

# **TENDENCY & COINCIDENCE EVIDENCE**

## **ADMITTING EVIDENCE ARISING FROM PRIOR ACQUITTALS**

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## I. INTRODUCTION

1. The common law has jealously protected accused persons against evidence of their own prior misconduct, driven at least in part by the long-accepted wisdom that juries may well act on that material rather than on the evidence in the case at bar.<sup>1</sup>
2. As far back as 1894 the House of Lords prophetically recognised tension in the reception of similar fact evidence that resonates to this day, stating:

‘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 up to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he has been tried’<sup>2</sup>

but also:

‘In their Lordships’ opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty ....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 one side or the other’.<sup>3</sup>

3. By 1917 the Law Lords had settled on the position that propensity evidence should be excluded except where the propensity to act was so rare or distinctive a character that ‘*it amounts to a physical peculiarity*’.<sup>4</sup> However, not all agreed with the strictures of this exclusionary rule, for example, in 1933 Professor Julius Stone wrote in the Harvard Law Review:

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<sup>2</sup> In *Markby v R* (1978) 140 CLR 108 at 116 Gibbs CJ restated the *Makin* test this way: ‘*evidence of similar facts is not admissible if it shows only that the accused had a propensity or disposition to commit crime, or crime of a particular crime, or that he was the sort of person likely to commit the crime charged*’.

<sup>3</sup> Lord Herschell in *Makin v Attorney-General for NSW* [1894] AC 57 at 65

<sup>4</sup> Lord Sumner in *Thompson v Director of Public Prosecutions* [1918] AC 231 at 236. It is remembered that *Thompson* is the case that introduced the world to the notion that guilty men carried powder puffs with them to assist with the sexual penetration of young boys, which one might well think is a fairly rare occurrence amongst the general population.

‘There is a point in the ascending scale of probability (of guilt arising from propensity) when it is so near to certainty that it is absurd to shy away at the admission of the prejudicial evidence’.<sup>5</sup>

4. The Evidence Act 1995 has, by and large, well and truly put paid to the exemplar of such protections. Successive cases, culminating in *Hughes* in the High Court have settled on a formula for the admission of tendency evidence that falls well short of the common law protections previously thought essential for an accused to receive a fair trial.
5. Indeed, the recent Royal Commission into Institutional Responses to Child Sexual Abuse conducted an empirical study in 2016 to examine jury reasoning to determine whether another holy grail of protections, the separate trial, is still required today to protect against prejudicial reasoning in joint trials involving multiple complainants.<sup>6</sup> The study concluded that there was little evidence that the test juries engaged in impermissible prejudicial reasoning in joint trials in which tendency evidence was admitted, and no evidence at all of emotional or illogical reasoning by such juries.<sup>7</sup>
6. But what of tendency or coincidence evidence in relation to an accused person which has resulted in an earlier acquittal. Surely that evidence would be excluded from any later trials against that accused on the basis of *autrefois acquit*, or *res judicata*, or issue estoppel? Surely, the jealous protections would still mean something in this tendency mad world? The answer to that question is, like so many more. Maybe. It depends. Perhaps Stone’s ‘*ascending scale of probability*’ still resonates to this day.
7. This paper will attempt to deal with the difficult question of when, or if, courts should admit tendency or coincidence evidence against an accused when it relates to earlier allegations of a similar nature which has or have resulted in acquittal. The law has developed somewhat differently in Australia to other common law jurisdictions, such as the United Kingdom, Canada and New Zealand, and the High Court has yet to

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<sup>5</sup> 46 Harv L Rev 954 at 983 quoted by Stone in ‘*Propensity Evidence in Trials for Unnatural Offences*’ (1941) ALJR 131. Stone points out that the evidence of possession of the powder puffs was admissible in any event as evidence of an act in preparatory to an offence, whereas evidence of possession of lewd photographs by the accused in his dwelling was truly evidence of his propensities.

<sup>6</sup> ‘Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study’ (2016): <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Research%20Report%20-%20Jury%20reasoning%20in%20joint%20and%20separate%20trials%20of%20institutional%20child%20sexual%20abuse%20An%20empirical%20study%20-%20Government%20responses.pdf>

<sup>7</sup> *ibid* at page 26

definitively rule on the issue. Intermediate courts of appeal still approach this question with some caution.

8. Nature abhors a vacuum and as issues in tendency evidence admissibility are settled or refined (such as by *Hughes*<sup>8</sup>, and more recently in *Bauer* and *McPhillamy*), it might be expected that this area of jurisprudence is now ripe for examination and exploitation by prosecuting authorities.

## II. ACQUITTALS, DOUBLE JEOPARDY & RES JUDICATA

9. In Australia and elsewhere, courts have developed rules surrounding the legal effects of acquittals. Differing circumstances yield differing results. Support for propositions as diverse such as an acquittal meaning everything, or very little at all can be found in the case law. Much will depend on the basis of the acquittal.

### **Sambasivan v Public Prosecutor, Federation of Malaya [1950] AC 458**

10. In *Sambasivam*, the accused was tried for two firearms offences and acquitted of one of those offences, that of being in possession of ammunition contrary to law. A retrial was ordered on the other firearms offence, that of carrying a firearm. On the retrial, the assessors were not told that the accused had been found not guilty of one of the firearms offences with which he had been charged in the first trial. The assessors were therefore not instructed to treat the accused as entirely innocent of the matters of which he had been acquitted. Reversing the Court of Appeal's decision, the Privy Council found that the error involved in the procedure adopted at the second trial undermined the acceptability of the verdict of guilty at that trial. The error justified setting that verdict aside.<sup>9</sup>
11. Lord MacDermott, who gave the reasons of the Privy Council said:

‘[A] verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *'Res judicata pro veritate accipitur'* is no less

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<sup>8</sup> As was explained in *Hughes v The Queen* [2017] HCA 20 at [20] the long-standing scepticism of tendency reasoning and appreciation of the dangers of the unfair prejudice to which it might give rise had been relaxing for some time in various jurisdictions other than Australia, and were lamented by academics such as Colin Tapper.

<sup>9</sup> As summarised by Kirby J in *Washer v Western Australia* (2007) 2 ALJR 33 at [70]

applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial.’

12. In *Washer*, Kirby J pointed out that this statement by Lord McDermott has proven to be highly influential and applied many times by the High Court of Australia.<sup>10</sup> It is this pedigree that has led the court to stand by this principle in face of attack from subsequent cases in other jurisdictions.

**R v Storey (1978) 140 CLR 364**

13. In *Storey* the High Court considered the admissibility of certain evidence on the retrial of two accused on two charges of rape. The evidence in question related to the behaviour of the accused towards the complainant shortly before the alleged rapes. In their earlier trial, the accused had faced, as well as the charges of rape, a charge of forcible abduction. In that trial, they were convicted on the counts of rape but acquitted on the count of forcible abduction. They appealed their rape convictions and were granted a new trial on those counts. On their retrial, the question of the admission of the evidence formerly relied upon by the Crown on the forcible abduction charge arose. It was relevant to the question of consent on the rape counts but was, of course, the evidence upon which the Crown had failed to gain a conviction for forcible abduction.
14. The trial judge admitted the evidence and gave certain directions to the jury with respect to the earlier acquittal. On appeal to the Court of Criminal Appeal, the convictions for rape were quashed and a new trial was ordered on the ground that by leading this evidence on the retrial the Crown was seeking to establish that the accused were guilty of the crime of which they had previously been acquitted. The Crown, unusually, was granted special leave to appeal to the High Court.

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<sup>10</sup> See *Kemp v The King* (1951) 3 CLR 341 at 342; *Mraz v the Queen (No 2)* (1956) 96 CLR 62 at 68; *Garrett v The Queen* (1977) 139 CLR 437 at 444-446; *R v Storey* (1978) 140 CLR 364 at 372-373; *Rogers v The Queen* (1994) 181 CLR 251 at 277-278; *R v Carroll* (2002) 213 CLR 635 at [37] and *Island Maritime Ltd v Filipowski* (2006) 226 CLR 32 at [41] and more recently in *Washer* and *Likiardopoulos v the Queen* (2012) 247 CLR 265 at 279 where the court held that the crown could not controvert the conviction of an accused for manslaughter by leading evidence in a subsequent trial that he was guilty of murder.

15. A majority of the seven judges who sat on the High Court appeal (Barwick CJ, Stephen, Mason and Aickin JJ) considered that the evidence in question was relevant to the issue of consent and so was admissible on the retrial for rape. However, it was incumbent on the trial judge to instruct the jury that, in considering the evidence, they had to accept the fact that the accused had been acquitted of forcible abduction and give full effect to that acquittal. The jury could not use the evidence to reconsider the guilt of the accused on the abduction charge and they had to consider the evidence in light of the acquittal on that charge. Mason J said that the directions should have gone as far as instructing the jury that they could not take any view of the evidence inconsistent with the acquittal. The Crown appeal was unsuccessful in Storey because three judges (Stephen, Mason and Aickin JJ) considered that the trial judge's directions as to the use the jury could make of the evidence were inadequate, and Jacobs J thought the evidence ought not to have been admitted.<sup>11</sup>
16. Mason J, as he then was, took the view that the doctrine of issue estoppel, as it had developed in civil proceedings is not applicable to criminal law.

**Garrett v the Queen (1977) 139 CLR 251**

17. In *Garrett*, the applicant was charged with a rape on the complainant in July 1976. His case was that he admitted the acts in question but said the complainant had consented. Over objection the Crown led evidence that in January 1976 the applicant faced a trial involving an allegation that he had previously raped the complainant in November 1975, when again consent was in issue. The applicant had been acquitted of that charge. The trial judge said that the earlier acquittal was a 'neutral fact' and no inference should be drawn from it.
18. The Court, by majority held that the evidence of the events of November 1975 was not admissible, and unanimously that the trial judge had misdirected the jury on the effect of the previous acquittal.
19. The Crown had said that the evidence was admissible to show that the relationship between the parties had, prior to the incident in question, well and truly ruptured, therefore making consent at the relevant time less likely. Barwick CJ saw that it was

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<sup>11</sup> As summarised and explained by Bongiorno J in *R v HP* (2011) 32 VR 687 at [2] – [5]:

both relevant and in the interests of the Crown to do so but pointed out that this could have been achieved by leading evidence that the complaint ‘had informed’ against the applicant and given evidence against him.

20. Noting that the Crown had gone further, and this had the effect of asserting the guilt of the accused for the earlier incident. Barwick CJ pointed out that this was not a case in which ‘*evidence of similar acts would be admissible to negative accident or other likely defence by an accused or to establish system*’ nor, at least in chief, ‘*to negative the belief of the applicant in the consent of the complainant to the intercourse in 1976*’.

21. Barwick CJ was of the view that the former acquittal could not be called in question in the subsequent trial, stating:

‘The relevant principle is that the acquittal may not be questioned or called in question by any evidence which, if accepted, would overturn or tend to overturn the verdict. That the applicant was not guilty of the former charge because acquitted of it is a matter which passed into judgment: it is *res judicata*. It is upon that principle and not upon any issue estoppel that the applicant succeeds. Here, if the Crown had sought to establish by the evidence of the prosecutrix an indictment that the applicant had raped her on the occasion in November 1975, he could have pleaded *autrefois* acquit and thus precluded the reception of any such evidence. Here, of course, he was not indicted in respect of the intercourse in November 1975: and the purpose of the Crown in proffering the evidence was not to secure a finding that the intercourse had been without consent. But the direct tendency of the evidence of the prosecutrix was to establish rape on the former occasion. It inevitably challenged the verdict of acquittal. It was therefore, on basic principle, without resort to any issue estoppel which might be suggested, inadmissible.<sup>12</sup>

22. Barwick CJ went on to say that this was not a suitable case to discuss whether issue estoppel (as it operates in civil proceedings) is available in criminal proceedings, thereby questioning the premise of the court’s earlier reasoning in *Mraz v The Queen* (No 2). Murphy J also expressed significant reservations as to whether issue estoppel had any part to play in the criminal law.<sup>13</sup>

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<sup>12</sup> at page 445

<sup>13</sup> at page 447

### **Rogers v The Queen (1994) 181 CLR 251**

23. In Rogers the High Court considered whether it was an abuse of process for the Crown to proceed to trial using various recorded interviews of the appellant that had already been ruled inadmissible in earlier trial proceedings that had resulted in an acquittal for the appellant.
24. Mason CJ adhered to his view that the doctrine of issue estoppel, as it had developed in civil proceedings is not applicable to criminal law, noting that the availability of res judicata, the defences of autrefois acquit and autrefois convict and the rule against double jeopardy and the doctrine of abuse of process make it unnecessary to introduce the concept of issue estoppel into the criminal law, and in any event, would otherwise make it more convoluted.<sup>14</sup>

### **The Queen v Carroll (2002) 213 CLR 635**

25. In 1985 Carroll was tried for murder. He gave sworn evidence in his trial denying that he had killed the deceased. He was convicted, but this was quashed on appeal. More than 14 years later he was tried for perjury, alleging that he gave false evidence when he gave evidence at his trial. He again was convicted and again on appeal the verdict was quashed as an abuse of process and also as it was unsafe and unsatisfactory. The Crown appealed to the High Court.
26. Gleeson CJ and Hayne J in a joint judgment noted at [27] that:

‘The trend of authority in other common law jurisdictions may appear to favour the conclusion that a prosecution for perjury may proceed where the perjury alleged is that in a previous criminal trial the accused swore that he or she was not guilty of the offence then charged against him or her. Certainly, there are statements to be found in those cases which would support that view’.
27. ‘*Those cases*’ cited by their Honours included *R v Z*, *R v Degnan* & *R v Arp*.
28. Their Honours continued at [28]:

‘What principle or principles are engaged in such cases? It is necessary to begin consideration of them by recognising that they consider two fundamentally different issues. In many cases [*Z*, *Degnan* & *Dowling v United States*] the question has been

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<sup>14</sup> at page 255



whether evidence of what are alleged to have been the accused's earlier crimes (for which the accused has been acquitted) may be led as similar fact evidence in a later trial for a different offence. There the issue is not whether there can be a trial of the charge preferred in the later indictment but what evidence may be led in proof of that charge.'

29. Their Honours then turned to what was referred to as the principle of the '*incontrovertibility of an acquittal*' referred to in *Rogers v The Queen* (1994) 181 CLR 251, stating at [37]:

'The principle is stated in various ways. In *Garrett v the Queen*, Barwick CJ ..... described it as being that 'the acquittal may not be questioned or called into question by any evidence which, if accepted, would overturn, or tend to overturn the verdict' (emphasis added).

30. Describing the principle themselves, and its accepted scope, their Honours then said at [45]:

'The need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct is a principle which requires that it is the verdict of acquittal which should be incontrovertible. It is not necessary in this case to attempt to decide what may be the limits of the principle about incontrovertibility and, in any event, it would be unwise to attempt to do so. It is a proposition which has not been held to preclude persons other than the prosecution asserting in later proceedings that the person committed the crime of which he or she was acquitted at trial. (Hence the decisions about what standard of proof is to be applied in civil cases in which a crime is alleged).'

31. Having stated the rule, which they held to apply in the case then before the bench, their Honours then stated what will be referred to as the proviso at [50]:

'Finality of a verdict of acquittal does not necessarily prevent the institution of proceedings, or the tender of evidence, which might have the incidental effect of casting doubt upon, or even demonstrating the error, or an earlier decision'. There may be cases where, at a later trial of allegedly similar conduct of an accused, evidence of conduct might be adduced even though the accused had earlier been charged with, tried for, and acquitted of an offence said to be constituted by that conduct. *R v Z, R v Apr & R v Degnan* are cases of that kind. In such cases, the earlier acquittal would not be controverted by a guilty verdict at the second trial.'

32. It is the significance of the proviso that has excited various of the bar and bench in Australia and elsewhere since.
33. Gaudron and Gummow JJ referred to the incontrovertibly principle, and its scope as follows at [93]:

‘We agree with the remarks of the Chief Justice and Hayne J in the present case respecting the decisions in *Rogers* and *Garrett*. Those authorities support the proposition that a prior acquittal itself cannot subsequently be controverted; it is unnecessary here to decide whether they support any wider proposition.’

34. McHugh J agreed that the doctrine of incontrovertibly applied in this case and said at [137]:

‘In some cases, evidence concerning a charge on which the accused has been acquitted may be admissible because it may be impossible to separate it from the evidence relevant to a charge in a subsequent case (citing Storey). But even though the evidence concerning the acquittal is admissible, the jury must be directed that the previous acquittal cannot be challenged and that the evidence must not be taken as proving guilt on the earlier charge. Barwick CJ dissented in that case but his statement of relevant principle in such a case was correct. The Chief Justice said (at 372):

"But the citizen must not be twice put in jeopardy, that is to say, as relevant to the present discussion, must not be placed at the risk of being thought guilty of an offence of which he has been acquitted, or of in any sense being treated as guilty. It is the use of the evidence given on the prior occasion to canvass the acquittal which, if allowed, would offend the rule against double jeopardy, giving that rule a generous application."

### III. THE HOUSE OF LORDS IN R v Z

35. In 2001 the House of Lords revisited the circumstances in which evidence could be led arising from earlier proceedings, and in so doing significantly limited the *Sambasivam* principles.
36. Munday has described the circumstances in which the House of Lords revisited the accepted doctrine as follows:

‘An accused is charged with rape. He will claim that the complainant consented. The Crown can prove that on four previous occasions that self same accused has been tried

on other counts of rape, but on all but one of them he has been acquitted. The trial judge rules that, had the accused been convicted on all four earlier rapes, such evidence would have been admissible at the fifth trial under similar fact principles. The single earlier conviction, however, standing alone, does not qualify as admissible similar fact evidence. These, in essence, were the facts confronting the House of Lords in *R v Z*, where the general question for the House being: despite three of Z's previous trials having resulted in acquittals, was the Crown entitled to lead evidence of all four earlier incidents, including testimony from the three complainants whose allegations had failed to persuade juries in the past?'<sup>15</sup>

37. To Munday's summary of the facts, I would add that the issue of consent was raised in each of the trials and indeed was the defence raised by the accused in the trial in question.

38. The principle determined by *R v Z* is neatly encapsulated in the headnote:

'The principle of double jeopardy prevented a defendant from being prosecuted for an offence on the same or substantially the same facts as in a previous prosecution; but that relevant evidence was not inadmissible merely because it showed or tended to show that the defendant had in fact been guilty of a previous offence of which he had been acquitted; and that, since the evidence of the three complainants was proposed to be adduced not to show that the defendant had been guilty on those occasions, but to show, by similar facts, his guilt of the offence for which he was being tried, the principle of double jeopardy was not infringed, and the evidence was, subject to the judge's discretion to exclude it after weighing its prejudicial effect against its probative force under s.78 of the Police and Criminal Evidence Act 1984, admissible'.<sup>16</sup>

39. Relevantly, section 78 states:

*(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*

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<sup>15</sup> Roderick Munday 'Admitting Acquittals as Similar Fact Evidence of Guilt' (2000) 59 CLD 468

(2) *Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.*

40. It is argued that *R v Z* stands for nothing more than the proposition that it is not *necessarily impermissible* to lead evidence of prior conduct which resulted in acquittals, but consideration of whether the evidence *should be permitted* in any case will depend on its own facts and circumstances and will be subject to a close consideration of the danger of unfairness caused by adducing the evidence in the particular case. There is therefore, in a sense, nothing much in *Z*'s case that was not foreshadowed by Barwick CJ in *Garrett*.
41. Colin Tapper, writing in the Law Quarterly Review stated that *R v Z* had '*taken admissibility into new territory, by allowing such evidence to be adduced, despite its having been found to be insufficient to ground a conviction when considered in a previous case against the same accused, by a different jury*'. Tapper was concerned at the time that it was far from clear whether the implications of the decision were fully appreciated by the Lords, either in relation to other aspects of the law of similar fact, or the treatment more generally of acquittals in the criminal justice system.<sup>17</sup>
42. Moreover, Tapper, in a something of a 'Chicken Little' moment, worried that the effect of the Lords was to:
- 'equate evidence of previous incidents, irrespective of whether the accused had been acquitted, convicted, or never tried. It recognised that this might lead to harassment of acquitted persons but took the view that the court's discretionary powers to stay for abuse of process or exclude evidence under its common law or statutory (s.78) power would be sufficient to prevent any such abuse. Given the enormous prejudicial effect of such evidence, especially of sexual misdemeanour, to say nothing of its power to distract, to which the trial judge drew attention in this very case, it is far from obvious that this will be sufficient. It is indeed hard to imagine a case where a jury would feel less inhibited from convicting than in one where it perceived the accused to have been guilty, but acquitted on numerous other occasions, and rightly convicted only on one. It is even conceivable that some juries might be prepared to redress what they perceive to be unmeritorious acquittal with unmeritorious conviction'.
43. Looking back since 2001 to how the law relating to '*bad character*' has developed in England and Australia since that time and, as previously noted, the relaxation of such

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<sup>17</sup> Colin Tapper 'Clouded Acquittal' 2 LQR (2001) 117.

protections around the world, Professor Tapper's views are now seen to be somewhat on the wrong side of history.

*R v Arp*

44. *Arp* is a 1998 decision of the Supreme Court of Canada and is cited in *Carroll* as authority for the proposition that in some instances a court may receive evidence of prior conduct which resulted in acquittal.

45. In that case Cory J, who gave the judgment for the Court said at [78]:

...In certain circumstances, the fact of an accused's prior acquittal may have relevance to an ultimate issue in a subsequent trial. For example, in *R v Ollis* [1900] 2 QB 758, the accused was charged with obtaining money by false pretences. He had obtained funds in exchange for a cheque that was later dishonoured. The accused was acquitted at his first trial on the basis that when he gave the cheque to the complainant, he expected to receive funds to cover it. The accused was later again indicted with obtaining money by false pretences, and at his second trial the Crown adduced the evidence of the first complaint as relevant to the accused's guilty state of mind. The Court held that the evidence was properly admissible.

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On the basis of this reasoning, the evidence of the prior acquittal in *Ollis* was correctly admitted. It was admitted to prove intent. Even if the accused was acquitted on the first charge, the fact that he had been tried on similar charges once before went to his knowledge of wrongdoing irrespective of his guilt on the first charge. The fact of the prior trial and acquittal could be admitted for this limited purpose, but of course would require careful instruction from the trial judge. Yet, in most circumstances, it will be unfair and inappropriate to admit the evidence underlying the prior acquittal as similar fact evidence in a subsequent trial of the same accused' (my emphasis).

46. Interestingly, it was *Ollis* that Basten JA footnoted in *Chase* [2018] NSWCCA 71 in support of his otherwise unexplored observation at [27] that:

'.....Indeed, evidence of a similar offence of which the accused has been acquitted may be relied on to demonstrate a propensity to commit similar offences, even though conviction on the charges before the court may involve the conclusion that the earlier acquittal was mistaken'.

47. Further, it must be understood that the comments by Cory J above were in fact incidental to the issues raised in that appeal. The question actually before the Court for determination was the standard of proof to be applied to conclusions drawn from similar fact evidence. More comment is made about that matter further down.

*R v Degnan*

48. This case, determined by the Court of Appeal in New Zealand in 2001,<sup>18</sup> concerned the admission of evidence of prior indecent assaults on young males, despite there being an acquittal in one matter and a stay of proceedings after a hung jury in the other. The Crown relied on similar fact evidence. The Court held that evidence that is rendered admissible as similar fact is not rendered inadmissible by reason of the fact that a previous trial based on that evidence resulted in an acquittal or stay of proceedings, summarised by Tipping J at [37]:

‘Evidence which otherwise qualifies for admission on similar fact principles is not rendered inadmissible at law by reason of the fact that a previous trial based on that evidence has resulted in an acquittal or a stay of proceedings. Such evidence is admissible, subject to the discretion of the court to exclude it if its admission would be unfair to the accused or would otherwise result in an abuse of process. To obtain such exclusion the accuse must be able to point to some particular feature of the case which requires that outcome against the general admissibility of evidence of this kind’.

#### **IV. R v Z IN AUSTRALIA**

49. From the outset, it is important to note that the High Court has had cause to look at *R v Z*, but only with a somewhat sideways glance, on two occasions.
50. In *Carroll*, Gleeson and Hayne referred to it as the proviso at [50]. It is this paragraph that has been seen as paving a way for the introduction of *R v Z* reasoning in Australian courts.
51. Whilst Gaudron and Gummow J gave a passing nod to *Z* by reference to the law’s ‘aversion to placing an individual twice in jeopardy of criminal punishment for the

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<sup>18</sup> At a time, as pointed out by Kirby J in *Washer* that the New Zealand courts were still liable to review in the Privy Council.

*one incident or series of events*’ as ‘*reflecting a broader precept or value*’ (at 84), McHugh J said nothing about it at all.

52. By 2007 the issue was beginning to heat up.

**Washer v The State of Western Australia (2007) 82 ALJR 33; [2007] HCA 48.**

53. In *Washer* the High Court again considered the admissibility of evidence adduced in an earlier trial which had resulted in acquittals. In that case the appellant was convicted for conspiring to possess drugs, with intent to supply. The alleged conspiracy involved importing the drugs from Queensland into WA. In an earlier trial, the appellant had been acquitted of conspiring with different persons to supply drugs.
54. Some evidence from the earlier trial had been relied on in the subsequent one. The appellant appealed to the High Court on the ground that the trial judge erred in not allowing him to adduce evidence of the fact he had been acquitted of the earlier conspiracy and that the judge should have directed the jury to give the appellant the full effect of his acquittal.
55. In dismissing the appeal, the Court (Gleeson, Heydon and Crennan JJ) held that it was neither explicit or implicit in the acquittal at the earlier trial that the appellant was not a drug dealer. For the purposes of the law, the acquittal established that the appellant was not a party to a conspiracy with [the earlier parties] to supply drugs to others, nothing more and nothing less. The evidence of the acquittal was, in those circumstances, neither relevant or admissible.
56. As to the significance, or operation of the principles stated in *R v Z* in the Australian context, the plurality stated at [37]:

*‘It is unnecessary for the purposes of this appeal to consider whether the approach of their Lordships to the issue [in that case] was different from the approach of this Court in cases such as Garrett, Storey, Rogers or Carroll. Lord Hobhouse of Woodborough, dealing with the considerations of fairness relevant to a discretion to receive or exclude similar fact evidence, pointed out that the fact that an earlier trial ended in an acquittal may be a factor to be put in the balance, in the exercise of the discretion.’ (my emphasis)*

57. In a dissenting judgment, Kirby J also pointed out at [44] that:

*'This Court has hitherto affirmed a principle that:*

*'where evidence which would tend to prove [an] earlier charge or some element of it is admitted in [a] subsequent charge, the jury must be duly warned that they must accept the fact of the earlier acquittal and not use the evidence in any wise ....to question or discount the effect of the acquittal'*  
(see *R v Storey* at 372, per Barwick CJ, Stephen, Mason & Aicken JJ).

58. Kirby J also, from [65] went into great depth concerning the concept of giving full value of the acquittal (and spoke of *Sambasivan* in continued positive terms).
59. Kirby J also provided a useful and detailed history of the principle of giving full credit to earlier acquittals at [62] – [79] during the course of which his Honour referred to the Victorian Court of Appeal decision of *R v Young* [1998] 1 VR 402.
60. In that case it was held that:

**(5) Evidence relating to the three counts of indecent assault of which the accused was acquitted was inadmissible at the second trial. This was not a case where an appropriate direction to the jury as to the consequences of the acquittals could ameliorate the tendering of that evidence, for to describe accurately the significance of the acquittals would leave that evidence as devoid of purpose and capable only of causing prejudice. The jury were being invited to conclude that there had been indecent assaults on each of the three acquitted occasions so as to be able more easily to conclude that the accused had formed a “guilty passion” for the victim, and suggesting and emphasising that the accused had a propensity for such behaviour which was inconsistent with the acquittals. Notwithstanding that the prosecution, by this use of the evidence, did not directly challenge the acquittals, such a use of the material undermined what was already the subject of a binding judgment and denied the accused the full benefit of his acquittals. As such, it was an abuse of process. It made no difference that the accused had been acquitted pursuant to s. 391 of the Crimes Act 1958, following the prosecution’s decision not to call evidence, rather than by a jury verdict.**

61. Kirby J was of the opinion that the Victorian Court of Appeal had correctly pointed to the fact that the governing principle (of giving full effect to an earlier acquittal) is broader than one forbidding only a direct contradiction of the earlier acquittal (for which *res judicata*, a plea of *autrefois acquit* or stay of proceedings for abuse of process would lie as protection of an accused). His Honour noted that a broader principle is required where a contrariety is less absolute and the undermining of the first jury’s verdict is more subtle, quoting *Young* at [62]:

‘It is not merely the possibility that the evidence might “tend to overturn” a verdict already entered but the likelihood that the jury will be invited to reach conclusions directly contrary to the effect of the acquittal, albeit for the purpose of determining guilt on another charge and it is that sort of attack by a sidewind which is seen to be



contrary to the requirement that a properly entered verdict must be treated as “incontrovertibly correct”.

62. As to the possible legal implications of *R v Z* in the Australian context, Kirby J said at [81]:

‘Whether the approach adopted by the House of Lords in *Z* may be reconciled with the reasoning of this Court in *Garrett and Storey* was a matter of dispute between the parties. Certainly, the decision in *Z* appears to favour a much narrower expression of the governing rule. It is one that runs the risk of effectively defining the rule out of existence. Neither party urged on this Court a reconsideration of *Sambasivam*, *Garrett and Storey* or an embrace, instead, of the approach stated in *Z*. and even in *Z*, Lord Hobhouse of Woodborough acknowledged that “[f]airness requires the jury to hear all relevant evidence”.

63. Thus it is clear that the High Court has not fully considered or adopted the principles set out in *Z*, and the law of this country, on this point, remains that which is stated in cases such as *Storey*, *Garrett* and *Rogers*. As to what the court might say when this question makes it way there is hard to say, but it would be fair to observe that the High Court has not disapproved of the reasoning in *R v Z*, and indeed, its most recent sanguine mention as a footnote in *Hughes* (at [20]), might appear as a portent of things to come.

#### **R v Z in NSW:**

##### **R v Chekeri (2001) 122 A Crim R 422**

64. In *Chekeri*, a case argued not long after the decision in *R v Z*, Howie J considered that *Z* was inconsistent with the High Court decisions of *Storey* and *Rogers*, as to the weight to be afforded an acquittal (at 53). His Honour was of the view that in such a case a jury must be directed that they cannot use the evidence in any way inconsistent with the verdict and they could not find (as a matter of fact) that the Crown had proved the earlier facts later relied upon.

**ELD v R (unreported NSWCCA 2 December 2005):**

65. *ELD* is an interesting decision in that its facts are not far dissimilar from those in *R v Z*, and it throws up the sort of scenario which may well be seen more frequently in the future.
66. The appellant had relevantly stood trial on two occasions:
67. *The first*, in answer to allegations of C1 that in 2000 and 2002, he had indecently assaulted her. The first occasion occurred in the appellant's motor vehicle on Stockton Beach when she was sitting in his lap practicing driving. He placed his hand on her breast. The second occasion occurred again whilst she was sitting in the appellant's lap driving his vehicle. He again touched her on the breast. The appellant was acquitted of both counts at his trial in 2013.
68. *The second*, in answer to allegations of C2 that in 2001, he had indecently assaulted her by placing his hand on her breast, whilst she was sitting in his lap, driving his car on Stockton Beach. She said that C2 was present on this occasion. There was a further trial involving allegations by C2, but there were no relevant issues raised in that trial.
69. One only needs to look at those facts to see the making of a strong similar fact case. Indeed, the Crown sought to lead it as coincidence evidence under s.98 Evidence Act. The trial judge permitted C1 to give evidence in the trial concerning C2 of the incidents that had been alleged in the trial in which there were acquittals.
70. On appeal the appellant argued that the trial judge erred in admitting the evidence of C1 on the basis of the reasoning of Barwick CJ in *Garrett*. Sully J disagreed, citing the *Carroll* proviso at [50]; *R v Z* and *R v Degnan*. In respect of the reference to *Carroll* Sully J was of the opinion that the proviso expressed at [50] in *Carroll* was not obiter. Minds might disagree with that, but the proposition does have support in a general sense.
71. Ultimately, the case turned on the directions given to the jury as to the use that could be made of the evidence of C1 – a critical matter given the numerous authorities earlier referred to as to the effect of an acquittal – during which Sully J posed the existence of two '*inescapable facts*' arising from the acquittal of the appellant:
  - (1) That C1's evidence had no probative force whatsoever save upon the premise that the jury found it to be both honest and reliable; and therefore, to be evidence that could be relied upon safely in aid of a conviction in the current trial; and

- (2) That the jury at an earlier trial had not been prepared to accept and act upon the evidence of C1; on only three bases: first that they thought her evidence dishonest or at least suspect as to its honesty; second that the jury thought her evidence was honest but unreliable, or at least suspect to its reliability; or thirdly, that the jury found her evidence was both dishonest or unreliable, or at least suspect on both those counts.
72. His Honour held that the trial judge's directions in no way properly dealt with the inescapable facts and the appeal was allowed.
73. It can be argued that, in the context of both tendency and coincidence evidence, when due weight is given to the fact of an earlier acquittal, and in light of the '*inescapable facts*' that are thrown up by an acquittal, then the evidence could never reach either of the thresholds under s.97/98 and 101(2) Evidence Act, and there is realistically no direction that can be given to a jury that could place the evidence in its context which satisfied those tests.

**Gilham v The Queen [2012] NSWCCA 131; (2012) 224 A Crim R 22:**

74. The facts in Gilham's case are notorious. In 1993 the applicant's parents and brother were all stabbed to death in the family home. At the time the applicant admitted killing his brother on the basis that he had been provoked by the brother's killing of their parents. He was charged with the murder of the brother, but a plea to manslaughter was accepted on the basis of provocation. He received a good behaviour bond.
75. In 2006, after constant family agitation, the applicant was charged with the murder of his parents. He was convicted. On appeal he argued that all evidence that called his conviction for manslaughter and acquittal of murder of his brother should have been excluded and that the principle of res judicata should have prevented the trial. The appellant argued that he had not been given the full benefit of his acquittal (see Garrett) and that because the issues in the trial involved traversing issues settled by the earlier verdict, the principle of res judicata operated to prevent the trial proceeding (see Storey).
76. As part of its deliberations the court took into account the cases which were the subject of the proviso in *Carroll*, namely *R v Z*, *R v Degnan* and *R v Apr*.

77. The judges in *Gilham* also considered what a verdict meant, in the context of whether later evidence controverted it. The court did not accept that an acquittal necessarily is an unequivocal finding of innocence (as was held in the Canadian decision of *Arp*), citing *Darby*, which in turn approved of *DPP v Shannon* [1975] AC 717, where Lord Salmon said:

‘An accused is entitled to be acquitted unless the evidence satisfies the jury beyond a reasonable doubt that he is guilty. A verdict of not guilty may mean that the jury is certain that the accused is innocent, or it may mean that, although the evidence arouses considerable suspicion, it is insufficient to convince the jury of the accused’s guilt beyond reasonable doubt. The verdict of not guilty is consistent with the jury having taken either view. The only effect of an acquittal, in law, is that the accused can never again be brought before a criminal court and tried for the same offence’.<sup>19</sup>

78. However, the judges in *Gilham* were of the view that the applicant’s acquittal of his brother’s murder was a relevant matter for the jury to consider, and said this at [152] – [154]:

‘Once it became apparent that the acquittal was relevant, the applicant became entitled to the "full benefit" of that acquittal: *Garrett* at 445 (Barwick CJ). Where evidence of an acquittal is admitted, it is not enough for a trial judge to instruct a jury, without further explanation, that a defendant is to be given the full benefit of his or her acquittal. The jury must be told what it means in the circumstances of the instant case to give the defendant the full benefit of the earlier acquittal: *Washer v Western Australia* [2007] HCA 48; (2007) 234 CLR 492 at [31] (Gleeson CJ, Heydon and Crennan JJ). In the context of the trial, that required the trial judge to inform the jury that the applicant's acquittal of murder constituted a formal acknowledgement by the sentencing court that the Crown could not, as at April 1995, negative the reasonable possibility that Christopher had killed Mr and Mrs Gilham, and that in doing so he provoked the applicant to kill him. That this was an assumption which underlay the acquittal is apparent from the agreed facts before the sentencing court, which read in part:

"The accused has given an account of events to Police which in their simplest form are a feasible account of what may have happened. The investigation to date has been unable to refute that scenario, despite a thorough scientific analysis and evaluation of the scene and available evidence."

The "feasible account" to which the statement of agreed facts refers appears in the previous paragraph and reads as follows:

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<sup>19</sup> At page 764

"The accused informed Police that he responded to a frantic intercom call from his mother after he was wakened from his dwelling, being a converted boatshed some 50-70 metres from the main house on the river line at the rear of the property. Upon entering the house the accused allegedly saw his brother Christopher standing beside their mother, who was lying on the floor, whom the accused presumed was deceased. As the accused approached his brother he (the accused) alleged his brother stated, words to the effect, 'I've killed Mum and dad', and with that saw a lit match in the brother's hand. As the accused drew nearer, his brother placed that match onto their mother's body which ignited immediately. The fire then spread rapidly to the main bedroom where the accused saw the presumed deceased of his father [sic] lying on the floor. With that, the accused stated that he responded and grabbed a knife, which was allegedly on the floor near to where his brother was standing, picked it up and chased his brother down a spiral staircase to a downstairs room where he fatally stabbed his brother a number of times ..."

Of course, the weight to be given to the assumptions that underlay the acquittal was entirely a matter for the jury. However, the jury were unable to consider whether to attach any weight to the fact of the acquittal because the trial judge did not inform them of it. More than that, the following direction given by the trial judge denied the relevance of one of the assumptions embodied in that acquittal, namely that the Crown could not disprove the circumstance amounting to provocation:

"Whether the Crown was correct to concede that the accused should be sentenced for manslaughter of his brother is neither here, nor there. They are decisions made by individual persons for reasons best known to that particular person in the circumstance of the facts that that particular person had before him or her at that particular time."

The applicant was denied the full benefit of his acquittal of murder. The second ground of appeal must therefore succeed.'

### **DS v R [2018] NSWCCA 195**

79. In DS the appellant was charged with a sexual offence involving fellatio against a young male nephew. At the trial the Crown relied on tendency evidence, arising out of earlier conduct of the appellant (some six years before) which involved placing his 4 year niece's hand on his penis. The appellant had been charged with that earlier conduct. The matter was dealt with in the Local Court. The appellant had not contested the facts of the matter, but rather the question for determination was whether the Crown had rebutted the *doli incapax* presumption, the appellant being

aged under 14 at the relevant time. The Magistrate held that the presumption had not been rebutted and the charges relating to the niece were dismissed.

80. In the later trial Crown presented a Tendency Notice asserting a tendency to have a sexual interest in young children relatives under the age of 10 years and a tendency to act, namely to indecently or sexually assault young children relatives under the age of 10 years.
81. At trial the appellant argued that the tendency evidence should not be permitted because it could never be evidence of a tendency to '*sexual assault*' young children relatives, having regard to the acquittal, that is inherent in a '*sexual assault*' is the mens rea associated with sexual offences, and the mens rea was not established when the charges were prosecuted. It was further submitted at trial that the evidence could not establish the appellant's tendency to have a sexual interest in children when he was presumed to be incapable of forming the intent to act in a criminal way.
82. At trial the Crown did not seek to put the evidence before the jury on the basis that it tended to suggest that the accused knew what he was doing to the niece was wrong. Rather, the evidence was tendered to establish a state of mind, namely to have a sexual interest in young children, relatives under the age of 10 years.
83. The trial judge noted that '*a person can have a sexual interest in another person without knowing that acting upon that interest in a sexual way is seriously wrong*'.
84. On appeal the Crown argued that the acquittal in the Local Court did not present a barrier to admissibility of the tendency evidence because its use did not tend to call into question the earlier acquittals, as the evidence only went to the *actus reus* of the conduct and not the question of the intent.
85. Wilson J noted that in her view the trial judge was correct to hold that it is possible for a person to have a sexual interest in a child, and to act on that interest, without understanding the wrongfulness of the conduct. Her Honour was also of the view that evidence of that nature would have had significant probative value concerning the principle fact in issue, namely whether the appellant had engaged with his young nephew sexually as charged and its value was sufficiently high as to outweigh the potential prejudicial effect upon the appellant.
86. However, Wilson J also noted that the way the trial was conducted and left to the jury was that the appellant had a tendency to engage in '*sexual misconduct*' with, or

‘*sexually assault*’, young relatives, with both the Crown Prosecutor and the trial judge using those terms before the jury. It can be seen therefore that the basis of the admissibility (as argued before the trial judge) and how the evidence was ultimately left to the jury significantly, and impermissibly changed during the course of the trial.

87. Wilson J was of the view that the evidence concerning the niece was never available as evidence of a tendency to ‘*sexually assault*’ young relatives and was of the view that the use of such terms ‘*tended to overshadow*’ the permissible use of the evidence, namely, a tendency to have a sexual interest in young children relatives and a tendency to act on that sexual interest. Her Honour felt that the distinction was more than semantic and created an impermissible prejudice to the appellant.

88. Concerning the ‘*principal of incontrovertibility*’ established in cases such as *Carroll* and *Gilham*, her Honour was of the view that:

‘to permit the Crown to rely on the evidence as ‘*sexual assaults*’ did in fact traverse those aspects of the principle that reflect the importance of finality of court verdicts, and the notion of inherent unfairness involved in the bringing of a further accusation with respect to conduct of which an accused person has been acquitted (other than those rare cases where it is permitted by statute).<sup>20</sup>

89. Basten JA delivered a separate judgement during which he agreed with Wilson J that the evidence involving the niece was not admissible for the reasons given by her Honour but also went further.

90. His Honour noted that the question of inadmissibility of the disputed evidence involved three steps:

- (1) There is the principle that a prosecutor cannot rely on conduct which has been the subject of a previous charge and acquittal in a way that would controvert the acquittal (relying on *Carroll* at [45], [93] and [137]). The scope of that principle will depend on the basis of the acquittal. In cases tried before a jury, an acquittal may reveal no more than that the jury was not convinced beyond reasonable doubt as to some element of the offence.
- (2) The earlier acquittal does not necessarily mean that the conduct the subject of the charge may not be relevant and admissible in a subsequent criminal trial for a different offence (citing *R v Z* and the proviso in *Carroll* at [50]).

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<sup>20</sup> At [101]

However, to ensure that the evidence is not used in a manner which controverts the acquittal, it is necessary to have careful regard to the basis upon which it is to be presented to the jury.

- (3) Arguably contrary to the observations and findings of Wilson J, and noting that the prosecution had been conscious of the need not to controvert the acquittal and thus supported the admissibility of the evidence on the basis that it was probative of the conduct of the accused on the charged offences, rather than on any mental state:

‘However, while the law distinguishes between a mental state (*mens rea*) and the conduct (*actus reus*), it is by no means clear that the use to which the evidence might be put could be differentiated that way. For example, where a man is charged with non-consensual sexual intercourse with a woman and denies that intercourse took place, evidence that the accused had consensual intercourse with other women on other occasions could hardly render the *actus reus* more probable’.

93. Lonergan J agreed with the judgement of Wilson J and the additional observations of Basten JA.

## V. OBSTACLES TO ADMITTING EVIDENCE OF EARLIER ACQUITTALS

94. The first, and most obvious obstacle is the yet settled status of *R v Z* reasoning in Australia, despite its references to within a number of Australian jurisdictions.<sup>21</sup> The High Court has yet to determine this issue. Having said that, NSW courts have been adopting, without any concerted challenge, such reasoning for some time. Whilst the full implications are yet to be considered, it can be expected that courts in NSW will permit the Crown to lead evidence of prior acquittals in appropriate circumstances, and with appropriate protections, as viewed through a current lens, the focus of which has shifted significantly since, for example, 2007, when *Washer* was determined. In that regard cases such as *Ford* and *Hughes* come to mind.
95. Care must be taken when importing concepts from foreign jurisdictions that conditions precedent to admissibility in that jurisdiction are compared with those in

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<sup>21</sup> Intermediate courts of appeal have adopted *R v Z* reasoning in courts in NSW, Victoria, Western Australia and Tasmania.



Australia. For example, consideration must be given to the standard of proof required for the admission of such evidence in that foreign jurisdiction (a matter since resolved by the High Court in *Bauer*) and the availability of statutory or common law discretions to exclude evidence (in this case for example, the text of s.78 of the UK Act which provided for a general fairness test in *R v Z's* case).<sup>22</sup>

96. Moreover in 1995 Wendy Harris argued that ‘*similar fact*’ evidence was an area of the law that had been plagued with controversy and interest over the years, in Australia and abroad. Difficulties had arisen concerning the theoretical foundation of similar fact evidence rule, and that contributing to this confusion had been the misdescription of similar fact evidence and the subjective use of terminology such as propensity

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94. <sup>22</sup> In *Arp* the Canadian Supreme Court held that the proper standard to apply to the primary inference drawn from similar fact evidence is proof on a balance of probabilities, as since the probative value of similar fact evidence, as circumstantial evidence, lies in the unlikelihood of coincidence, it does not make sense to require one of the allegations to be proved beyond a reasonable doubt as a prerequisite to the trier of fact’s consideration of it (at page 6). In New Zealand, where *Degnan* was decided, the Evidence Act 2008 at s.40 deals with the topic of ‘*propensity evidence*’ which is said to be a move away from the common law term of ‘*similar fact*’. The predecessor of the 2008 Act is the 1908 Evidence Act, which is silent as to the admissibility of such evidence, and common law principles applied. In *Mahomed v R* (2011) 3 NZLR 145, William Young J set out the common law background to the admission of similar fact evidence, prior to enactment of the 2008 Evidence Act (from [50]). As stated in *Mahomed*, the Evidence Act represented a ‘*clean sweep*’ in relation to the provision of what is now known as propensity evidence. Under s.40 there is no standard of proof required. The learned authors of *Garrow & Turkington’s Criminal Law in NZ* (Lexis Nexis) at APPVIII.19 state that the test for admission of such evidence is arguably not susceptible to any standard of proof before being considered (citing *Stewart* [2008] 1 NZLR 197 at [34]). Finally, in the United Kingdom the question of the proper standard of proof for similar fact matters was recently clarified in *R v Mitchell (Northern Ireland)* [2016] UKSC 55. In that case Lord Kerr (with whom the rest of the bench agreed) conducted an historical examination of this issue and concluded at [31]: ‘*Consideration of these authorities (and R v Z [2000] 2 AC 483 to which the respondent also referred) leads inevitably to the conclusion that before the enactment of the 2004 Order (and its England and Wales counterpart, the Criminal Justice Act 2003) there was no clear, definitive statement on the issue now raised as to how juries should treat evidence of similar facts or propensity*’. However, *Mitchell* now makes it clear that a jury should be directed that, if they are to take propensity in to account, they should be sure it has been proved; that does not require that each individual item of evidence said to show propensity has to be proved beyond a reasonable doubt (see also *Halsbury’s Laws of England* (Lexis Nexis) under the heading ‘*Bad Character*’ at [589]).

evidence, propensity reasoning and probability reasoning.<sup>23</sup> Harris was so pleased when the High Court in *Pfennig v R* (1995) 127 ALR 99, finally grasped the nettle and tidied up the use of terminology.

97. However, within days the certainty was over for NSW when the Evidence Act 1995, introduced the complementary statutory terms of ‘*tendency evidence*’ and ‘*coincidence evidence*’, which are broadly understood to mirror their common law counterparts of ‘*propensity evidence*’ and ‘*similar fact*’ evidence, although it is conceded that this analogy is not a particularly nuanced one.
98. The distinction between tendency and coincidence evidence is a significant one in the context of this area of law, given that the cases advocating the admissibility of this type of evidence arise in common law jurisdiction and use ‘*similar fact*’ evidence as their platform for admissibility.
99. When the matter of *McPhillamy v R* was before the Court of Criminal Appeal the judges considered the possible differences between tendency and coincidence evidence at [52] – [53]:

‘Section 97 is to be contrasted with s 98 which is concerned with the admissibility of evidence adduced for the purpose of engaging coincidence reasoning. In the context of criminal proceedings such reasoning relies on evidence of the accused’s involvement in events which have ‘striking similarities’, ‘unusual features’ or ‘underlying unity’ in common with the charged conduct so as to raise, as a matter of common sense and experience, the objective improbability of the charged event having occurred without the involvement of the accused: *Hoch v The Queen* (1988) 165 CLR 292 at 294-295 (Mason CJ, Wilson and Gaudron JJ). Each of these forms of reasoning may be employed relying on evidence of similar facts.

The nature of tendency evidence is described in the judgments of this Court in *Gardiner v R* [2006] NSWCCA 190; (2006) 162 A Crim R 233 at [124] (Simpson J); *Elomar* at [253], [359]-[360] and *Hughes* at [160]. In *IMM Gageler J* citing *Elomar* said at [104]:

The nature of tendency evidence adduced by the prosecution in a criminal trial is that it is evidence of another occasion or occasions on which the accused acted in a particular way. The evidence is adduced in order to provide a foundation for an inference that the accused has or had a tendency

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<sup>23</sup> W Harris ‘*Propensity Evidence, Similar Facts and the High Court*’ (1995) 11 QUTLJ 97

to act in that way or to have a particular state of mind, the existence of which tendency makes it more probable that the accused acted in a particular way or had a particular state of mind at the time or in the circumstances of the alleged offence. Tendency evidence is thus evidence the relevance of which lies in its capacity indirectly to affect the assessment of the probability of the existence of the fact in issue of the accused's action or state of mind at the time or in the circumstances of the alleged offence.

In addition to evidence of conduct which is likely to constitute similar fact evidence, evidence of “character”, “reputation” or of the “tendency” itself may be adduced to prove a tendency or propensity. The tendency, which is the “particular matter” within the meaning of s 95(1) to which the exception in s 97 is directed, must be “to act in a particular way, or to have a particular state of mind.’

100. Given the open natured text contained within s.97, and the High Court’s interpretation of it in *Hughes*, there may be a real distinction between the probative value of each of these categories of evidence in any individual case. Tendency evidence may be admissible in NSW which is of a significantly lower probative value than that of coincidence evidence, which by its nature requires a high degree of similarity and thus may well result in greater probative value.
101. It may be argued that a court might be more likely to admit evidence of a prior acquittal in circumstances where a high degree of coincidence evidence is available (see *ELD*) than it would be when tendency reasoning is relied upon (see *DS*). Stone’s ‘*ascending scale of probability*’ again comes to mind in this regard.
102. Given the highly prejudicial nature of evidence of prior sexual misconduct, great care should be given to consideration of the 101(2) Evidence Act.
103. As to the potential prejudicial effect of prejudice of tendency evidence, the High Court said in *Hughes* at [17]:

‘The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its

onus may be clouded by the jury's emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.'

104. Earlier, in *Watkins*, Barr J at [49] said there was a:

'... a real danger that the jury's recognition of the appellant's prior guilt was likely to divert them from a proper consideration of the evidence as bearing on the question of his intent in the charges before them.'

105. Finally, in *ELD*, his Honour Sully J was well alive to the prejudicial nature of the evidence sought to be adduced, and its probative value. In doing so he referred to the 'inescapable facts' which made crafting jury directions difficult in such a case.

## VI. CONCLUSION

106. For some time the courts have allowed a more permissive view of the reception of evidence of bad character. Admitting evidence of prior acquittals is another step along that road.

107. For practitioners it is essential to understand the theoretical basis for the possible admission of such evidence, and to constantly test its boundaries. Care must be taken to ensure that the protections of prior acquittals are jealously guarded, or like other aspects of discretionary or statutory exclusion, they will be taken away by a case with the wrong facts, at the wrong time.

108. Whilst there may be circumstances in which a court might permit evidence of proper acquittals to be admitted, the bar to the reception of such evidence should remain at a proper level and not be eaten away by the ever swinging pendulum of shifting standards.