (2011) 215 A Crim R 315.

303 Ibid 334, [105]–[107] (Redlich JA and Macaulay AJA agreeing).

state of mind of the applicant. It was unlikely to have been understood as requiring the jury to consider whether there was a pattern of conduct engaged in by the applicant towards the complainants. Critically, this was not done.

231 Second, as the model direction suggests, the jury should be directed to scrutinise that evidence to determine whether it did demonstrate a pattern of conduct or similarity of circumstances. This direction enables the jury to recognise whether the evidence has the necessary quality to permit tendency reasoning. No instruction to this effect was given.

232 Third, her Honour did not follow the model charge, and direct the jury to consider the act from each charge which was in issue, and to which that tendency evidence might relate in order to determine whether such pattern or similarities as they found existed made it more likely that the act was committed.[304] These critical directions were necessary if one were to have any confidence that the jury engaged in sound tendency reasoning. The instructions were thus likely to have misled the jury as to how they could legitimately reason. The fact that the evidence was to be treated as tendency evidence, and so cross-admissible, did not relieve the trial judge of the duty to explain in this manner how the cross-admissible evidence could permissibly be used.

233 Instead of instructing the jury as to this process of reasoning, her Honour took the jury directly to the general conclusion which the prosecution had asserted in its tendency notice flowed from that process, namely that the applicant had a particular sexual interest in the complainants and that he was prepared to act upon that interest. The trial judge should not have instructed the jury to the effect that the tendency upon which the prosecution relied was the applicant's willingness to act upon his sexual interest in the complainants and commit the offences charged. We earlier explained why such a direction should not have been given.[305] The applicant thus complained on appeal that the explanation that 'the prosecution led the evidence to prove that the accused had a sexual interest in the complainants' and that a

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304 The need for such directions is set out in the Victorian Criminal Charge Book bench notes in the model directions.

305 See paragraph [22] above.

finding 'that the accused was sexually attracted to the complainants and was willing to act on that attraction' may be used to determine 'whether the accused committed the offences charged' was too general. It was likely to produce impermissible reasoning by the jury. The applicant, with some force, contended that the instruction invited circular or 'bootstrap' reasoning in which the jury, having determined that the applicant had a sexual interest in all of the complainants (which he was prepared to act upon) probably committed the offences charged. It invited pure propensity reasoning and was not the basis upon which the complainants' evidence was cross-admissible.

234 Tendency evidence in relation to a single complainant may demonstrate the accused's sexual interest in that complainant, and so increase the probability that further charged offences were committed.[306] Such tendency reasoning has in the past been described inaptly as 'guilty passion' reasoning.[307] But, in the absence of identification of the evidence which constituted the tendency evidence, instructions to the effect that the applicant was sexually attracted to 'all the complainants' and was prepared to act upon that attraction did not advance the process of tendency reasoning. It served only to deflect attention from whether there existed sufficient similarities in the applicant's conduct, or the circumstances surrounding its commission on particular charges, or both, as would render more likely the occurrence of the facts in issue on other charges concerning another complainant.

235 Insofar as the evidence of an offence provided 'context' for the offences committed against a particular complainant, the direction must also have been confusing because the trial judge had introduced this direction by stating that she was instructing them as to how the evidence of one complainant was supportive of another. The jury may have understood from the instructions given that the use of the evidence on one charge as providing 'context' could be used to support the allegations of other complainants.[308]

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306 *HML v The Queen* (2008) 235 CLR 334; *R v BJC* (2005) 13 VR 407; *R v VN* (2006) 15 VR 113; *R v EF* [2008] VSCA 213.

307 *Rolfe v The Queen* [2007] NSWCCA 155.

308 *HML v The Queen* (2008) 235 CLR 334.

236 Further, the direction as to the inferences that could be drawn from this evidence was, for these reasons, also likely to lead the jury to embark upon impermissible reasoning.

237 This ground is made out.

Ground 1 — The verdicts in respect of Charges 2, 3, 7, 8, 11, 12 and 13 are unsafe and unsatisfactory.

238 For the purpose of any retrial, it is necessary to consider this ground and the discrete arguments that the evidence on particular charges rendered those convictions unsafe.

Charge 2

239 The applicant submits that the verdict of guilty on Charge 2 was unsafe on the basis that it was supported by tenuous evidence. The Crown relied on the complainant GS's answers in the VARE:

Q234: So what, when you said that you saw, on the September holidays that have just gone —

A234: Mm.

Q235: — what, what happened, what did you see him do?

A235: Oh, he would do it with me too, like, we will start play fighting, and then, like, oh, you know, I didn't know that he might do that, so, like, he would grab us there then.

Q236: So tell me about a time when he did that.

A236: Yeah, as I said, last holidays and —

Q237: Yeah.

A237: … but he would do it, like, when we're older. Like, when we're little —

Q238: So last —

A238: — he never did it.

Q239: Last holidays, what, tell me what he did.

A239: Like, we will play fight and then he would, like, try and grab us in the privates —

Q240: Mm.

A240: — and, yeah.

Q241: So try to grab, or did he grab you?

A241: Oh, he would've tried to, but then he, yeah, he sort of did. Sometimes he did and sometimes he'd try.

Q242: So when you say, He did, what did he do? Tell me about it.

A242: Well, yeah, we were, like, playing, we were playing games and he would, you know, grab there. And then we would fall back down on the ground, and we would start playing again, and, yeah.

Q243: How would he grab your private?

A243: Oh, you know, the normal way, he would just grab it, like, yeah, with his hand he would grab it.

Q244: How long did he grab it for? What did he do with his hand?

A244: Yeah, he just grabbed it and then he let go, but —

Q245: OK.

A245: — yeah, he just grabbed it, then he let go.

Q246: Did he say anything when he did it?

A246: No. Like, we were laughing, but he, yeah, he didn't saying anything when he did it.

Q247: And whereabouts on your private part did he touch, like?

A247: Yeah, the, like, directly, he wouldn't touch here or here, like, he would, like —

Q248: Yeah.

A248: — if he wanted to do it.

Q249: But which part? Well, what do you —

A249: Oh —

Q250: — call your private part?

A250: Oh, penis, penis, penis.

Q251: Penis. So whereabouts on that area would he touch?

A251: All around it, you know, ‘cause his hand’s big, he would try to do that, and sometimes he would’ve done that, but, yeah.

The VARE excerpt highlighted by the applicant was not the only evidence relating to Charge 2. GS made numerous other references during the VARE to the applicant grabbing GS’s crotch while play fighting. The complainant’s mother gave evidence that GS had told her that

the applicant's hand would stray and touch his groin when they were play fighting. On this evidence, it cannot be said that the jury must have entertained a doubt about the applicant's guilt.

Charge 3

240 Charge 3 arose from a statement made by the complainant MS to her father while they were on holiday in Queensland. The complainant told her father, 'out of the blue', that she saw the applicant's penis. When asked to elaborate by her father, the complainant demonstrated that the applicant had opened his pants and shown her his penis. The complainant's mother overheard the conversation. On the evening of 10 October 2011, the day MS returned to the day-care centre, she told her mother that she had '[seen the applicant's] penis again' that day, indicating that it was not the first time she had seen his penis.

241 The Crown sought to rely on this evidence under s 377 of the *Criminal Procedure Act 2009*, rather than s 66 of the *Evidence Act*. Section 377 provides:

> 377 Exception to hearsay rule—previous representations made by complainant under 18 years
>
> (1) In this section—
>
> ***asserted fact h***as the same meaning as in the Evidence Act 2008;
>
> ***hearsay rule*** has the same meaning as in the Evidence Act 2008;
>
> ***previous representation*** has the same meaning as in the Evidence Act 2008.
>
> (2) This section applies in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence if a complainant under the age of 18 years who made a previous representation is available to give evidence about an asserted fact or the complainant's credibility is relevant.
>
> (3) Subject to subsection (4), if a complainant has been or is to be called to give evidence, the hearsay rule does not apply to evidence to support an asserted fact or the complainant's credibility that is given by—
>
> (a) the complainant; or
>
> (b) a person who saw, heard or otherwise perceived the

representation being made.

(4) Subsection (3) does not apply unless the court is satisfied that the evidence is relevant to a fact in issue and is sufficiently probative, having regard to the nature and content of the representation and the circumstances in which it was made.

(5) A witness has personal knowledge of the asserted fact if his or her knowledge of that fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

(6) Evidence of the kind referred to in subsection (3) is admissible to support the credibility of the complainant as a witness.

(7) Nothing in this section takes away from or limits any discretion a court has to exclude evidence.

242 An asserted fact is defined in s 59 of the *Evidence Act* as follows:

(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

(2) Such a fact is in this Part referred to as an ***asserted fact***.

243 At the beginning of the trial, the trial judge ruled that the evidence from MS's parents was admissible. She advised counsel that if, after having completed the special hearing with MS, the parents' evidence in respect of Charge 3 was the only evidence against the applicant on this charge, she would consider giving an unreliability warning. Though it was the only evidence, no warning was sought and none was given.

244 During MS's VARE interview on 13 October 2011, she did not make reference to the alleged offence constituting Charge 3. She stated that the incident on 10 October 2011, constituting Charges 4 and 5, was the only occasion on which she had seen the applicant's penis. No evidence in respect of Charge 3 was elicited during that interview. Moreover, MS's mother gave evidence that three days after telling her father about the first alleged incident, MS retracted the assertion she had made to her father. After cross-examination during the special hearing, the prosecutor sought leave to re-examine the complainant. The prosecutor asked the complainant if, in addition to the incident which occurred on 10 October 2011, she had seen the applicant's penis on any other occasion. The complainant said no.

245 The applicant challenged the admissibility of the complaint evidence under Ground 3.

He alternatively submitted that this evidence, if admissible, did not provide a satisfactory basis to support the conviction. Upon it becoming apparent during the course of oral argument that the evidence had not been wrongly admitted, the applicant abandoned Ground 3 and pursued the submission that the conviction was unsafe. For the reasons that follow, the applicant was correct to concede that the evidence was admissible and to focus upon the bases upon which it should have been excluded.

246 The applicant's contention that s 377(3) of the *Criminal Procedure Act 2009*, as an exception to the hearsay rule, did not permit a witness to give evidence of a fact asserted in a previous representation when that fact is only asserted in the previous representation and not in the complainant's own evidence or testimony was unsustainable.

247 An additional question arose as to whether s 377 applied to the exclusion of s 66 of the *Evidence Act*. In our view, this question was resolved by the Court in *Stark v The Queen*:[309]

> In contrast to s 66(2A), s 377 is not accompanied by a 'Note' explaining its genesis. Had such a note been included, it would doubtless have confirmed what the extrinsic materials make clear — that s 377 (like its predecessor, s 41D) was enacted to give effect to the Commission's 2004 recommendation, that there be a 'child-specific exception' under which the admissibility of the hearsay evidence *would not* depend upon the 'asserted fact' being fresh in the child's memory.
>
> As we have seen, both the Commission's recommendation and the legislative enactment were directed at *extending* the hearsay exception created by s 66. In short, the provision was intended to establish a different, and less rigorous, test of admissibility in the case of a child complainant. The focus is not on whether the child's memory of the alleged assault is fresh but on whether the evidence 'has sufficient probative value'. Importantly for present purposes, evidence which satisfies s 377 is admissible for the specified purposes, whatever the position might be (or have been) under s 66.
>
> The notion that s 377 would 'extend' the hearsay exception would seem to carry with it the assumption that evidence which was not admissible under the (more liberal) test in s 377 would not be likely to have satisfied the requirements of s 66. It is unnecessary to explore whether there is in fact any realistic scope for complaint evidence to be admitted under s 66 in circumstances where it would not be admissible under s 377. There is certainly nothing in the legislative history or in the language of s 377 to suggest that Parliament, in enacting s 377, intended to render s 66 unavailable in a case involving a child complainant. Rather, the provisions were to operate 'in conjunction'. But evidence which would satisfy the 'fresh in the memory' test in s 66 would almost certainly be viewed as 'sufficiently probative' for the purposes of s 377, such that s 66 would have no additional work to do.[310]

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309 [2013] VSCA 34.

310 Ibid [38]–[40] (Maxwell P).

248 No complaint could be made that her Honour's ruling was made prior to the special hearing and prior to the VARE being tendered into evidence. For the purpose of admitting the evidence at that stage, it was sufficient that the complainant made a representation and that the complainant would be called to give evidence. As was to become evident later on in the trial, the asserted fact had been recanted during the VARE and during re-examination by the prosecutor. Had such facts been known to her Honour, the evidence could have been excluded under s 377 on the basis that it was not sufficiently probative, or it could have been excluded under s 137 of the *Evidence Act* on the basis that its probative value was outweighed by its prejudicial effect.

249 Although the sequence of events at trial meant that the parents' hearsay evidence was not excluded, the verdict under Charge 3 is plainly unsafe. The complainant flatly denied on the VARE, and during re-examination, that she had seen the applicant's penis more than once. There was no direct evidence to support this charge, the Crown relying solely on the hearsay evidence of the complainant's parents. The complainant's mother had also given evidence that MS had retracted her allegation three days after first describing the incident to her father. In light of this limited evidence, it was not open to the jury to be satisfied beyond reasonable doubt that the applicant was guilty of this charge.[311] We would grant leave, allow the appeal on this part of this ground and enter a verdict of acquittal.

Charge 7

250 Under Charge 7, it was alleged that the complainant, OA, was upstairs playing on a laptop when the applicant put his hands down her pants and touched her vagina in a circular pattern.

251 OA stated during cross-examination and re-examination that she was only ever alone upstairs with the applicant for a couple of seconds, when she stayed to pack up toys after the other children had gone downstairs. The applicant submitted that the complainant's evidence

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311 *M v The Queen* (1994) 181 CLR 487, 493.

in cross-examination and re-examination establishes that she was never alone upstairs with the applicant for a period of time long enough for this offence to have taken place.

252 This submission is misguided because the conviction on Charge 3 was not contingent on the applicant being alone upstairs with the complainant. Having regard to the evidence led in support of Charge 7, which is drawn from OA's first VARE on 13 November 2011, there is no suggestion or necessary inference to be drawn that OA and the applicant were alone when this offence occurred. It is unfortunate that in summing up the circumstances of the offence in her charge, the judge stated that it had occurred 'when they were alone upstairs', as this was not the evidence as led, but no objection was made by defence counsel to her Honour's summation.

253 The room upstairs contained a laptop computer and a Nintendo Playstation, which were in separate parts of a 'fairly small' upstairs room. GS and OA's brother would generally play on the Playstation, whereas the complainant would play on the computer. OA did not specify whether she was alone with the applicant at the time Charge 7 occurred, and there was no inconsistency between her account of Charge 7 and her evidence that she was never alone for more than a few seconds with the applicant. No reason has been demonstrated why the jury should have entertained a reasonable doubt about her evidence that the offence occurred while other children were playing the Playstation. There is nothing unsafe about the jury's findings on this charge.

Charges 8, 12 and 13

254 Each of these offences occurred while the applicant was upstairs with the complainant, in the company of GS and her brother. The Playstation was positioned to the left and in front of the computer, so that OA, playing on the computer, would have been visible to the boys playing on the Playstation. The applicant submits that the allegation that the applicant could have committed sexual acts on OA, in the presence of GS and OA's brother, without either of them becoming aware of the conduct, was implausible, if not impossible.

255 This submission must be rejected. Charge 8 involved the applicant placing the complainant's hand on his penis over his clothing. For Charge 12, it was alleged that the applicant touched the applicant's vagina over her clothing. He then put his hand inside her pants and touched her vagina (Charge 13). These acts, while invasive, could have been committed without diverting either of the boys' attention. As the respondent rightly observed, it is common experience that children playing on a computer game can be oblivious to what is going on around them. There was nothing implausible about the complainant's evidence and there is no basis for concluding that the verdicts were unsafe or unsatisfactory.

Charge 11

256 Under Charge 11, it was alleged that the applicant placed his hands on the complainant's bottom underneath her pants and above her underpants, while she was outside patting the family dog. This evidence was adduced during the complainant's second VARE on 17 November 2011. In cross-examination, OA gave the following evidence:

DEFENCE COUNSEL:	So you certainly would never touch the dog, is that right?
OA:	No, but I did get to pat it a couple of times.
DEFENCE COUNSEL:	Do you say — did [the applicant] ever touch you when you patted the dog?
OA:	No.

257 The complainant was not re-examined on this evidence. In light of the complainant's contradictory evidence, and in the absence of any supporting evidence, this verdict cannot stand. It was not open to the jury to find beyond reasonable doubt that the applicant was guilty of Charge 11. We would grant leave to appeal as to this part of Ground 2 and set aside the verdict of guilty on this charge.

Conclusion

258 We would grant leave to add Ground 6, grant leave to appeal on that ground and allow the appeal. The convictions on all counts must be set aside. We would grant leave to appeal

as to Ground 1, allow the appeal in part and enter a verdict of acquittal on Charges 3 and 11. We would direct that the applicant be retried on Charges 2, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15 and 16.

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