

Propensity Evidence - Similar Fact Evidence

[R v McNeish \[2019\] QCA 191](#)

This type of evidence may be used in a number of ways but most frequently:

- **Relationship Evidence:** To remove implausibility that might otherwise be attributed to the complainant's account of the offence if the offending thought to be an isolated incident. *HML v The Queen* (2008) 235 CLR 334 (used to supplement other evidence). Bolsters the credibility of the complainant if certain conditions are satisfied.
- **Motivation evidence/relationship evidence:** To demonstrate sexual attraction felt by the accused to show motive to commit the offence. (used to supplement other evidence)
- **Tendency/propensity evidence:** To demonstrate the accused not only had the motive to commit the offence but he was the one who prepared to act on his motivation to commit the offence because he had committed similar offences against the complainant or others previously. (used to supplement other evidence) Render the commission of the offence more probable because the evidence of uncharged acts shows not only that the accused has the particular sexual urges but that he is prepared to satisfy them by action, cf. *R v Bauer* (2018) 92 ALJR 846
- **To identify** an offender *Pfennig*. (Used to identify the defendant)
- **Relationship/identification evidence:** Evidence that an offence has been committed and that the accused is the offender, a combination of the above categories. *Makin v Attorney-General for New South Wales*

4 step test for the court to examine the admissibility:

1. what is the factual issue the Crown seeks to prove with the circumstantial evidence, identifying the tendency.
2. If the evidence is accepted, would it prove the tendency?
3. Does the evidence in the uncharged acts contain some feature which links the acts to the charge by reference to a particular issue? -*Hughes*
4. does the probative force of the evidence overcome its prejudicial effect?

One approach to resisting propensity evidence is to show that it is equivocal, meaning it is also consistent with an explanation or a reasonable hypothesis consistent with innocence. *IMM v The Queen* (2016) 257 CLR 300 *Pfennig*.

Pfennig v The Queen (1995) 182 CLR 461 - fundamental case discussing how similar fact/propensity evidence can be used as circumstantial evidence against an accused. The accused indecently dealt with a young boy and made statements against interest, a recently murdered boy with similar evidence was present was used to identify and convict the defendant.

Notes on the application of similar fact:

- The relationship between the contested evidence and the issue it is attached to may take many forms and the relationship cannot be confined to 1 of "striking similarity", *Director of Public Prosecutions v P* [1991] 2 AC 447.
- The evidence does not need to be so strong that it demonstrates guilt alone *Phillips*