## ADVERSARIAL TRIAL

### Answering Exam Questions

1. Is it relevant?
2. If relevant then admissible
3. Does any legal exclusion apply? (Rules of law and discretions) – only if evidence is relevant do questions about admissibility apply
   a) Exclusion on grounds of unreliability: hearsay, opinion evidence
   b) Exclusion on ground of tendency to mislead: whether logical probativeness of evidence is outweighed by prejudicial effect, similar fact evidence
   c) Exclusion on ground of public policy: privilege, evidence obtained unfairly - fairness discretion
4. Or evidence may be admitted subject to a warning or direction by judge

### Characteristics of the adversarial trial

Governed by: law of procedure (Crim code, rules of court), the law of evidence and professional ethical rules.

- Jury as the ultimate tribunal of fact
- Judges determine the law and facts, give a summing up and directions about law of evidence and ensure jury is not mislead by inadmissible evidence
  - Sometimes line can be blurred
  - E.g. in deciding a question of law whether or not a confession is admissible, a judge may be required to consider conflicting factual allegations as to how it was obtained and choose which facts to believe
  - E.g. in criminal cases – may be asked to rule on whether there is no case to answer…that there has been insufficient factual evidence led upon which a jury could be satisfied beyond reasonable doubt of the accused's guilt. This is almost an exclusive factual assessment by the judge, even though notionally the judge us making a finding of law
- Preponderance of oral presentation through witnesses who can be cross-examined (orality)
- Continuous presentation of evidence at a trial (continuity)

**Orality:** evidence generally presented orally, assurance of reliability –given under oath and other side able to test through cross-examination (exceptions documentary evidence), physical/real or documentary evidence tendered through oral testimony (to establish the character of the evidence)

**Continuity:** once trial begins, generally all evidence is presented continuously

## MATERIALITY AND RELEVANCE

Evidence must be both material and relevant to be admissible

### Two limbs:

1. Positive limb: if relevant and material, then admissible
2. Negative limb: unless excluded by a rule of evidence law (evidentiary rules) or at discretion of the court (when probative value outweighed by other factors)

### Materiality

Material = means directed at a fact in issue/element of the offence

Facts in issue – legally significant facts in the light of the cause of action or offence (not so much probative force as legal significance)

Will be immaterial if directed at issue or fact that is not part of the action of offence – something that does not need to be established

### Relevance

A legal question:

Does the evidence rationally affect the probability that a fact in issue or an element of an offence did or did not occur?

**Ordinary logic:** applying ordinary logic to the evidence, does this piece of evidence make the occurrence of the fact more probable than not

### Ordinary experience

- Relevance is to be determined on the basis of the ordinary experience of things
  - E.g. couples fight and have arguments and ordinarily this doesn't result in murder
  - E.g. expression 'I'll kill you' is often used as a figure of speech, people do not ordinarily act on this
  - E.g. person matching description of the accused running away from the scene, relevant since puts them in the vicinity of the offence at the right time (person committing a crime might be more likely to flee or run away from apprehension – consistent with a guilty conscience– innocent person might stay or walk away from the scene)

***Hollingham v Head:*** does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would be fraught with great danger.

Relevance is defined in terms of tendency of evidence to render the existence of a disputed fact more or less probable than would otherwise be the case if the evidence were not adduced.

### Two possible formula:

1. Natural relevancy test: even minimally probative evidence is admissible
2. Legal or sufficient relevancy test: only sufficiently probative evidence is admissible

**Note:** in any case, general judicial discretions may apply to exclude evidence with minimal probative value, e.g. where it has an unfair prejudicial affect.

***R v Stojkovic:*** the applicant must…demonstrate that the evidence was sufficiently relevant or, to put it another way, not too remote – was its weight such that it could serve to add to or detract from the probability of the principle issue being established

### Compare with 'relevance' under Uniform Evidence Acts

No mention of sufficient relevance

**s 55(1)** relevant evidence is evidence that could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings

**s 135 Uniform Evidence Acts:** confers discretion to reject relevant evidence on the basis that it might be prejudicial, misleading, confusing or a waste of time

***Smith v R:*** accused of bank robbery, security cameras in bank showed some of the face, issue was identity – was it the accused being depicted in these videos. Two police officer gave evidence of previous dealings with accused and that he was person in photos/camera. **HC:** inadmissible evidence of PO since not relevance, evidence did not add to empirical data available to the jury from w/ it could determine whether accused was person depicted in photo, merely a conclusion officers had reached which was not based on information beyond that available to the jury.

If the evidence is not relevant, no further question arises about its admissibility arise. Irrelevant evidence may not be received by the court.

### Different forms of relevance

- Direct evidence - observation of elements of an offence, no inferences need to be drawn, either accept as true or not
- Circumstantial – evidence from which you have to infer something
  - E.g. accused running away from scene – asking jury to connect it to X's guilt by way of an intermediate process…knowledge of human behaviour – those who run away from the scene of the crime may have a guilty conscience
- Relevance to fact in issue or collateral fact
  - Credibility of the witness (collateral relevance)
- Relevance may be admitted on a preliminary basis because probative force depends on it being taken together with evidence yet to be presented
  - E.g. circumstantial evidence often relies on building a case
  - E.g. tendering a gun with fingerprints, evidence from expert that gun found on accused

***Goldsmith v Sandilands* (2002) McHugh J:** whether a fact is a fact in issue depends upon the pleadings and particulars of each party's case. The facts in issue reflect the material facts that constitute the claimant's cause of action – which may be defined as the set of facts to which the law attaches legal consequences that the claimant asserts. The facts in issue also include those material facts that provide any justification or excuse for, or a defence to, the cause of action.

### Weight

Weight is a matter of fact (not a legal test), some evidence may be relevant but have very little weight (i.e. have very little probative force).

Weight may be greater when taken together with all the evidence.

Weight is a matter for the jury in criminal cases, not an issue for the judge to rule on.

## STANDARD AND BURDEN OF PROOF

### Standard of Proof

Crown/plaintiff have to meet an evidentiary standard – beyond reasonable doubt or on balance of probabilities. If a reasonable alternative explanation exists with some persuasive force consistent with innocence then the standard has not been met.

This is a rational test, law says should not try to explain what 'beyond reasonable doubt' is.

### Burden of Proof

- **GENERAL:** Burden of proof is the obligation to adduce evidence to support a particular contention.
- **LEGAL BURDEN:** The burden of persuading the court to the standard required *in relation to a particular issue.*
  - *Woolmington v DPP* [1935]: laid down principle that common law requires prosecution to have ultimate legal burden of proving the accused's guilt – by proving each and every element of the offence
  - This might shift during the trial, e.g. might shift to the defence to meet the standard on a particular issue that arises during the course of the trial
  - E.g. might have to prove something in a voire dire in relation to admissibility of evidence
  - Ex
- **EVIDENTIAL/EVIDENTIARY BURDEN:** The burden of adducing enough evidence to warrant a court considering an issue.
  - Having enough evidence to make an issue come alive, for the court to have to deal with it
  - Sufficient evidence to raise an issue
  - Very low burden, only bringing it to light for the court to deal with, not to persuade
- **ULTIMATE BURDEN:** Adducing sufficient evidence to *win the case* on the relevant standard (always remains with the Crown/prosecution)
- **TACTICAL BURDEN:** The factual burden of preventing the court from making an adverse inference or decision by disproving the adversary's evidence or by presenting other evidence.

### Incidence of the burden of proof

Ultimate burden is burden of presenting sufficient evidence to win the case

Legal burden is the burden of persuading a court on a particular issue:

- This burden is distributed between the parties during the course of a trial. This burden shifts between parties
  - E.g. s 129(1)(c) Dangerous Drugs possession of a dangerous drug
  - Law provides occupier of premises is treated as if in possession of the drug
  - But also says that you can prove you were totally unaware of the presence and had no reasons to suspect the presence of the drugs on the premises (legal burden on accused)

### This burden may have different standards attached to it:

- Eg insanity – accused has evidential and legal burden
  - Presumption of sanity s 26 Crim Code – every person presumed to be of sound mind and to have been of sound mind at any time which comes into question until the contrary is proved
  - Defence has to raise evidence to make this an issue (evidentiary)
  - And also has the legal burden of proving insanity is established
- Eg self-defence – accused has evidential but not legal burden
  - Only an evidentiary burden of the accused, only has to raise it in some way
  - Then burden shifts onto the Crown to disprove self-defence (legal burden)

## CATEGORIES OF EVIDENCE

### Presumptions of Law/Legal Presumptions

Sometimes the law presumes certain facts, so that the part adversely affected by the presumption has the burden of disproving it. A short cut in terms of otherwise having to prove certain facts.

Mostly rebuttable presumptions, express or by necessary implication from statute.

**Example:** Presumption of sanity s 26 Criminal Code Qld.

### Formal process of admissions

Occurs when a party concedes a fact in issue in pre-trial pleadings (*Fitzgerald v Hill*)

Or in response to a notice to admit, or in open court (Crim Code s 644)

A free and rational guilty plea is a formal admission of every element of the offence charge (*Meissner v The Queen*), whether it is true or not (*Holdway v Arcuri Lawyers*).

### Real Evidence

Things and documents, unless tendered for content of the document (testimonial).

- Brought to court by a witness tendering the evidence
- Importance of ensuring integrity, continuity and accuracy
- Authentication by witness – prove that exhibit is what it purports to be/portray
- Excluded: if misleading or intended to mislead, or more prejudicial than probative

***R v Ames*:** prosecution tried to tender graphic photos that would engender a sense to the jurors of wanting to convict someone based on the gruesome nature of the photos, which did not add anything to the case.

## JUDICIAL NOTICE

Judicial notice may be taken of certain categories of facts – facts that are known and regarded as being so 'notorious' (self-evident or well know) that a court may assume them to be true without the need for formal proof, and would be ridiculous to require a party to tender evidence on this fact.

**Example:** it is dark at night, roads are more slippery when they are wet

**Cross on Evidence:** When a Court takes judicial notice of a fact, it declares that it will find that the fact exists, or direct the jury to do so, even though the fact has not technically been established by evidence

***Holland v Jones*:** no exhaustive list of things that are open to judicial notice. Wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the court 'notices' it, either simpliciter if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt

### 1. Common notice – Judicial Notice without inquiry

Commonly known and generally accepted facts, known to everyone.

- So commonly known and accepted
- Within the relevant community/area
- That is cannot reasonably be disputed

### Examples

- Geography (e.g. that the capital of Qld is Brisbane)
- Heroin is addictive
- The holocaust happened
- The falling value of $'s – the existence of inflation
- That cannabis is known as 'grass'
- That cancer is a major health problem

### Case examples where judicial notice was taken

- University exists at least partly for the advancement of learning (*Re Oxford Poor Rates Case*)
- Cats are kept as domestic pets (*Nye v Niblett*)
- Special precautions must be taken to protect children from dangers that are more obvious to adults (*Clayton v Hardwick Colliery*)
- AIDS may now be regarded as a life-threatening disease (*Mutumeri v Cheesman* (1998))
- Sunday markets are held at Waterfront place, Brisbane (*Naomi Marble and Granite v FAI*)
- Crèches are in existence for the use of working mothers with children (*Trenerry, Hedge and Suncorp*)
- Interest on bank credit cards is within the vicinity of 15-16 per cent (*Re Planet Securities Unit Trust v Dalrymple*)

### Case examples where judicial notice was NOT taken:

- Cannot note accuracy of gene scanners used in DNA identification (*R v Hytch* (2000))
- Cannot note drinking habits of Australians – still the subject of dispute among reasonable men (*Munro v Tooheys Ltd* (1991))
- Cannot note 'normal' yields of cannabis crops or their street value – not yet sufficiently notorious or indisputable (*R v McCourt*)

### A fact may become notorious by being continually noted by Courts

- *R v Hunt*: if a person has a BAC nearly two and a half times the legal limit they are likely to be intoxicated to a substantial degree. It is a matter of the commonest of common knowledge that if a person had in his blood a concentration of alcohol nearly two and a half times the legal limit…he is likely to be intoxicated to a substantial degree

### Issues of when a judge or magistrate may make use of their own personal knowledge

Facts that are judicially noted without enquiry are supposed to be so notorious that *everyone* knows them to be true, not the function of this area of law to allow a judge to shown off their own special expertise beyond the law or to use information acquired as part of a hobby or special interest study.

**At the same time:** cannot avoid a judge bringing their own professional expertise to the case, judges are supposed to know the law and direct the jury on it.

**However…….**

***Wetherall v Harrison* [1976] QB 773:** held a lay magistrate who was also a doctor could guide his fellow justices through certain evidence which was given regarding 'needle phobia' in a motorist required to submit to a blood test, provided he did not seek to replace that evidence with an expert opinion of his own He is not there to give evidence himself, or to give evidence to other justices, but he can employ his basic knowledge in considering, weighing up and assessing evidence given before the court

### When judges can use their local knowledge

Some facts may be regarded as notorious in some localities even if totally unknown in others.

**Tasmanian SC in *Warren v Pilkington*:** able to judicially note that the sun never sets as late as 8.45pm in Tasmania.

***Simpson v Fraser*:** judicially noting the existence of Lennon's Hotel in George St Brisbane.

### 2. Readily ascertainable knowledge/Judicial notice after inquiry

Courts take judicial notice of a fact after carrying out research, may be incontrovertible but just not instantly or already known to everyone.

Judges able to independently access sources and accept facts contained within them.

**Typical references:** standard works of reference, dictionaries, maps, reputable scientific texts, rules of a well-known international body, maps and charts (**EA s 65**).

- Knowledge capable of accurate and ready determination
- From reliable sources
- Whose accuracy cannot reasonably be questioned
- Not controversial, divided or disputed issues
- Facts that are notorious and beyond dispute, but may only be immediately known to specialists in that field

***Munro v Tooheys*:** a point capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy.

***Al Shakarji v Mulhern* [2010] QDC:** status of Google Earth Maps/photographs, Google earth photograph in evidence used to depict location where police had operated speed camera…judge said of admitting since maps produced by governments are admissible, ipso facto commercial maps should be accepted as showing at least a general layout of streets etc. Especially Google Earth …possible by looking at view from different heights to start off with whole of town or citiy visible and then get progressively closer to relevant part of it – in present case could have produced photo of whole of Bowen, then part of Bowen which was recognisably part of the first photo – obvious enough that magistrate (resident magistrate in Bowen) could recognise it and then take judicial notice of fact this was a photo of Bowen.

### Case examples

- Taking judicial notice of the normal period of human gestation
- The Court was invited to take judicial notice of the precarious law and order situation in Qld (not able to take judicial notice of this – a controversial statement)
- Judicial notice of taken of the fact that the internet is full of violent and graphic material
- Basic principles of communism – by means of reference tests (*Australian Communist Party v Cth*)
- Which part of an Indian hemp plant contained the seeds using Encyclopaedia Britannica (*Horman v Bingham*)
- Reference to medical journals to determine the extent of nervous shock relating to the caused of psychological injury (*Jaensch v Coffey* (1984))
- **Whether or not a camel was a wild animal (*McQuaker v Goddard*)
  - Court allowed parties to supplement written word of zoological texts with submissions and expert evidence on the matter, since it was an issue that impacted significantly upon the outcome of the case)
  - Duty of care involved in preventing a camel from biting the plaintiff

### Use of online dictionaries and Wikipedia

***Hayes v Surfers Paradise Rock and Roll Café P/L* [2009] QDC:** employee of Crazy Horse Club handing out cards on the street which read …'continuous striptease, private lap dancing room'. Charge od advertising adult entertainment – cannot publish an advertisement that describes the sexually explicit nature of acts performed in the adult entertainment. Looked up Wiktionary to define 'lap-dance' since no prosecution evidence was led of what 'strip-tease' or 'private lap-dance meant'. **Held:** denial of natural justice by not allowing the parties opportunity to make submissions with respect to the Wiktionary entry as to the meaning of 'lap dance'.

Also used Oxford and Macquarie dictionary for definitions of 'tout' (in context of offence of touting or spruiking for adult entertainment place).

***MZXMM v Minister for Immigration & Anor*:** use of a Wikipedia site…. whilst the website might be an acceptable general source of information perhaps for a primary or secondary school student it is difficult to conceive that it would be material which an undergraduate could rely upon in a bibliography or a list of references at any respectable university. Reliance upon a website of this kind would appear to transgress well established academic and legal principles applying to texts including identification of the author, distinctions between opinion and facts and accurate identification of source material.

### Problems

- Hard to back up the notion that it is inherently unreliable or that it does not have quality control to provide reliability
- Articles may be incomplete, being edited at that point in time, recently vandalized,
- A critical point for judicial notice is public acceptance – something which Wikipedia lacks
- However, Wikipedia is ranked 7th in the world in regards to most accessed sites – most widely accepted reference source worldwide
- Researchers such as T. Chesney, have shown that the accuracy of content in Wikipedia is broadly comparable to that in many other encyclopaedic references
- An empirical examination of Wikipedia's credibility (2006)
- Vandalism is an issue but ability to self-heal, at least for popular articles, is remarkable
- Vandalism is often repaired within minutes (either automatically or manually)
- Apparently there is only a 0.007% chance of viewing a damaged page (Priedhorsky)

### 3. Legislative Facts

- Facts relevant to interpreting legislation
- Distinguish from adjudicative facts
- Judges may make own inquiries into relevance, social, political, ethical and historical issues
- Examples: when statute passed, policy goal of statute, what evil the statute addressed or remediated, processes in parliament that led to the passing of the Act

***Woods v Multi-Sport Holdings Pty Ltd* (2002):** statistics relating to the cost to the health system of accidental injuries in an action for negligence involving injuries to an indoor cricketer.

**McHugh J (not in majority, but useful observation regarding use of statistics):** in my view it is legitimate, and in accordance with long-standing authority and practice to refer to these statistics. They fall into a class of legislative facts that a court might judicially notice and use to define the scope or validity of a principle or rule of law.

### Judicial Notice under Evidence Act

**S 65:** in any case in which an issue arises regarding territorial limits, the location of a place or the distance between two places, then the court may consult a published book, map, chart or document that appears to be a reliable source of evidence'

**S 66:** allows proof by certificate of 'astronomical phenomena' such as sunrise, sunset and degree of twilight at any given time

**S 68:** proof of foreign and inter-state laws by way of authenticated copies

**S 41:** Required to note State Public Seal

**S 42:** Identities and signatures of past and present State Governors, Ministers and judicial officers

**S 43: Qld crts are required** to judicially note the law of their own jurisdiction, both statutory and case law

## WITNESSES

### Competence of Witnesses

Only competent witnesses can testify, competent is a person permitted by law to testify. Up until recently a lot of categories/classed deemed not competent to give evidence in court.

**S 9(1) Presumption:** Every person, including a child is presumed to be-

a) Competent to give evidence in a proceeding; and

b) Competent to give evidence in a proceeding on oath.

(2) Subject to this division.

### Young children

**S 9A(2):** Deemed to be competent if in the court's opinion they are able to give an intelligible account of events which they have observed or experienced.

Then, **s 9C** applies to adducing expert evidence to inform the court's opinion.

- Expert evidence is admissible in the proceeding about the person's or child's level of intelligence, including the person's or child's powers of perception, memory and expression, or another matter relevant to the person's or child's competence to give evidence, competence to give evidence on oath, or ability to give reliable evidence

### Witnesses interested of convicted of offence

No person shall be excluded from giving evidence in any proceeding on the ground–

(a) that the person has or may have an interest in the matter in question, or in the result of the proceeding; or

(b) that the person has previously been convicted of any offence.

### Parties and their spouses

**S 7 for civil cases:** parties themselves are competent and compellable and so are their spouses

**S 8 for criminal cases:** spouse competent and compellable, the accused is deemed to be competent but not compellable (right to silence)

### Sworn & unsworn evidence

Sworn evidence is evidence given on oath or affirmation.

**S 9B(2):** If competent a witness may give sworn evidence if they understand that

a) Giving evidence is a serious matters; and

b) They have an obligation to tell the truth

**9B(3):** if a person is competent to give evidence in a proceeding but not competent to give evidence under oath, the court must explain to the person the duty of speaking the truth

**S 9D(2)(a):** the probative value of the evidence is not decreased if not given under oath

### 9B Competency to give sworn evidence

1. This section applies if, in a particular case, an issue is raised, by a party to the proceeding or the court, about the competency of a person called as a witness in the proceeding to give evidence on oath.
2. The person is competent to give evidence in the proceeding on oath if, in the court's opinion, the person understands that—
   a) the giving of evidence is a serious matter; and
   b) in giving evidence, he or she has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.
3. If the person is competent to give evidence in the proceeding but is not competent to give the evidence on oath, the court must explain to the person the duty of speaking the truth.

### 9D(2) No difference in probative value

If evidence is admitted under section 9A –

a) The probative value of the evidence is not decreased only because the evidence is not given on oath; and

b) A person charged with an offence may be convicted on the evidence (i.e. no requirement of corroboration of unsworn evidence)

c) Person giving evidence is liable to be convicted of perjury to the same extent as if the person had given evidence under oath.

***R v MBT* [2012] QCA 434:** appellant convicted of rape, complainant was 4 yr old granddaughter of de facto partner at time of offence, 6 at trial, expert psychologist evidence given of intelligence, memory and ability to understand concepts such as truths and lies, asked by judge if understood it was important to tell truth – and that she could get into trouble for telling a lie and promise to tell truth, didn't understand affirmation read to her, in these cases must consider conditions in 9B before allowing to give unsworn evidence.

***R v BBR* [2009] QCA 178:** person giving evidence not under oath must have the court explain the duty to speak the truth – enough to overturn a conviction if this is not done

### Compellability of witness

Compellable – means a witness is obliged to testify in court but not answer questions.

### Compellability of spouses

**Historically:** not compellable to give evidence for the prosecution except in limited circumstances …Crimes against children, against the spouse etc.

**Now:** Only the accused is not compellable s 8

### Section 8(3)

A spouse is competent and compellable to disclose communications made between the husband and the wife during the marriage.

**No privilege relating to spousal communications any more

Accused may have admitted to the offence to their spouse – this might now be admissible hearsay

### Privilege against self-incrimination

At common law privilege is wider - a very broad and absolute right, in both civil and criminal matters: no one is obliged to answer any question or produce any document if the answer or the document would have a tendency to expose that person, either directly or indirectly to the imposition of a civil penalty or to conviction for a crime.

### Now, s 10 EA

(1) Nothing in this Act shall render any person compellable to answer any question tending to incriminate the person.

(2) However, in a criminal proceeding where a person charged gives evidence, the person's liability to answer any such question shall be governed by s 15

**S 15(1):** Where in a criminal proceeding a person charged gives evidence, the person shall **not be entitled to refuse to answer** a question or produce a document or thing on the ground that to do so would tend to prove the commission by the person of the offence with which the person is there charged.

**(2)** Where accused give evidence, person shall not be asked, and if asked shall not be required to answer, any question tending to show that the person has committed, or been convicted of or been charged with any offence other than that with which the person is there charged, or is of bad character unless-

a) Question directed to showing a matter of which the proof is admissible evidence to show the person is guilty of offence charged

b) To show any other person charged is not guilty of the offence

c) Person has personally or by counsel asked question of witnesses with a view to establishing person's own good character, or has given evidence of good character, or nature or conduct of defence involves imputations on character of prosecutor or of any witness for prosecution or any other person charged

## CHRISTIE/FAIRNESS DISCRETION

***R v Christie* [1914]** adopted in Australia in the case of ***R v Lee* (1950)**

Relevant evidence that is unfairly prejudicial to the accused may be excluded in the exercise of the Court's discretion.

- Unfairly prejudicial = too prejudicial to the prospects of the accused receiving a fair trial, up to the accused to raise this
- Strict application of the law/rules would operate unfairly against the accused
- Weigh up probative value against unfair effect
- Unfairness to the accused must be balanced against the seriousness of their alleged crime and the magnitude of the risk they will be wrongfully convicted if the evidence is admitted
- Applies to: confessions, real evidence, unsafe identification evidence
- Can also apply together with other bases for exclusion –
  - Voluntariness of confessions
  - Illegality and impropriety
  - Tricker and entrapment

**S 130:** preserves the common law position……Nothing in this Act derogates from the power of the Court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence.

***R v Jamieson*:** photographs of a 'trussed up' corpse were admitted as part of the Crown case in order to prove that there must have been more than one culprit involved.

In such cases, courts consider whether horrific photos or videos of crimes scenes are too horrific or emotive to allow jury to see them – in case they react irrationally in seeking to convict person. Test appears to be – such items can be shown if they contain real evidence of important to the crown case, e.g. position of the body.

***R v Swaffield*:** covert tape-recording of conversation between S and undercover police officer, had previously denied to give an interview, undercover drugs operation – secretly recorded conversation where he admitted to involvement in earlier charge of arson. **Crt:** inadmissible, unfair-since obtained in breach of right to silence (had previously exercised this right when first questioned).

***R v Davidson and Moyle; ex parte A-G*:** admitted secretly recorded admission of guilt by accused in prison for another matter, distinguished *Foster* since accused hadn't previously exercised right.

***Em v The Queen*:** mere fact conversation secretly recorded not enough to make it unfair.

***R v M*:** taped conversation between 15 year old girl to step-grandfather admitted, specific purpose of getting him to confess to what he had done to her at 7 years old, taping in itself not illegal, could have withdrawn from the conversation had he wished, had not been interviewed or charged by police.

### Other general discretions

***McKinney discretion*:** judge must warn jury against relying on an uncorroborated alleged confessions obtained while in custody, which the accused denies at trial

***Foster v R*:** a species of the *Christie* discretion, unfairness relating to confessions. Gave a six line typed confession found to be voluntarily signed in police custody, 21 yr old aboriginal man, had been picked up by police at his home, ordered to get in the back of a caged truck, taken to a police station some 40km away, and threatened if he didn't sign confession he would be taken out and bashed and his younger brother would also be picked up, also shown statements of two co-accused and told they had implicated him in statements – when they had not, F semi-literate. **Held:** evidence inadmissible both using *Christie test* and public policy test….unfair.

## SIMILAR FACT EVIDENCE/PROPENSITY EVIDENCE

### Answering questions

- Standard from *Pfennig* is very high: high probative value and a direct connection between the previous offence and the current charge
- Identify the exact issue the other occasion evidence is relevant to
- Analyse by looking at characteristics of the facts – try to identify similarities in detail not just abstract
  - Proximity in time between charged act and other act
  - Similarity in detail and modus operandi, special or unusual features so as to make it unlikely someone else would coincidentally do the same thing in detail
  - Number of occurrences
  - Similar circumstances
  - Any intervening events
  - To what extent the other event is proven or easy to prove independently
  - Does it fall into another category of recognised relevance other than propensity
- List the similarities
- Identify the potential prejudice
  - Identify prejudice in express terms
  - The more general the relevance the higher risk of prejudicial character reasoning
  - The more fact specific the similarities are, the less the risk the jury will employ unfair or prejudicial reasoning
  - How inflammatory are the other events? Will the jury want to see somebody pay irrespective of the actual evidence?

Conclusion: is there striking similarity/unusual fact pattern that would be of such high probative value to outweigh the risk of unfair prejudice?

**High Court in *Pfennig*:** *"Propensity evidence is not admissible if it shows only that the accused has propensity or a disposition to commit a crime. The basis for the admission of propensity or similar fact evidence lies in its* ***possessing a particular probative value or cogency*** *such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged."*

### Explanation of test:

1. No other way to explain similar fact evidence other than as consistent with the guilt of the accused
2. AND probative value is so high that the risk of unfair prejudice that the risk of prejudice can be dismissed

*Then if still a risk of unfairness overall, still have the 'fairness' discretion

### Propensity reasoning

Evidence relating to other facts or events that is relevant only via propensity reasoning (character reasoning) is not admissible.

- E.g. propensity to engage in certain offences indicating a disposition to commit certain offence – has no probative value beyond showing he is a person of bad character
- Danger of unfair prejudice to the accused
- The reasoning is based on prejudice and emotion

**BUT,** if relevant, logically probative to some issue in the case then may be admissible

- E.g. charged with specific way of operating and trying to establish a pattern of the same modus operandi so as to almost exclude others coincidentally acting in the same manner
- Then the probativeness derives from independent logic rather than character reasoning

### Progression of Cases

- The traditional approach: trying to fit the similar fact evidence into established categories such as:
  - Relationship evidence
  - *Res Gestae* – issue of trying to determine when facts start and finish, are they all interconnected facts/all part of the same event (the *res gestae*)
  - To disprove a defence
  - Identity
  - Striking similarity
  - *And then ask whether it was relevant in that specific capacity
- The *post-Boardman* approach: probative force must outweigh unfair prejudice
- Ie generally probative of guilt rather than linked to another specific issue before the jury

***Makin* (1894):** husband and wife charged w/ murdering infant in foster care and burying body in yard of house, evidence of 12 other bodies found in previous residence. **Crt:** evidence admissible, evidence of another similar event not admissible in principle – unless exceptional circumstances that render the evidence highly probative to a particular issue

- *It is* ***undoubtedly not competent*** *for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment,* ***for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried****. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible* ***if it be relevant to an issue before the jury****, and it may be so relevant* ***if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused****. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other*

***R v Straffen*:** S escaped from high security prison and murdered a young girl he came across, evidence of convictions of two previous murders also relating to small children was admitted as evidence – striking similarity.

***Smith (Brides in the Bath Case)*:** accused or murdering wife by drowning and stood to benefit financially, had taken her to the doctor previously saying she suffered an epileptic fit, tried to claim she drowned after having an epileptic fit. Prosecution allowed to give evidence of two other wives who had drowned after this event in the bath where he stood to benefit financially. **Crt:** high probative value to disprove his allegation she had drowned accidentally.

***Perry v McQueen*:** Mrs P accused of attempted murder against her husband by arsenic, pros wanted to give evidence that second husband had died of arsenic poisoning and she stood to benefit financially from that (but no conviction in that case), also had a brother who had died of arsenic poisoning – possibility of innocent explanation but also of gaining some relief, de facto partner who died of overdose – not arsenic but stood to gain financially. **Crt:** evidence not admissible, danger of circular reasoning to build the case against the accused – suddenly other events that might have looked quite innocent individually take on a sinister air, dissimilarities between cases – didn't go much further than character assassination, danger of jury been too ready to convict.

***Boardman Case*:** headmaster accused of abusing two boys in his care, two matters heard together, in each case headmaster had used very similar tactic/conduct to gain access to the boys. **Crt:** evidence from one witness was admitted as evidence also for the other charge, was admissible and relevant due to striking similarity of modus operandi. Test: does SFE have direct relevance not through propensity reasoning? Balancing act – does high probative force outweigh risk of unfair prejudice?

### Cases in Queensland

Standards in Queensland became rather law and moved away from *Pfennig* for a time

***R v O'Keefe* [2000]:** charge of arson, staying in lodgings and was kicked out, then went down the street and set fire to that lodging, prosecution wanted to tender fact of 25 years earlier had been charged with setting fire to two dwellings in another town. **Crt:** is the evidence of such calibre that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged? Is the evidence is admitted, is the evidence as a whole reasonably capable of excluding all innocent hypotheses? ***Note:** was intended to set a high standard, but became little more than a requirement that the evidence generally support the Crown's case

***R v McGrane*:** Doctor found guilty of murdering recent Chinese immigrant – overdose of morphine administered by lethal injection

Crown case – M had visited her at home as a patient and had administered lethal dose of drug

Evidence he had acquired a certain amount of that drug, and could not account for a precise amount – same amount that had been administered. But issue of what was the motive?

Could evidence be given of two women who had complained to the health rights commission that he had drugged them with more than what was required and then sexually interfered with them?

Evidence that victim had also called the commission, and then commission had notified hospital

**Crt:** Evidence of two others was admissible – since had probative value related to motive- victim would complain again and ruin career

***R v Brown* [2011] QCA:** convicted of burglary by break with violence, GBH, rape and stealing, similar fact evidence of prior conviction for common assault admitted at trial. In each case: offence committed in the night, intruder made a noise that caused concern that was sufficient for the victim to check the noise, victim was a mature aged woman, alone in her house, intruder did not speak, intruder acted alone, intruder used violence without resort to a weapon; and open to be inferred that attack was sexually motivated. **Note – earlier offence did not involve rape

**Held:** similar fact evidence admitted

- Of course, the existence of "striking similarities", "unusual features" or an "underlying unity", "system" or "pattern" is not an essential pre-requisite to the admissibility of such similar fact evidence. But evidence of the type under consideration is admissible only if there is no reasonable view of such evidence, considered together with the other relevant evidence in the case which is consistent with the innocence of the accused
- Acting on the principles stated above, the primary judge was entitled to conclude that the **similar fact** evidence supported an inference that the appellant was "guilty of the offence charged, and [was] open to no other, innocent, explanation."[9] There was a sufficient connection between the **similar fact** evidence and the other evidence relied on by the prosecution and the **similar fact** evidence had sufficient probative force to warrant its admission
- *Note – perhaps not quite striking similarity in this case – maybe not correctly decided?

### Criticism of the test in *Pfennig*

- *Pfennig* is a common law test. As it now stands only South Australia, the Northern Territory and Queensland are bound by it. The other states have legislated to override *Pfennig*.[4] Queensland should do the same. The Queensland legislature has reacted in the past to reform portions of the law on similar fact and it needs to do so again.[5]
- We need to bring the law in Queensland into line with the common law world. The *Pfennig* test is very much an aberration from the High Court. Whereas the prevailing view is that the admissibility of similar fact evidence should be determined by a rigorous weighing of the probative value of the evidence against its potential prejudice. The law already accepts that introducing other discreditable acts or other bad acts committed by the accused is presumptively inadmissible because of its unfair prejudice to the accused. The accused is apt to be convicted because of who he is or because of what he has done in the past rather than based on the evidence respecting the present charge. The balancing of the probative value of the evidence against its potential prejudice is the best way of dealing with similar fact evidence. It may not be perfect, and application will continue to be difficult, but it is a fairer and more practical approach then presently under *Pfennig* and *HML*.

**Holmes JA in *R v Roach* [2009] QCA (overruled on appeal):** evidence concerning prior violence was admitted under **s 132B EA** as evidence of domestic violence relevant to the history of the domestic relationship, identified that in realty this would be used more as propensity evidence to show repeated behavior rather than just evidence relevant to the state of the relationship (to show animosity etc.)

- Relationship evidence in such cases can only, in truth, be admissible as evidence of propensity
- Similar fact evidence: evidence of uncharged acts, even when received and used as evidence of motive, is unlikely to compel, as a matter of logic, a conclusion that the charged offence or offences occurred. To prove that a person did something many times does not compel a conclusion that he did it again. However, it might make it more likely that sworn testimony that he did it again is true
- The question, then, is as to the relevance of the **propensity** disclosed by the evidence of the earlier assaults. In their judgment in Pfennig, Mason CJ, Deane and Dawson JJ distinguished between general and specific **propensity** evidence:
- "Thus, evidence of mere **propensity**, like evidence of a general criminal disposition having no identifiable hallmark, lacks cogency yet is prejudicial. On the other hand, evidence of a particular distinctive **propensity** demonstrated by acts constituting particular manifestations or exemplifications of it will have greater cogency, so long as it has some specific connexion with or relation to the issues for decision in the subject case.

### Protection under the Evidence Act

#### What if the accused is a witness?

**SEC 15 (2):** An accused shall not be asked/not required to answer questions tending to show:

- The commission of offences by the accused
- or that he has been charged or convicted of any offences
- or that he is of bad character.

#### Exceptions by leave

EVIDENCE ADMISSIBLE AS 'SIMILAR FACT EVIDENCE': **SEE SEC 15 (2) (a).**

- If those convictions are admissible as similar fact evidence, then allowed to put them to the accused in cross-examination

Can also raise prior convictions if the accused has 'put his character in issue' **(sec 15 (2)(c))** by:

- testifying to it himself
- asking questions of another witness to establish his own good character
- attacking the character of the complainant, prosecution witnesses or co-defendants

*By doing this you 'drop the shield'

#### Character of the accused

- Accused may himself testify about own good character
- Accused may prove good reputation within a community through witness
- Witness may not refer to:
  - opinion
  - specific incidents proving good character