The admissibility of evidence of criminal propensity in Common Law jurisdictions

Roderick Munday*

Dr Munday examines several developments which tend to run counter to the accepted principle that in criminal cases the prosecution is generally forbidden to introduce evidence to show that the accused has committed like offences or been guilty of similar misconduct to that with which he is now charged. Legislative instances examined are cases of traitors, receivers of stolen property, and poisoners. Common law instances examined are sexual aberration, membership of criminal organisations, syndrome evidence, and cross examination to credit. The author concludes by expressing some concerns about such inroads into the accepted principle.

I. INTRODUCTION

It is a vaunted principle of the common law that in criminal cases the prosecution is generally forbidden to introduce evidence to show that the accused has committed offences or been guilty of misconduct other than that charged in the indictment. This self-denying ordinance, intended to obviate undue risk of prejudice to the defendant, is subject to few exceptions. The rules permitting the admission of what falls under the generic description of 'similar fact evidence', however, furnish an important derogation from this intentionally humane evidentiary principle. Yet, in so far as they seek to restrict the admissibility of evidence of other misconduct to cases where the evidence of misdoing enjoys an unusually high degree of relevance in relation to the offence or offences charged, these rules - buttressed as they are by Viscount Sankey LC's account in *Maxwell* v *DPP* of the lofty pose struck by the criminal law whose "whole policy ... has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues"[1] - are largely consistent with the common law's oft-avowed aim to minimise, if not eliminate, risk of prejudice to the accused.[2]

* Fellow of Peterhouse, Cambridge. Visiting Lecturer at Victoria University of Wellington, June-December 1988.

1 [1935] AC 309, 323.

2 The prejudice may take a number of forms. Most obviously, it can consist in evidence that encourages the jury to decide the case in an improper manner - taking the intellectual short-cut by assuming that a person of general bad character is therefore likely to have committed the offence charged: *US* v *Shackleford* 738 F 2d 776 (7th Cir 1984). Revelation of an accused's other misdeeds may suggest that person has less to lose than someone of unblemished character and encourage a jury to apply a less exacting standard of proof to the question of guilt. Alternatively, if the other misconduct concerns acts for which the defendant has not been charged, the jury may seek to punish the accused for those acts rather than just the offence

It is clear that the narrow scope of the similar fact rules sometimes proves irksome. Not only can the layman view uncomprehendingly the law's refusal to admit evidence, adverse to the defendant, that he would cheerfully recognise as conclusive or at least strongly indicative of guilt, but judiciary and legislature alike can similarly betray sporadic doubts as to the wisdom of excluding from the courts' consideration evidence of other misconduct. Such doubts may reveal themselves by the law's treating classes of offenders or offences as exceptional and thus deserving of special rules. In this way, English courts, until recently, were wont to treat homosexual offenders as a breed apart, whom it was appropriate to question on their general sexual propensities. In an oft-rehearsed passage from his speech in *Thompson* v *R*, Lord Sumner had referred to "persons who commit the offences now under consideration seek(ing) the habitual gratification of a particular perverted lust which not only takes them out of the class of ordinary men gone wrong, but stamp them with the hallmark of a specialised and extraordinary class as much as if they carried on their bodies some physical deformity."[3] In *Sims* the English Court of Appeal was to press this view to its logical conclusion and suggest that evidence of an accused's homosexual propensity, regardless of its similarity to the offence complained of, should always be admissible where an accused stands trial for homosexual offences.[4] In the 1970s the courts retreated from this position, and the House of Lords in *Boardman* v *DPP* eventually established that no special similar fact rules obtain in trials for offences of a homosexual nature.[5] Courts henceforth should apply similar criteria to all offences and admit other misconduct evidence only if it exhibits special probative value in respect of the offence charged.[6] But even if *Boardman's* case has restored a measure of orthodoxy to this area of law, the episode serves to illustrate the way in which the law, forever seeking after an equilibrium between competing desires to act fairly towards the accused and yet to admit all evidence that genuinely points to guilt, can be induced to create exceptions to the general rule. The purpose of this paper will be to consider certain of the exceptions that legislatures and courts in the common law world have seen fit to introduce in this domain.

The exceptional classes of case treated here will all be instances where the law has allowed the tribunal of fact to employ what is widely designated 'the forbidden reasoning'. There are formidable difficulties in expressing with precision what is exactly meant by the forbidden reasoning.[7] There is agreement that similar fact evidence pointing indisputably to the guilt of the accused in respect of an offence charged avoids

charged. For a recent discussion of these factors, see Inwinkelried *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence* 56 Fordham L Rev 247, 262-3 (1987).

3 [1918] AC 221, 235. Broadly similar sentiments are expressed in the American case of *State* v *Start* 132 Pac 512, 517 (Ore 1913).

4 [1946] KB 531.

5 [1975] AC 421.

6 See notably, *Rance* (1975) 62 Cr App R 118, 121 *per* Lord Widgery C J. Presumably, a case like *Twomey* [1971] Crim L R 277 would exemplify this requirement.

7 For discussion of the problem, see Odgers *Similar Fact Evidence and Perry* v *The Queen* (1983) 57 ALJ 613.

the forbidden reasoning. Thus, in the case of 'Brides in the Bath' Smith,[8] the overwhelming list of similarities between the various drownings rehearsed by Scrutton J at the trial should convince even the most intractable sceptic of Smith's guilt of the murder for which he stood indicted, that of Bessie Mundy. Similarly, there will be little dissent from the proposition that evidence merely portraying the accused as someone of bad character, and for that general reason more predisposed to have committed offences of which he stands charged will not be sufficiently relevant to be admitted as part of the Crown's evidence. Hence, the fact that Smith has gone through a form of marriage with each of his three 'brides' was admissible as one feature those incidents all shared in common. However, the fact that Smith was already married to a fourth woman and therefore had committed the offence of bigamy with the three 'brides' would never have been admissible simply to suggest a tendency on his part to break the law or behave immorally and, hence, to indicate predisposition to drown brides who financially had outlived their usefulness.[9] The problem naturally lies in identifying this dividing line between these two uncontroversial categories of case. As Lord Cranworth LC once remarked, "There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine."[10] The courts, applying a blend of experience and commonsense, simply require that in the context of the case the evidence of other misconduct proffered should display a far higher measure of relevance than that customarily demanded, this sometimes being described as "positive probative force".[11] This evidentiary concept is generally understood and the mapping of the precise dividing line between the admissible and the inadmissible need not detain us, as this paper will be concerned exclusively to assemble some of those maverick cases where the general principle is obviously breached.

II. LEGISLATIVE TREATMENT OF TRAITORS, RECEIVERS AND POISONERS IN ENGLAND AND NEW ZEALAND

In the legislative field, both New Zealand and English law can boast exceptional provisions which have left it open to the prosecution to lead evidence of a defendant's general tendency to commit the type of offence charged, thereby inviting the tribunal of fact to adopt 'the forbidden reasoning' and to infer guilt from the fact that the accused is the sort of person who commits that species of offence. Certain of these provisions resemble one another closely.

A. *Traitors*

Section 7 of the New Zealand Official Secrets Act 1951 (now repealed by the Official Information Act 1982) was broadly similar to provisions in the English Official Secrets Act of 1911, which latter Act will shortly be repealed. In as much as section 7

8 (1915) 11 Cr App R 229. See notably Scrutton J's charge to the jury in Watson (ed) *Trial of George Joseph Smith (1922) Notable British Trials* 307.

9 Watson (ed), above n 8, 274.

10 *Boyse* v *Rosborough* (1857) 6 HLC at p 45.

11 For example, *Rance*, above n 6, 121 *per* Lord Widgery CJ. See also *Scarrott* [1978] QB 1016, 1022 *per* Scarman LJ.

permitted the Crown to show from "the known character of the accused as proved" that the accused's purpose was to act in a manner prejudicial to the safety or interests of the State, the provision clearly qualified as a case of the law's exceptionally allowing the introduction of evidence of general disposition that invited the tribunal of fact to indulge in the forbidden reasoning.[12] This unorthodox provision also imposed a legal burden of proof on the accused to show that his purpose was not prejudicial to the interests or safety of the State. The draconian character of the section might have been explicable in terms of the overriding importance ascribed to the interests the Act sought to protect and the acute difficulty the prosecution would have encountered in proving such a purpose beyond reasonable doubt by other means. However, it offered the Crown unusual latitude and uncharacteristically entitled it, presumably subject to the trial judge's customary discretion to exclude unduly prejudicial evidence, to adduce all manner of data from which an accused's supposed objectives might be deduced.

It can only be said that prosecutions under these Official Secrets Acts were comparatively few - and, all too often, fruitless. Perhaps for this reason, the renegade evidentiary principles attracted comparatively little critical comment from writers on the law of evidence. Moreover, when New Zealand repealed the Official Secrets Act 1951, the reasons the Danks Committee gave for abrogation of this provision did not derive from disquiet at the admission of such general character evidence but rather from the Committee's desire drastically to narrow the criminal sanctions attendant upon this species of offence,[13] and from a shared conviction with an earlier Canadian Commission of Inquiry that the reversal of the burden of proof effected by the enactment was not only contrary to basic principles of the criminal law but seemed to have exerted minimal impact on the number of convictions returned by Commonwealth juries.[14]

12 See Cross *Evidence* (3rd NZ edition, by Mathieson, 1979, Butterworths, Wellington) 378. The English provision is framed in the following terms:

> On a prosecution under this section, it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place within the meaning of this Act, or anything in such a place, is made, obtained, or communicated by any other person other than a person acting under lawful authority, it shall be deemed to have been made, obtained, or communicated for a purpose prejudicial to the safety or interests of the State unless the contrary is proved. (section 1(2)).

13 See Supplementary Report of the Committee on Official Information *Towards Open Government* (Government Printer, Wellington, 1981) esp paras 5.36 - 5.38.

14 See Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police *First Report, Security and Information* (1979) paras 79-82. It is true that the Canadian report did remark upon the exceptional nature of the character evidence admissible under the equivalent Canadian provisions (para 80), but quite reasonably the statutory presumptions created by the Act served as the principle focus for criticism.

B. *Receivers*

It is sometimes claimed that the prosecution rarely exercises its right under another anomalous provision of English and New Zealand law to adduce in appropriate circumstances evidence of propensity at the trial of a defendant charged with receiving dishonestly obtained property.[15] However, a flurry of recent reported decisions in England would indicate that, despite suggestions to the contrary,[16] the Crown cannot always be depended upon sportingly to refrain from availing itself of a provision that allows it to adduce evidence of the defendant's disposition to commit the offence of receiving. Although, as will be seen, the English and New Zealand enactments are not identical in their terms, both provisions permit the introduction of two types of evidence of disposition. Section 258(2) of the New Zealand Crimes Act 1961 provides as follows:[16a]

> ... where any one is being proceeded against for an offence against this section, the following matters may be given in evidence to prove guilty knowledge, that is to say:
>
> (a) The fact that other property obtained by means of any such crime or act as aforesaid was in the possession of the accused within the period of twelve months before the date on which he was first charged with the offence for which he is being tried:
>
> (b) The fact that, within the period of five years before the date on which he was first charged with the offence for which he is being tried, he was convicted of the crime of receiving:
>
> Provided that the last-mentioned fact may not be proved unless there has been given to the accused, either before or after an indictment has been given that the property in respect of which the accused is being tried was in his possession.

15 Since 1968, when the Larceny Act 1914 was repealed, the English offence is that of handling stolen goods.

16 Compare May *Criminal Evidence* (London, 1986) para 5.37.

16a This provision is not reproduced in the present Crimes Bill now before Parliament - ed.

The English provision, section 27(3) of the Theft Act 1968,[17] differs in several points of detail from the New Zealand enactment.[18] Amongst current differences, it could be noted that in paragraph (a) of the English statute the twelve-month period restricting the evidence of other stolen goods the Crown may adduce relates to the date on which those other goods were stolen and not, as in the case of the Crimes Act 1961, to the period during which the accused was found in possession of other dishonestly obtained property. English law, therefore, has determined that what counts is that within a relatively short period the defendant has been found in possession of other "hot" goods - thereby conceivably seeking to justify the rule by implicit reference to the presumption of fact that at law allows the tribunal of fact in cases of theft and receiving to infer guilty knowledge from the possession of recently stolen goods.[19] In New Zealand, the predominant concern is that by a strange coincidence the defendant has more than once, within the space of a year, been caught in possession of dishonestly obtained property. The staleness of its dishonest acquisition is not necessarily a relevant consideration - although it might of course entitle a court to exercise its discretion and exclude the evidence from the trial on grounds of unfairness.[20] A further distinction between the two paragraphs (a) is that the Crimes Act 1961 only allows evidence of other receiving that has been committed before the date upon which the offence was charged; in contrast, the English statute, which was deliberately altered to this effect in 1968, would allow proof of handling incidents subsequent to the date of the offence

17 Section 27(3) reads as follows:

> Where a person is being proceeded against for handling stolen goods (but not for any offence other than handling stolen goods), then at any stage of the proceedings, if evidence has been given for his having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal, disposal or realisation, the following evidence shall be admissible for the purpose of proving that he knew or believed the goods to be stolen goods:
>
> (a) evidence that he has had in his possession, or has undertaken or assisted in the retention, removal, disposal or realisation of, stolen goods from any theft taking place not earlier than twelve months before the offence charged; and
>
> (b) (provided that seven days' notice in writing has been given to him of the intention to prove the conviction) evidence that he has within the five years preceding the date of the offence charged been convicted of theft or of handling stolen goods.

18 As Denniston J observed almost a century ago in *Wilkinson* (1898) 17 NZLR at 5 - a case that highlighted the distinctions between the wording of section 262(2) of the Criminal Code 1893 and of section 19 of the English Prevention of Crimes Act 1871, precursors of the provisions under consideration - where the statutory language differs, cases on the interpretation of the English Act will not necessarily be applicable in New Zealand.

19 See, for example, *Schama* (1914) 84 LJKB 396; *Aves* [1950] 2 All ER 330.

20 It is clear that, as in England, the New Zealand trial judge retains a discretion to exclude technically admissible evidence if he esteems that its prejudicial effect outweighs its probative value - *McDonald* [1976] 2 NZLR 99, 102 *per* Hutchison J.

charged (or, for that matter, subsequent to the date of charge) provided that the goods were stolen no earlier than one year before the date of the offence.[21]

The wording of paragraph (b) also diverges in the enactments. Both provisions allow the prosecution, upon the giving of notice, to prove that within a previous five-year period the defendant has been convicted of certain offences. But whereas the Crimes Act only allows proof of conviction for receiving - thus suggesting that the objective is to secure evidence that the defendant is a persistent or professional fence, the English Theft Act allows the proof of convictions for theft or handling, thereby indicating that a broader range of dishonest activities can be assumed to point to guilty knowledge in handling cases. The five-year period also runs from different dates in the two provisions, although little need be made of this: in New Zealand the operative date is that of first being charged, in England it is the date of commission of the offence.[22]

The textual variants in the two statutes communicate a certain air of serendipity and neither provision can be squared with orthodox evidentiary principles. That New Zealand courts may have endeavoured to reconcile section 258(2) of the Crimes Act 1961 with the general intellectual framework of similar fact evidence rules is suggested by their readiness to accept that, as in other realms, there exists a discretion to exclude technically admissible evidence if it is simply too prejudicial, and, more particularly, to cite in support of this proposition[23] Lord Sumner's warning against the prosecution crediting the defendant with fanciful hypothetical defences simply in order to introduce a damning piece of prejudice, delivered in the similar fact case of *Thompson*.[24] The difficulty is that, no matter how one gilds the pill, although the Acts only render the other misconduct evidence admissible for the limited purpose of establishing guilty knowledge,[25] it nevertheless constitutes evidence of general disposition extending far beyond the bounds of conventional criminal proof. The quandary posed is perhaps revealed in Williams J's brief judgment in the English case of *Carter*.[26] The case concerned a charge of receiving a stolen mare. The prosecution had sought to have

21 "Subsequent", in this context, therefore goes far beyond what was contemplated by Hawkins J in *Carter* (1884) 12 QBD 522.

22 In a more general perspective, it is arguable that in regard to this matter the two jurisdictions are moving perceptibly in opposite directions. New Zealand legislation has tended to restrict the evidence admissible under section 258(2) of the Crimes Act 1961, whilst in England the tendency has been, if anything, to expand the scope of the equivalent provision. Thus, paragraph (a) in section 284(2) of New Zealand's Crimes Act 1908 more closely resembled the amended English section 27(3)(a) than its 1961 successor in that its wording may have allowed the proof of receiving incidents subsequent to the date of charge. Similarly, the offences proof of which is admissible under New Zealand's paragraph (b) has been whittled down from 'any offence of a fraudulent or dishonest nature' to simply 'the crime of receiving'; the English enactment persists in admitting more general evidence of dishonesty.

23 See, for example, *McDonald* [1976] 2 NZLR 99; *Rogers* [1979] 1 NZLR 307.

24 Above n 3.

25 And the judge must direct the jury clearly to this effect - *Wilkins* (1975) 60 Cr App R 300.

26 (1884) 12 QBD 522.

admitted evidence that on an earlier occasion the accused had received another stolen mare. Under the specific wording of the statute then in force, section 19 of the Prevention of Crimes Act 1871, the evidence was unanimously rejected by the Court for Crown Cases Reserved on the grounds that the other stolen mare was not in the accused's possession at the time when he was found with the mare that was the subject of the offence charged. However, Williams J significantly went on to say that "according to the proper construction of the section in question, and *also according to reason and commonsense*, the evidence was improperly admitted."[27] In short, such evidence of other misconduct simply does not coincide with the classical evidentiary perception of things - a sentiment not unreminiscent of Hood J's stalwart affirmation of common law doctrine in the Australian case of *Emmett*, when he rejected "the assumption that a man who has six stolen sheep in his possession could not have honestly come by a seventh."[28]

Nor are matters helped by both enactments referring exclusively to the admissibility of *"the fact"* that the accused has received other goods or been convicted of offences. Although there was once authority for saying that under paragraph (a) the prosecution could inform the court of the circumstances surrounding the finding of other dishonestly obtained property,[29] English courts have now retreated from this position and under both paragraphs refuse to allow the Crown to adduce more than the mere fact of other misconduct or criminal convictions.[30] There is some New Zealand authority for permitting the admission of further details of convictions under paragraph (b). In *Brosnan* the Court of Appeal, battling to make sense of the provision, discerned that "the intention of the section is to prove guilty knowledge from the similarity of the events" and proposed that relevant surrounding circumstances, such as the nature of the previous offence, the property which was the subject thereof and the name of the owner could be admitted.[31] It is, however, doubtful that a court would today dare in this way to assimilate section 258(2) of the Crimes Act 1961 with the general principles governing the admission of similar fact evidence. Indeed, *Brosnan's* strained interpretation of the statute may be explicable in terms of the very broad range of convictions admissible under the old section 284(2) of the Crimes Act 1908.[32] In both New Zealand and England, therefore, this legislation admits only the bare minimum of relevant information, thereby guaranteeing that the tribunal of fact, if it makes use of this evidence is guided only by insinuation and suggestion.

Even if it would not be followed today, *Brosnan* does illustrate one possible consequence of legislatures creating rules that infringe entrenched evidentiary principles.

27 Above n 26, 524 (emphasis added).

28 [1905] VLR 718, 721.

29 *Smith* [1918] 2 KB 415. See also Cross *Evidence*, above n 12, 379.

30 *Bradley* (1979) 70 Cr App R 200; *Wood* [1987] 1 WLR 779 (section 27(3) (a) Theft Act 1968); *Fowler* (1987) 86 Cr App R 219 (section 27(3) (b) Theft Act 1968).

31 [1951] NZLR 1030, 1039 *per* Hay J. For a broadly similar view of the English paragraph (a), see *Smith* [1918] 2 KB 415, 417-8 *per* Darling J.

32 See above n 22. Some of the difficulties posed by the English statute's narrow scope have been considered in Munday *Handling the Evidential Exception* [1988] Crim LR 345. That discussion is largely applicable to the New Zealand statute.

In order to retain coherence in the law, courts may either seek to interpret a statute restrictively so as to contain its exceptional provisions, or, as in *Brosnan*, by analogy to explore extensions of common law doctrine with a view to bringing the two bodies of rules into closer alignment. English courts have not always found it easy to resist adopting this second strategy. In *Waldman*,[33] for instance, a defendant, convicted of receiving, appealed against conviction on the ground that the prosecution had wrongly been permitted by the trial judge to cross-examine him on both an earlier conviction and an earlier acquittal involving charges of receiving stolen goods. Counsel for the Crown put forward the ambitious argument that, once the accused, by testifying and calling evidence as to his good character, had forfeited the statutory shield that would otherwise protect him from the cross-examination on his bad character,[34] since *mens rea* remained the only disputed issue in the case, it was open to the prosecution to adduce evidence tending to prove that the accused possessed the necessary *mens rea*. The accused's previous conviction and acquittal - both for receiving, counsel asserted, indicated that Waldman was "obviously a man who should be more careful about the reception of property which was outside the scope of his normal business".[35] Leaving to one side the fact that, unlike the exceptional provision of the Theft Act 1968 regarding handlers to which reference has already been made,[36] cross-examination as to bad character, when permitted, in English law is only admissible as evidence going to credit,[37] the interesting point in the case is that Avory J did not dismiss the prosecution's argument out of hand. On the contrary, alluding to the exceptional statutory provision governing evidence admissible against receivers, the judge proceeded to observe that there might indeed be a distinction to be drawn between cases where the Crown sought simply to introduce evidence of a previous acquittal - which the House of Lords had shortly before ruled in *Maxwell* v *DPP*[38] was not relevant to any issue in that trial - and cases like *Waldman*, where it wished to question the accused about a conviction *and* an acquittal. Whilst the Court of Criminal Appeal declined actually to rule on the point, Avory J was

33 (1934) 24 Cr App R 204.

34 Under section 1(f) of the Criminal Evidence Act 1898. The principles enshrined in that provision are generally followed by the New Zealand judges in the exercise of their discretion to allow cross-examination of an accused on his bad character under section 5(2)(d) of the Evidence Act 1908: *Clark* [1953] NZLR 823, 830-1; *Fox* [1973] 1 NZLR 458; *Potter* [1984] 2 NZLR 374.

35 The implication is not particularly compelling, although it is sometimes said to justify the reception of evidence under section 27(3) of the Theft Act 1968: see, for example, *Wood* [1987] 1 WLR 779, 784 *per* Mustill LJ. For whilst other incidents *may* predicate that a defendant will have been more inquisitive about the provenance of goods he is offered and, therefore, more likely to know that they are in fact stolen, the contrary hypothesis cannot be excluded - that given his previous skirmishes with the courts, he will have been more careful and the reason that once again he has stolen goods in his possession is because he is genuinely more likely *not* to have known that they were dishonestly come by.

36 See above n 17.

37 *Richardson* [1969] 1 QB 299, 311 *per* Edmund Davies LJ. The position is slightly different in New Zealand, where cross-examination may be allowed if relevant to some matter in issue at the trial - *Fox*, above n 34.

38 [1935] AC 309.

willing to concede that "no doubt ... there is much to be said for making a distinction between a charge of receiving stolen goods and a charge such as that with which the House of Lords dealt in *Maxwell*".[39] The judge, at no loss for metaphors, was emphatic that the questions put to the accused concerning his previous acquittal, "even assuming that (they) ought not to have been put ... could not have turned the scale against the appellant but one pennyweight or one dram, much less by an ounce."[40] But it seems clear that, under the influence of the statutory provision concerning receivers, Avory J was not wholly averse to making an exception in favour of the prosecution, at least in the case of receivers. Technically, his *obiter dicta* in the case have never been overruled; but they would not be followed today. The case nevertheless offers an illustration of how an exception, grafted onto the law, can serve to fuel further speculation as to categories of offender for whom the law of evidence may reserve special treatment.

C. *Poisoners*

New Zealand possesses a third enactment that exceptionally allows the Crown to prove evidence of disposition. Section 23 of the Evidence Act 1908 provides:

> Where in any criminal proceeding there is a question whether poison was administered or attempted to be administered by or by the procurement of the accused person, evidence tending to prove the administration or attempted administration by or by the procurement of the accused, whether to the same or to another person, and whether at the same time as the time when the offence charged was committed or at any other time or times, shall be deemed to be relevant to the general issue of "Guilty" or "Not guilty", and shall be admissible at any stage of the proceedings, as well for the purpose of proving the administration or attempted administration by or by the procurement of the accused as for the purpose of proving the intent.

This curious provision, an authentic specimen of knee-jerk legislation, was passed following dismay at a ruling of the Court of Appeal in the case of *Hall*.[41] Hall had been

39 (1934) 24 Cr App R 204, 208. The distinction, if any, does indeed appear to repose in the nature of the offence. In *Maxwell*, a doctor was charged with the manslaughter of a patient following an illegal operation. Evidence that a charge in respect of another similar incident, that resulted in an acquittal, had been made out against the practitioner in the past was just not relevant either to establishing that the doctor had committed an offence on the second occasion or to showing that he was a person of bad character and thus not necessarily to be believed on oath. Given that he had been cleared of the first charge, admission of such evidence would not merely have been unfair (compare *Holloway* [1980] 1 NZLR 315, 321 *per* McMullin J) but simply irrelevant. In the case of receiving, the argument might run, where the state of mind of the accused is central to the charge, an earlier acquittal on a count of receiving may be anticipated to operate as a shot across the bows and incite a defendant to display greater caution when he acquires goods, thereby increasing the likelihood that he will have known if they were in fact obtained dishonestly.

40 Above n 39.

41 (1887) 5 NZLR 93. For further light on the case, see Treadwell *Notable New Zealand Trials* (New Plymouth, 1936) 147-60. In sentencing Hall in October 1885 for the

convicted of the murder of Captain Cain by antimonial poisoning. At his trial, evidence had been led that a few months after the incident Hall's wife, upon whom he had attended devotedly, displayed similar signs of poisoning by antimony. The Crown could only show that Hall was in possession of antimony and owned a copy of Taylor's well-known treatise on poisons, a book that he had providently purchased shortly before his wedding. The trial judge freely confessed that in the absence of evidence of the administration of poison to the wife, he would probably have had to withdraw from the jury the case against Hall in respect of the death of Captain Cain. The Court of Appeal ruled that the judge had committed an error in admitting the evidence relating to the attempt on Mrs Hall's life. Assuming that the object of the prosecution had been to use the evidence of the poisoning of Mrs Hall to prove both the *actus reus* and the *mens rea* of the offence alleged to have been committed against Captain Cain, the Court of Appeal essentially determined that such evidence could only be admissible to prove *mens rea*, and that only if the *actus reus* were independently proven. The evidence, in short, was not sufficiently probative. The accused's conviction was therefore quashed. It was to remedy the Court of Appeal's ruling that evidence of other poisoning incidents could only be admitted to show *mens rea* that legislation[42] was passed deeming such evidence always to be relevant to the question whether the accused administered or attempted to administer poisons as charged.

Despite it generous provisions, section 23 of the Evidence Act 1908 seems to have been rarely employed and is the subject of only one reported New Zealand case. Nevertheless, it was remarked upon by the New South Wales Court of Criminal Appeal in *Grills*,[43] where Street CJ, of course recognising that the statute had no application in Australia, nonetheless observed that:[44]

> It is interesting to see that this statutory recognition has been given in poisoning cases to the admissibility of evidence of this type, both for the purpose of proving the administration of the poison by the accused as well as for the purpose of proving the intent. Evidence which merely tends to prove the administration by the accused of poison in other cases is admissible on the issue of guilt or innocence in relation to the particular poisoning charged.

The New Zealand courts were afforded an opportunity to consider the provision in *Phillips*.[45] The defendant, a nursing sister, was charged on two counts with administering belladonna in some milk that she had poured for her colleague, Elspeth

attempted poisoning of his wife, Johnston J dubbed the prisoner "the vilest criminal ever tried in New Zealand". In the context of these remarks, particularly spoken by a judge who claimed "to make it a rule not to speak in strong terms to anyone fallen to such depths of human degradation," the legislature's response is perhaps understandable. *Hall* did not escape criticism in other jurisdictions: see *Makin* (1893) 14 NSWLR 1, 22-26 *per* Windeyer J.

42 Originally passed as section 16 of the Evidence Further Amendment Act 1895. There is no equivalent English provision.

43 (1956) 73 NSW (WN) 303.

44 Above n 43, 305.

45 [1949] NZLR 316.

Denison. In the Supreme Court at Hamilton the question arose as to the admissibility of a statement made by Phillips in which she admitted having dined with Elspeth Denison on an earlier occasion, when she had poured out the milk, and when sister Denison had suffered similar poisoning symptoms. In the Supreme Court, Gresson J was doubtful as to whether the provision applied at all in the circumstances of the case:[46] in as much as the mere fact that Phillips had dispensed the milk at dinner was no evidence that she had seized the opportunity to administer poison to one of the company, the evidence fell outside the terms of the statute in not "tending to prove the administration of poison".[47] The Court of Appeal judgments, it must be said, are primarily concerned with the admissibility of the statement in which the defendant allegedly made this potentially damaging admission. However, apart from Kennedy J's mysterious reference to "other evidence, which was excluded" that in conjunction with the evidence of the administration of poison might have rendered the additional item of evidence admissible,[48] the other members of the court were clearly of the view that the other misconduct evidence was irrelevant: the literal wording of the section had to be complied with and "there must ... be evidence of fact the tendency of which is to prove that on a previous occasion the accused administered or procured the administration of poison".[49]

Arguably, the poisoning provision is of little practical impact. However, it does form part of a cluster of statutory enactments which, for one reason or another, in England and New Zealand, allow evidence of other misconduct to be adduced by the prosecution in circumstances where the common law would strongly incline to exclude it. These enactments are of interest not merely because they afford glaring exceptions to the general rule, but more broadly because they serve to consecrate the idea that the exacting criteria applying to the admission of evidence of other misconduct may be relaxed in the case of certain defined categories of offender. This idea has sometimes been overtly recognised by the common law; sometimes one merely suspects its covert acceptance. In the next part of this paper we shall gather a few common law examples of this phenomenon with a view to examining its prevalence and justification.

III. ADMITTING PROPENSITY EVIDENCE IN THE COMMON LAW

A. *Introduction*

As has already been stressed, the division between evidence of propensity and evidence pointing distinctly to guilt is of capital importance in the common law. It is sometimes suggested that the necessity to exclude prejudicial evidence of criminal disposition flows from the institution of jury trial - a hypothesis that Lord Griffiths

46 Above n 45, 326.
47 Above n 45, 319.
48 Above n 45, 352.
49 Above n 45, 358 *per* Findlay J.

recently revived in a Privy Council opinion where, noting that the judges in Hong Kong sat without a jury, he observed:[50]

> It is not without significance that this was a trial by judge alone. If the judge had been sitting with a jury he would have had to weigh carefully the probative value of such a previous conviction against the prejudice to the accused that would be likely to arise in the minds of the jury. The risk of such prejudice overbearing the probative value of evidence is of infinitely less significance when a case is tried by judge alone. The judge must of course guard against any such result but his whole background and training have fitted him to do so.

Apart from the presumption of the claim that the judiciary will invariably rise above the battle being trained to remain detached in the presence of evidence of bad character, this carries the implication that in systems where there is no jury or where the jury is relegated to the role of lay assessors, less caution need be exercised and evidence of propensity can more confidently be admitted before the tribunal. In fact, even in such systems some thoughtful commentators express doubts as to the wisdom of admitting general propensity evidence.[51] But whatever its rationale, the common law's self-abnegating posture in this regard can still leave laymen bemused,[52] and from time to time the judiciary feel impelled to relax the traditionally stern refusal of the common law to admit propensity evidence. This the courts have achieved in two ways. The courts may identify particular classes of defendant in respect of whom the normal rules are deemed not to obtain - as with the older English cases concerning homosexual misconduct.[53] Alternatively, the courts may simply blur the distinction normally drawn between evidence going to issue and evidence going to credit in such a way as to leave the tribunal of fact in possession of what is clearly evidence of propensity, which can then be accompanied by a forlorn cautionary direction desiring the tribunal not to use such evidence for an improper purpose. In the ensuing sections, these two approaches to propensity evidence will be briefly illustrated.

B. *Evidence of Sexual Aberration in the United States*

In American case law there has been a discernible tendency in certain categories of sexual offence not unreminiscent of the English courts' treatment of homosexual offences earlier this century, to relax the normal exclusionary rule that applies to

50 *Attorney-General for Hong Kong* v *Siu Yuk-Shing* Privy Council Appeal No 44 of 1987; (1989) Daily Telegraph, London, 6 February.

51 For example, Gide *Souvenirs de la Cour d'Assises* in *Ne Jugez Pas* (Paris, 1969) 70-1; Grenier *Le rôle d'accuse* (Paris, 1948) 18.

52 The writer once tried to explain just such a case in an article in the press. Public response indicated the difficulty non-lawyers have in accepting the present position: *Keeping Juries in the Dark* (1986) The Observer, London, 16 March; reprinted in Hennessy *Writing Feature Articles* (Heinemann, 1988).

53 See above notes 3-6, and accompanying text.

evidence of other misconduct.[54] The exception, enshrined in the decisions of several jurisdictions, was accurately summarised by Holohan J in *State* v *McFarlin*:[55]

> In those instances in which the offence charged involves the element of abnormal sex acts such as sodomy, child molesting, lewd and lascivious, etc, there is sufficient basis to accept proof of similar acts near in time to the offence charged as evidence of the accused's propensity to commit such perverted acts. The "emotional propensity" exception is limited to those cases involving sexual aberration, but this is not to say that the other usual exceptions to the exclusionary rule cannot be used. It simply means that in addition to the usual exceptions there is in cases involving the charge of sexual aberration the additional exception of emotional propensity.

The object of the exception is to allow proof of what is variously designated the accused's "lustful propensities", "lewd disposition", "specific emotional propensity" or "emotional propensity for sexual aberration". Thus, at the trial of an accused charged with lascivious behaviour, evidence of two further incidents of lascivious behaviour involving other young girls was held to have been rightly admitted to demonstrate the "lustful disposition or nature of the defendant".[56] Similarly, in *State* v *Schlak* the defendant was charged with committing a lewd act upon a fifteen-year-old girl, namely squeezing her breast; evidence was held to have been properly admitted that a few months earlier he had accosted two other fourteen-year-old girls and put his arm around the waist of one of them, since it established "the desire to gratify his lustful desire by grabbing and fondling young girls".[57] This approach to other misconduct evidence has been reiterated in cases of rape,[58] in homosexual cases[59] and in a variety of other sexual contexts.

54 See generally, Wigmore *Evidence in Trials at Common Law* (Boston, 1979, revised ed by Chadbourne) s 398, p 456.

55 517 P 2d 87, 90 (Ariz 1973). This ruling was cited with approval in *State* v *Gates* 542 P 2d 822 (Ariz 1973), a case involving two episodes of indecent exposure in a laundromat, and in *State* v *McDaniel* 580 P 2d 1127 (Ariz 1978).

56 *State* v *Whiting* 252 P 2d 884 (Kan 1953). In *Mackler* v *State* 298 SE 2d 589 (Ga 1983) the bald fact of two convictions for indeterminate sexual offences within the 4 1/2 years previous to the trial were admissible against a defendant charged with child molestation to show his "lustful disposition".

57 11 NW 2d 289, 291 (Iowa 1961).

58 *US* v *Lovely* 77 F Supp 619 (EDSC 1948); *State* v *Finley* 338 P ed 790 (Ariz 1959).

59 *Dyson* v *US* 97 A 2d 135 (DC Mun App 1953). Technically, the accused was charged with simple assault; but since he had injudiciously squeezed the private parts of an undercover police officer, the court readily treated the offence as sexual in character and admitted other evidence of his "lustful and perverted state of mind". See also *State* v *McDaniel* 298 P 2d 798 (Ariz 1956).

The reasons for creating the exception are not far to seek. As one judge remarked:[60]

> I have no doubt that but for the abhorrence and deep-rooted contempt with which all sex crimes are viewed this additional exception to the general rule would never have found its way into the jurisprudence of the courts of the land.

The desire to assuage public feeling, outraged by this species of offence, and a belief, not unchallenged, that the likelihood of re-offending amongst sex offenders was higher than that prevailing amongst other species of criminal,[61] have figured prominently amongst the reasons customarily assigned to explain this exceptional derogation from normal evidentiary principles.[62]

The doctrine perhaps attained its apogee in *Commonwealth* v *Kline*.[63] A defendant was charged with the statutory rape of his daughter and evidence was adduced that in the same month Kline had indecently exposed himself to his next door neighbour, Mrs Borg. The Supreme Court of Pennsylvania decided that the evidence of indecent exposure was admissible under the similar fact rule. Courts should be more liberal in the evidence they admit in sexual cases and, in the opinion of the majority of members of the court, the indecent exposure was sufficiently similar to the rape to be logically probative of the defendant's guilt:[64]

> The defendant's act against his neighbor's wife and his act against his daughter at about the same period of time were both in the nature of an indecent assault. In one case the assault was against a neighbor woman's sensibilities. In the other case the assault was against his daughter's sensibilities and against her person. The defendant's indecent exposure to his neighbor showed that he was of that type called an exhibitionist and when he by his denial raised an issue as to the truth of the charge made against him by his daughter, the testimony of his neighbor as to his exhibitionism was material and relevant.

Not surprisingly, decisions such as these provoked a reaction. Some writers were extremely hostile to the creation of such an exception,[65] and some courts began to distance themselves from this doctrine. Thus, in *Commonwealth* v *Boulden*,[66] a case involving a mechanic indicted for corrupting the morals of two seven-year-old girls, it was held that evidence that a year previously the accused had attempted to induce another

60 *State* v *Ferrand* 27 So 2d 174, 179 (La 1946).

61 This assumption was vigorously challenged in Gregg *Other Acts of Sexual Misbehaviour and Perversion as Evidence in Prosecutions for Sexual Offences* 6 Ariz L Rev 212 (1965).

62 See, for example, Wolfen & Test *Note* 39 Cal L Rev 584 (1951).

63 65 A 2d 348 (Pa 1949).

64 Above n 63, 352. In a curious footnote, the report refers to the markedly repetitive behaviour of exhibitionists in a bid to justify the exceptional rule that applied in sexual cases. Its relevance to a charge of rape is marginal.

65 See, for example, Gregg, above n 61; *Note* 17 Wash & Lee L R 83 (1960); *Note* 13 Vand L Rev 394 (1959).

66 116 A 2d 867 (Pa 1955).

girl to give him similar gratification and had shown a further girl a dirty picture had been wrongly admitted. As the court observed:[67]

> In sex cases courts have been more liberal in the admission of evidence of offences other than that charged. Although in some types of sex offences and under some circumstances there may be justification in this approach, there is a grave question whether the distinction as frequently applied is not the result of an emotional rather than a logical approach to the issue. As a matter of fact in some respects there should be no distinction between sex offenders and other offenders, while in other respects there should be a distinction between different types of sex offenders.

It was perceived that the exception provokes too many awkward questions concerning recidivism and the predictability of criminal behaviour. The distinctions it became necessary to defend, such as why it might be allowable to admit evidence of previous soliciting against someone charged with a prostitution offence but impermissible to introduce a pickpocket's previous convictions for theft, defied judicial logic and led the court to the view that such evidence was not admissible, even in sexual cases, merely "to show depravity or propensity".[68]

A developed line of authorities has expressed reservations concerning the "emotional propensity" rule. Its application, of course, is sometimes unexceptionable. For example, a 54 year-old man who persistently "French kisses" little girls is presumably in the grips of a sexual obsession sufficiently distinctive to bring him within the orthodox scope of the other misconduct rule.[69] Similarly, evidence of an accused's repeated acts of paedophilia may afford sufficiently compelling evidence of an "emotional propensity for sexual aberration" to justify its admission under conventional criteria.[70] However, the expression "emotional propensity" can lead to the courts' admitting in evidence in sexual cases other categories of case. As Lewis CJ observed in *Meeks* v *State*,[71] "an individual on trial for a sexual offence should be afforded the same evidentiary safeguards against irrelevant prejudicial testimony as an individual on trial for another felony". Prentice J in *Gilman* v *State* made the point even more explicitly:[72]

> We must acknowledge that great prejudice exists in our society against persons who are either known to be or suspected of being sexual deviates. Our function is to protect, to the extent possible, the accused from all prejudices, *even those we know to be holding the majority*.

67 Above n 66, 873. See also *State* v *Treadaway* 568 P 2d 1061 (Ariz 1977); *Commonwealth* v *Shirley* 424 A 2d 1257 (Pa 1981).

68 Above n 66, 874.

69 *State* v *Bailey* 609 P 2d 78 (Ariz 1980).

70 *State* v *Superior Court of the State of Arizona, in and for the Country of Conchise* 631 P 2d 142 (Ariz 1981).

71 234 NE 2d 629 (Ind 1968).

72 282 NE 2d 816, 818 (Ind 1972) (emphasis added).

Moreover, in view of the difficulty encountered in delineating the bounds of recognisable sexual aberrations and deviancy, some courts have exhibited a reluctance to admit other misconduct evidence at all under the "emotional propensity" rule in the absence of expert scientific evidence on the subject.[73] Although occasional decisions still throw up some broad dicta,[74] giving the rule a generous interpretation,[75] this derogation from standard evidentiary principles in sexual cases in favour of the prosecution no longer commands a significant measure of support.[76]

C. *Membership of Criminal Organisations*

Sexual aberration does not afford the sole pretext for courts to admit what looks suspiciously like evidence of propensity. There exist other situations where it is not always easy to determine whether the other misconduct evidence serves merely to suggest a propensity for wrongdoing, thereby shedding more heat than light, or whether it points sufficiently strongly and specifically to the guilt of the defendant in respect of the offence charged. The rule that once applied in American sexual cases is not wholly dissimilar to a well-known cluster of Pennsylvania decisions that were concerned with the prosecution's right, in cases involving killings committed by organised crime, to adduce evidence that the defendant was a member of a particular criminal organisation. To allow evidence that an accused belongs, say, to an organised crime syndicate or to a gang noted for its lawless articles of association or to a group with terrorist connections, may be relevant in suggesting that someone who would belong to such a body is more likely to be of the appropriate criminal bent, and yet unsatisfactory in that it may obviously induce the tribunal of fact to convict on the basis of evidence of general propensity.[77] A member of a chapter of Hell's Angels, the reasoning would run, is the sort of person who would be more disposed to commit offences against the person or against property than uninitiated members of the public. In what were known as the

73 For example, *State* v *Treadaway*, above n 67.

74 For example, *Brackens* v *State* 480 NE 2d 536, 539 (Ind 1985).

75 For example, *State* v *Munz* 355 NW 2d 576 (Iowa 1984), where the defendant's taking his daughter to a motel, forcing her to strip and thrashing her with his belt was held to be a "similar act" to having illicit sexual relations with her.

76 In California, for example, the Supreme Court has lately made it clear that evidence of disposition, even if concealed under a euphemism like "evidence of common plan or scheme", is inadmissible: *People* v *Tassell* 201 Cal Rptr 567 (Cal 1984); *People* v *Alcala* 205 Cal Rptr 775, 792 (Cal 1984); *People* v *Moon* 212 Cal Rptr 101, 104 (Cal 1985).

77 Although she is primarily concerned with the questions of public interest immunity and hearsay, an Australian writer has recently advanced the thesis that since terrorists are "engaged in an 'ongoing' no-holds-barred policy to destroy the social and political framework of ... society", when one examines the policy and justice arguments in favour of retaining the various rules of evidence, these may reasonably yield exceptions in the case of this class of offender. Indeed, interestingly, the author accepts that the reasons for relaxation of certain of the rules of evidence in the case of terrorist trials could be equally applicable to drugs offences and organised criminal operations: see Magner *Is a Terrorist Entitled to the Protection of the Law of Evidence?* (1988) 11 Syd LR 537.

"Mollie Maguire" cases, the courts ruled that when murder was charged it was permissible to prove that the defendant was a member of a secret organisation, having as its object the commission of crimes, including murder, in order to establish *inter alia* a predisposition to commit the crime charged.[78] As the Pennsylvania Supreme Court pointed out in *Commonwealth* v *Fragassa*, a case where evidence was admitted to show that two years previous to the murder the defendant had belonged to the Black Hand Society - an organisation whose purpose included such unlawful objects as "blowing up houses and killing and robbing", evidence of membership of a secret organisation could be used to establish the defendant's motive for killing.[79] In short, it could be used to prove a general predisposition to kill.

As in the case of sexual offences, the courts have since retreated somewhat from this position. In contemporary jurisprudence the problem most frequently manifests itself in the context of gang activities. In several murder cases the question has arisen as to whether, as part of its case, the prosecution is entitled to prove the defendant's membership of a gang and the fact that his crime is consistent with the philosophy espoused by that gang. Whilst the courts may occasionally admit such evidence as a prelude to demonstrating that the defendant committed an offence qua gang member,[80] or in order to establish motive or intent on his part,[81] it is generally recognised that:[82]

> [T]here is no rule of evidence that permits a prosecutor to show that a defendant is a member of an organisation and then impeach him with the alleged illegal, immoral or vicious acts of that organisation.

Occasionally, if the evidence goes to establishing some other material fact, it may be admitted provided that the judge does not consider it too prejudicial. Hence, in the extraordinary case of *People* v *le Grand*,[83] evidence of the nature and beliefs of a "church" organisation was admitted to demonstrate the patriarchal influence the defendant exerted over its members, which tended to explain why sixty or so people would have allowed themselves to be imprisoned whilst the murders of two of their number were committed virtually before their eyes. However, as the Appellate Division was at pains to stress, such evidence would not have been led had it simply "demonstrate(d) a propensity to commit the brutal murders of which the defendants stood charged."[84]

78 See notably *Hester* v *Commonwealth* 85 Pa St 139 (Pa 1878). See also *Carroll* v *Commonwealth* 84 Pa St 107 (Pa 1877); *Campbell* v *Commonwealth* 84 Pa St 187 (Pa 1877); *McManus* v *Commonwealth* 91 Pa St 57 (Pa 1879).

79 122 A 88, 89 (Pa 1923).

80 *People* v *Torres* 421 NYS 2d 275 (1979).

81 For example, *Chambliss* v *State* 373 So 2d 1185 (Ala Cr App 1979) (membership of the Ku Klux Klan); *Butler* v *Smith* 416 F Supp 1151 (SDNY 1976) (membership of a Black Muslim splinter group).

82 421 NYS 2d 275, 276 (1979).

83 431 NYS 2d 850 (1979).

84 Above n 83, 853.

Although not always easy of application, this distinction has now been accepted in other cases[85] and is illustrated in decisions of other common law jurisdictions. Two recent Privy Council appeals from Hong Kong involving evidence of membership of illegal Triad groups, exemplify the point. In *Law Shing-Huen* v *R*,[86] the appellant had been charged with the murder of a rival for his girlfriend's affections. The evidence indicated that the appellant had ordered two other men to perform the killing. With the aid of an expert witness, who had served in the Triad Society division of the Hong Kong police force, the Crown sought to explain the two co-accuseds' preparedness to kill on behalf of the appellant on the basis of their respective ranks within the Triad organisation of which all three were members. Distinguishing the situation where such evidence was led, say, to establish that a murder bore the hallmark of a Triad killing, where such evidence might be sufficiently relevant, Lord Ackner observed that "in introducing the Triad evidence, what in effect the prosecution was seeking to do was to establish the propensity of the appellant and his co-accused to resort to violence". Admittedly, this "known propensity of members of that illegal organisation readily to resort to violence" supplied a motive for an otherwise inexplicable slaying. However, in the Board's view, it embodied the forbidden reasoning of guilt from the propensity and should not have been admitted by the trial judge. In contrast, in *Attorney-General for Hong Kong* v *Siu Yuk-Shing*[87] the appellant was charged with the offence of membership of the Triad Society 14K. A number of incriminating articles were found in his possession - a ritual altar and items bearing Triad writings - but these could also be freely obtained in shops in Hong Kong and were capable of innocent interpretation. The issue at trial was whether the defendant appreciated the ritual significance of these objects in the context of the activities of the 14K. To establish his knowledge on this score the Crown sought to adduce evidence of the appellant's previous conviction in 1975 for membership of the 14K. Whilst acknowledging that it was a distinctive feature of the common law to refuse to regard a propensity to commit crime as probative of the commission of the particular offence charged, Lord Griffiths concluded that in this case "the previous conviction for being a members of the 14K was powerful probative evidence that the accused knew the 14K ritual and the significance of the articles associated with it and it was in the circumstances properly admitted ... to prove such knowledge".

D. *Syndrome Evidence*

A further area where American courts have been induced to stray into the realm of propensity evidence is that of 'syndrome evidence', where American prosecutors in recent

85 For example, *People* v *Connally* 481 NYS 2d 432 (1983) where (at 433) "the testimony that defendant was a member of the 'Five Percenters' and that the 'Five Percenters' were antagonistic to other groups such as the 'Hollis Crew' was properly admitted into evidence to establish defendant's motive and intent in shooting Fite" but where "the extensive testimony about the activities and beliefs of the 'Five Percenters', which was irrelevant to any of the issues at trial, was improperly admitted into evidence".

86 Privy Council Appeal No 5 of 1988.

87 See above n 50.

years have taken advantage of presumptive scientific insights into the standard profiles of certain types of victims or offenders. In the United States a number of such syndromes have been prayed in aid by the courts and evidence has been admitted as a matter of course in most jurisdictions to instruct the tribunal of fact on the standard characteristics of these conditions. Thus, evidence is commonly adduced to inform juries on the nature of 'rape trauma syndrome', more properly known as 'post traumatic stress disorder'. This piece of evidence has been widely recognised by the courts as affording a means of confirming a victim's testimony in rape cases by offering a check-list of clinical symptoms that commonly reveal themselves after rape has occurred.[88] In a similar way, evidence is admitted to instruct juries on the subject of 'battered child syndrome'[89] and 'battered woman syndrome'.[90]

It can be argued that the common law's notorious aversion to allowing the question of the credibility of a witness to be taken out of the jurors' hands and placed in those of experts[91] is sidestepped because syndrome evidence is of a specialised expert kind, outside the normal juror's experience, designed to enable jurors to make informed decisions concerning the trustworthiness of a witness's testimony. However, there is always the temptation to extend these frontiers. This may be essayed by adducing expert evidence that a given witness, being a victim of a certain class, is unlikely to lie, effectively determining the question of guilt for the jury.[92] More frequently, the attempt is made to introduce prejudicial misconduct evidence under the guise of expert testimony. In *State* v *Steward*,[93] a murder case involving a babysitting boyfriend, the court determined that 'expert' evidence was wrongly admitted suggesting that serious injuries were often inflicted on children by live-in or babysitting boyfriends. Similarly,

88 See, for example, *State* v *Marks* 647 P 2d 1292 (Kan 1981); *State* v *McQuillen* 689 P 2d 822 (1984); *State* v *Liddell* 685 P 2d 918 (Mont 1984); *State* v *Taylor* 663 SW 2d 235 (Mo 1984); *State* v *Reid* 475 NYS 2d 741 (1984); *State* v *Whitman* 475 NE 2d 486 (1984). For a useful discussion of this subject, see Buchele & Buchele *Legal and Psychological Issues in the Use of Expert Testimony on Rape Trauma Syndrome* 25 Washburn LJ 26 (1985).

89 The syndrome was described in *State* v *Best* 232 SW 2d 47 (1975), although it has since been held that not all six of the features listed there need be present in every case: *State* v *Holland* 346 NW 2d 302 (SD 1984). See, for example, *Allison* v *State* 353 SE 2d 805 (Ga 1987).

90 For example, *Smith* v *State* 277 SE 2d 678 (1981). Such evidence is typically admitted as part of the defence case where a woman who had killed her husband or boyfriend raises the defence of self-defence: *State* v *Hodges* 716 P 2d 563 (Kan 1986).

91 For example, *Turner* [1975] 1 QB 834.

92 *State* v *Lindsey* 720 P 2d 73, 76 (Ariz 1986): "Even where expert testimony on behavioral characteristics that affect credibility or accuracy of observation is allowed, experts should not be allowed to give their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried. Nor should such experts be allowed to give opinions with respect to the accuracy, reliability or truthfulness of witnesses of the type under consideration. Nor should experts be allowed to give similar opinion testimony, such as their belief of guilt or innocence. The law does not permit expert testimony on how the jury should decide the case."

93 660 P 2d 278 (Wash App 1983).

in *State* v *Maule*[94] an 'expert' on child sexual abuse not only testified as to the common characteristics exhibited by victims of this sort of offence (battered child syndrome) but went on to opine that the majority of such cases involve "a male parent-figure, and of those cases that would involve a father-figure, biological parents are in the majority". As the court rightly observed in reversing the verdict:[95]

> [S]uch evidence invites a jury to conclude that because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child sexual abuse, it is more likely the defendant committed the crime. Admission of this testimony was reversible error.

In *Loebach* v *State*[96] an even more direct attack was made on the defendant. The case concerned child abuse and the trial court allowed an expert in child abuse, without referring specifically to the case of the accused, to give evidence to the effect that battering parents tend to have similar personality traits and personal histories. Other witnesses then introduced evidence about the defendant's past history, in effect demonstrating that he matched the battering parent's standard profile. Not surprisingly, the Appeal Court, expressing doubts as to the reliability of such syndrome evidence in general, issued a prospective ruling that the prosecution would not be permitted in future to introduce evidence of 'battering parent syndrome', or, more particularly, to show that the accused's personality coincided with that of the typical abuser unless the defendant deliberately put his character in issue. The rule subsequently commended itself to the Georgia courts where the prosecution adduced similar evidence to counter a defence of insanity, holding that:[97]

> Unless a defendant has placed her character in issue or has raised some defense which the battering parent syndrome is relevant to rebut, the state may not introduce evidence of the syndrome, nor may the state introduce character evidence showing a defendant's personality traits and personal history as its foundation for demonstrating the defendant has the characteristics of a typical battering parent.

These provide obvious instances where psychological testimony is exploited to found a case on the forbidden reasoning, by suggesting that the defendant is the sort of person, more likely on account of his or her psychological make-up, to have committed the offence or offences charged. Although such rulings may slip into the traditional American mould of permitting the prosecution to meet a defendant's claim of good character with evidence of his bad character,[98] their invitation to the tribunal of fact to convict on the basis of general predisposition is not wholly reassuring.

94 667 P 2d 96 (Wash App 1983).

95 Above n 94, 99.

96 310 NW 2d 58 (Minn 1981).

97 See *Sanders* v *State* 303 SE 2d 13, 18 (Ga 1983). See also *State* v *Wilkerson* 247 SE 2d 905 (NC 1978); *re DL* 401 NW 2d 201 (Iowa 1986).

98 Hughes *An Illustrated Treatise on the Law of Evidence* (Chicago, 1907) 39-40; *McCormick on Evidence* (St Paul, 1984, ed by Cleary) para 191; Fed R Evid para 404(a)(i). As Imwinkelried pointed out, American courts have not yet settled the question whether a defendant, in cases where evidence of other misconduct is admitted

E. *Cross-examination to Credit*

Occasionally evidence of propensity may intrude in judicial decisions under another guise. A recent case-law development in England, that is quite likely to be followed in New Zealand, illustrates this process. Whilst the prosecution is normally forbidden from introducing evidence of an accused's previous convictions and bad character, under the terms of the English Criminal Evidence Act 1898 it may do so in cross-examination if the accused discards this shield either by adducing evidence of good character, by attacking the character of the prosecutor or the prosecution witnesses, or by giving evidence against a co-accused charged in the same proceedings.[99] New Zealand possesses no similar provision to section 1(f) of the Criminal Evidence Act, but the courts have determined that the unfettered discretion accorded to judges under section 5(4)(b) of the Evidence Act 1908 is to be exercised in general along the lines of the English Act.[100] In both jurisdictions, cross-examination to character goes to the credit of the accused;[101] that is, the judge will direct the tribunal of fact that evidence of the defendant's previous convictions or past misdeeds reflects solely on that person's truthfulness and is not to be taken simply as evidence of guilt.

The distinction between issue and credit is notoriously difficult to maintain. It is widely accepted that juries[102] and even judges[103] will have difficulty in making sense of admonitions to use evidence of previous convictions only to gauge the defendant's credibility. But imagining for a moment that this is not merely "one of those distinctions without a difference"[104] and that previous convictions unrelated to the offence charged can aid in assessing an accused's credibility, a wholly different problem is posed when the accused's previous record closely resembles the offence or offences charged in the indictment. In such cases, the courts have traditionally tended to exercise their discretion in favour of the accused, aware of the impossibility of a jury's not using such data as evidence of propensity, directly establishing guilt. Thus, in *Watts*[105] the defendant was charged with indecently assaulting a young woman. Having cast

to contradict the latter's assertion of good character, is entitled to a limiting instruction that such evidence is only relevant to the accused's credibility: *Uncharged Misconduct Evidence* (Wilmette, 1981) para 6-16. For an attractive attack on some of these concepts, see Uviller *Evidence of Character to Prove Conduct: Illusion, Illogic and Injustice in the Courtroom* 130 U Pa L Rev 845 (1982).

99 For fuller accounts of this legislation see Cross *Evidence*, above n 12, 387-413; Munday *Reflections on the Criminal Evidence Act 1898* [1985] CLJ 62.

100 See notably, *Clark* [1953] NZLR 823, 830; *Leadbitter* [1958] NZLR 336; *MacLeod* [1964] NZLR 545; *Fisher* [1964] NZLR 1063. But see Potter [1984] 2 NZLR 374, which illustrates that New Zealand adheres to the original unamended text of that Act.

101 *Inder* (1978) 67 Cr App R 143, 146. Since *Fox* [1973] 1 NZLR 458 it is true that the New Zealand Court of Appeal has held that such cross-examination will additionally be allowed when it is relevant to some matter in issue at the trial. But such cases are bound to prove rare.

102 For example, Friedland *Annotation* (1969) 47 Can Bar Rev 656, 658.

103 *US* v *Banmiller* 310 F 2d 720, 725 (3d Cir 1962).

104 Cross *An Attempt to Update the Law of Evidence* (Jerusalem, 1974) 21.

105 (1983) 77 Cr App R 143.

imputations on the character of the prosecution witnesses, he was cross-examined on his previous convictions that involved other indecent assaults on young girls. The Court of Appeal determined that the trial judge had been mistaken to allow such cross-examination: the convictions were likely to inflame the jury as it was highly improbable in the circumstances that the jurors could perform the feats of "mental gymnastics"[106] necessary to enable them to use the knowledge of these particular convictions exclusively in assessing the accused's credibility. In view of the fact that, without actually meeting the law's exacting criteria in this regard, the earlier convictions for indecent assault looked dangerously like similar fact evidence, the Court of Appeal understandably determined that such cross-examination was inadmissible.

The case of *Watts* is reminiscent of the contemporaneous New Zealand decision in *Kalo*.[107] The accused was charged with committing an assault on a police officer. At her trial, she repeatedly contested the police's version of events, accusing the police of using violence on her and on members of her family. Given that New Zealand employs the English Act "as a guide",[108] Eichelbaum J in the Court of Appeal was of the view that, once the defendant had cast imputations on the character of the police witnesses the trial judge *prima facie* had been justified in permitting her to be cross-examined on a previous conviction. However, this conviction was also for an assault made on a police officer in the course of his duty. The court, therefore, concluded that, owing to the similarity of the offences, the evidence had been wrongly admitted:[109]

> [T]here is hardly any need to emphasise once more the danger that if an accused's antecedents become known to the jury the latter may form the conclusion that because of her past criminal conduct or character she is on trial, *especially so when as here the previous conviction was for the very same offence ... the danger of the prejudicial effect in this case was considerable.*

Up to this point, it can be argued that by prohibiting cross-examination on similar previous convictions, the courts have excluded from the jury's consideration information that smacks too obviously of evidence of propensity. However, in *Powell*[110] in 1985 the English Court of Appeal executed a nimble *volte-face* and abandoned the reasoning that had applied in cases like *Watts* (or *Kalo*). *Powell* concerned the offence of knowingly living on the earnings of prostitution, an offence for which the defendant already had similar convictions. Lord Lane CJ, repenting of the benevolence courts had previously exhibited in such cases, declared that in future English judges should not feel bound to refuse to allow the prosecution to cross-examine an accused on his record

106 The selfsame expression made an appearance in the American case of *Nash* v *US* 54 F 2d 1006, 1007 (2d Cir 1932).

107 (1983) 1 CRNZ 413. See also *Samuel* (1956) 40 Cr App R 8.

108 Above n 107, 414.

109 Above n 107, 415 (emphasis added). The facts in *Kalo* are very similar to the English case of *Fentiman* (1984) October 5, unreported (CA), where Ackner LJ, bridling somewhat, accepted that jurors could not perform the "intellectual acrobatics" of using two previous convictions for assaults on the police as anything but evidence of guilt when the defendant was again charged with this selfsame offence.

110 [1985] 1 WLR 1364.

merely because it consisted of convictions for offences similar to that or those charged. This ruling, which has been criticised in detail elsewhere,[111] was clearly intended to admit evidence of propensity. The Court's appeal to the authority of *Selvey* v *DPP*,[112] a case that had, on the most generous reading, only permitted such a course by default and that has since been criticised in no uncertain terms,[113] and the Court's lame emphasis on the unvarnished 'tit for tat' philosophy espoused in the English legislation,[114] are less than convincing. Equally unconvincing is the Court of Appeal's credulous belief that suitable warnings will prevent a jury from misunderstanding the limited use they are permitted to make of the evidence of similar previous convictions. True, Lord Lane CJ concedes that "it does ... require careful direction from the judge to the effect that the previous convictions should not be taken as indications that the accused has committed the offence".[115] But granted that, even in less tempting circumstances, it is accepted that no "wave of the evidentiary wand" can confidently be relied upon to protect an accused against the misuse of prejudicial evidence,[116] and that the admission of an accused's record at the best of times can prove devastating,[117] the practical effect of *Powell* - a case that New Zealand courts may feel tempted to follow in preference to *Kalo* - is indubitably to admit evidence of propensity and to enable a jury to convict a defendant on 'the forbidden reasoning'.

IV. CONCLUSIONS

Cardozo J once remarked that "in a very real sense a defendant starts his life afresh when he stands before a jury".[118] Its resolve to eliminate the risk of prejudice in the criminal trial has led the common law to exclude evidence of an accused's other misconduct as evidence going to issue in all but a highly restricted range of cases. Admittedly, certain similar fact cases are sometimes said to rest upon evidence of propensity. For instance, in *Armstrong*[119] it can be claimed that the introduction of evidence of the accused's having attempted to poison a solicitor eight months before poisoning his wife to show that he was prepared to administer arsenic to another human being does look suspiciously like propensity reasoning. *Ball*[120] and *Straffen*[121], too, are argued to repose upon evidence of propensity. Indeed, certain judges - such as Lord

111 See Munday *Stepping Beyond the Bounds of Credibility: The Application of section 1(f)(ii) of the Criminal Evidence Act 1898* [1986] Crim LR 511.

112 [1970] AC 304.

113 See Heydon *Can the Accused Attack the Prosecution?* (1974) 7 Syd LR 166.

114 Echoing arguments marshalled by Ackner LJ in *Burke* (1985) June 21, unreported (CA).

115 [1985] 1 WLR 1365, 1370.

116 *US* v *Garber* 471 F 2d 212, 215 (1972). See generally, *The Limiting Instruction - Its Effectiveness and Effect* 51 Minn L Rev 264 (1966).

117 For example, Kalven & Zeisel *The American Jury* (New York, 1966) 160.

118 *People* v *Zackowitz* 254 NY 192, 197; 172 NE 466, 468 (1930).

119 [1922] 2 KB 555. See generally Filson Young (ed) *Trial of Armstrong* (Edinburgh, 1927).

120 [1911] AC 47.

121 [1952] 2 QB 911. See generally Fairfield & Fullbrook (eds) *Trial of Straffen* (Edinburgh, 1954).

Cross in *Boardman* v *DPP*, would concede that the courts have employed such reasoning in deciding some similar fact cases.[122] However, whilst the reasoning in some cases may be open to this particular censure, such criticism can be exaggerated. After all, no serious voice has been raised protesting the innocence of any of the above-mentioned parties. The critical consideration in these cases, therefore - ignoring the fact that they can be justified on other grounds - is that the propensity evidence admitted was highly specific in character and unusually cogent in the context of those particular trials. In contrast, it is suggested that the instances with which we have been concerned in this study are of another order and exemplify occasions when the law has been induced to relax its invariably inflexible refusal to admit general propensity evidence.

The examples we have examined may be somewhat out of the normal run. However, they are representative of a legal counter-culture that would consider the common law's traditional self-denying ordinance too stringent and that would therefore seek to shift the balance. For instance, one writer has recently contended that child abusers could profitably be treated as a case apart: given the specificity of their criminal proclivities, the horror in which such offences are held and, presumably, offenders' propensity to re-offend, it is argued that their previous criminal history for offences involving children could be admitted as a matter of course - subject to the judicial discretion to exclude such evidence, if considered unduly prejudicial.[123] In a broader context, other writers have suggested that there may be more general reason to mitigate the rigours of the present exclusionary rule.[124] Such a reform would accord with the spirit of the compromise proposals put forward in the Eleventh Report of the Criminal Law Revision Committee, that recommended some relaxation of the rules governing the admission of similar fact evidence.[125]

The arguments for relaxing current requirements, however, do not always carry complete conviction, as is demonstrated in the largely inclusive discussion of other misconduct evidence in the CLRC's Eleventh Report.[126] As so often in the realm of character evidence, appeal is made to so-called dictates of commonsense[127] and to the inherent reasonableness of trusting the tribunal of fact with patently relevant data without succeeding in allaying excusable fears of the prejudice such information is bound to engender in the minds of autonomous, untrained jurymen.[128] At first sight,

122 Speaking of *Straffen*, above n 121, Lord Cross described the case for the Crown as "simply evidence to show that Straffen was a man likely to commit a murder of that particular kind" [1975] AC 421, 457.

123 Spencer *Child Witnesses, Corroboration and Expert Evidence* [1987] Crim LR 239, 245. On the problematic nature of claims concerning recidivism amongst sex offencers generally, see above n 61.

124 For example, Forbes *Similar Facts* (Sydney, 1987) vi and *passim.*

125 Cmnd 4991 (HMSO, London, 1972) esp paras 91 ff.

126 Above n 125, paras 70 ff.

127 For comment on this aspect of character evidence, see Uviller *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom* 130 U Pa L Rev 845, 866 (1982).

128 See, for example, Wilcox *Keeping the Jury in the Dark* (1982) 138 NLJ 245; and Munday (1988) 138 NLJ 334.

therefore, an historical argument contending that the common law's rules concerning evidence of disposition were formulated by judges at a time when the criminal law applied with greater rigour and that in a kindlier age relaxation is justified has attractions. As Forbes has recently written, the similar fact rules "may be used with an indulgence towards defendants which was appropriate under an older and harsher criminal law; the community, properly informed, might now wish to alter the balance".[129] However, assuming that it were possible to demonstrate the direct link between the former severity of the criminal law and a resultant judicial solicitude for the interests of the accused, the historical arguments suffers from certain defects. First, there is the danger that the benevolent face now worn by criminal law (and procedure), whilst in some sense lessening the risk run by the defendant, may also encourage tribunals of fact to take greater risks. Quite simply, if the accused has less to lose, a jury or judge may be prepared to act less cautiously, thereby increasing the risk of error. Secondly, it is notable that the case for relaxation of the rules comes chiefly in respect of those very offences where judicial error will have the direst consequences for anyone wrongly convicted. Sex offenders and child molesters are not popular in prisons, and mistakenly to convict someone of such offences, even if they may have committed sexual offences in the part, is particularly serious. Finally, the historical argument often reposes upon an insidious belief that contemporary jurors are more sophisticated than their forbears. Quite how one measures this superiority is hard to determine - particularly when persons largely innocent of the business of the courts and of the workings of the criminal psyche, are summoned to return a verdict on a fellow citizen and are apprised of the general tendency of that accused to commit offences of the broad kind under investigation. It is far from self-evident that the select nineteenth-century jury, conscious of the severity of the criminal law of its age, would behave less circumspectly than a contemporary jury, the product of universal suffrage, confident in the begign posture struck by its legal system.

Disagreement, such as it is, centres upon what measure of risk is considered acceptable in alerting juries to the criminal predisposition of the accused. Traditionally, it has been thought fitting that the law should stray on the side of indulgence and, at all costs, minimise the risk of wrongful conviction, no matter that this entails that the guilty may sometimes escape punishment.[130] The law, overcautious in the view of some, had consciously set up a generous buffer zone, allowing an appreciable margin of safety. If the breadth of this margin is currently under scrutiny, the instances examined in this paper demonstrate that the law's assumptions in this matter of other misconduct evidence are forever being proved. But in the ultimate analysis, in the absence of legislative authority, it is striking that judicial forays into realm of evidence of disposition have been short-lived and merely offer singular exceptions to one of the common law's hitherto most cherished convictions.

129 Above n 124.

130 See, for example, *Abbot* [1955] 2 QB 497 and *Lane and Lane* (1985) 81 Cr App R 5 for judicial statements to like effect.