EVIDENCE OF SYSTEM IN COMMONWEALTH LAW

I. The Foundations of the Law

THE principles of English and Commonwealth law governing the admissibility of similar fact evidence in criminal proceedings have received authoritative formulation:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.[1]

The first sentence contains a general rule of exclusion.[2] The second sentence has been interpreted as recognizing the existence of exceptions to the exclusionary doctrine or as enumerating the pur-

[1] *Makin* v. *Attorney-General for New South Wales* (1894) A.C. at p. 65. For explicit adoption of these principles in Canada, see *R.* v. *Paul* (1912) 4 Alta. L.R. 377; *R.* v. *Gibson* (1913) 28 O.L.R. 525; *R.* v. *Melvin* (1916) 38 O.L.R. 231; *R.* v. *Gold* (1923) 35 Que. K.B. 403. For a *pie-Makin* statement of the rule in New Zealand, see *R.* v. *Hall* (1887) 5 N.Z.L.R. 93. *Cf.* the judgment of the Supreme Court of Victoria in *R.* v. *Knorr* (1893) 15 A.L.T. 152.

[2] *Boardman* v. *Director of Public Prosecutions* (1974) 3 All E.R. 887 at p. 903, *per* Lord Hailsham.

The rational bases of the exclusionary rule are: (1) the over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) the tendency to condemn not because the defendant is believed guilty of the present charge but because he has escaped unpunished from other offences; (3) the injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated. (J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law,* 3rd edition, 1940, article 194, adopted by the Supreme Court of Canada in *Leblanc v. R.* (1975) 29 C.C.C. (2d) 97 at p. 102, *per* Dickson J.).

For a comprehensive statement of the exclusionary rule in Australia, see *R. v. Hutton* (1936) 36 S.R. (N.S.W.) 534 at p. 541, *per* Jordan C.J.; *Cf. R.* v. *Robinson* (1909) 26 W.N. (N.S.W.) 142 at p. 143, *per* Simpson A.C.J.; *R.* v. *Lowery and King (No. 3)* (1972) V.R. 939, at p. 945, *per* Winneke C.J.

Legislative provisions may abrogate the exclusionary rule of the common law in specific contexts: *R.* v. *Clark, Buchanan and Twibell* (1962) V.R. 657 at p. 661; *R.* v. *Tween* (1965) V.R. 687; *cf. R. v. Rabbins* (1966) V.R. 508 at p. 511.

poses for which the adduction of evidence of other crimes is legitimate.[3] This exposition of English law has been accorded emphatic approval at the highest level of judicial authority.[4]

The body of evidentiary law applicable in several Asian jurisdictions including Malaysia, Singapore and Sri Lanka is modelled on the Indian Evidence Act of 1872. The provisions of the Evidence Ordinance, No. 14 of 1895, of Sri Lanka are representative of these codified South Asian systems. The provision made by the law of Sri Lanka is that "Facts showing the existence of any state of mind — such as intention, knowledge, good faith, negligence, rashness, ill will or goodwill towards any particular person, or showing the existence of any state of body or bodily feeling — are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant"[5] and that "When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such an act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."[6]

English and Commonwealth law and the codified Asian systems have in common the characteristic that the law aims at reconciling two conflicting postulates. The exclusionary rule enshrines "one of the most deeply rooted and jealously guarded principles of the English criminal law."[7] Lord Loreburn, L.C., has declared that "Courts ought to be very careful to preserve the time-honoured law of England, that you cannot convict a man of one crime by proving that he had committed some other crime."[8] It is a principle of rudimentary justice that "Criminal propensity as such can never be adduced in order to establish the guilt of a person of the offence charged."[9] As Viscount Simon has pointed out, evidence of other occurrences which merely tends to deepen suspicion does not go to prove guilt.[10] "Judges can be trusted not to allow so fundamental a principle to be eroded."[11] On the other hand, there are situations in which, in

3 R. Cross, *Evidence* (5th edition, 1979), p. 360.

4 *Boardman's* case (1974) 3 All E.R. 887 at p. 912, *per* Lord Salmon.

5 Evidence Ordinance, section 14.

6 Evidence Ordinance, section 15; *cf.* sections 14 and 15 of the Evidence Act of India, No. 1 of 1872, of the Evidence Ordinance of the Federation of Malaya, No. 11 of 1950 (which re-enacted previous legislation) and of the Evidence Ordinance of Singapore, No. 3 of 1893.

7 *Maxwell* v. *Director of Public Prosecutions* (1935) A.C. 309 at p. 317, *per* Viscount Sankey, L.C.

8 *R.* v. *Ball* (1911) A.C. 47 at p. 71; *cf. R.* v. *Fisher* (1910) 1 K.B. 149 at p. 152, *per* Channel J.

9 *R.* v. *Brown, Smith, Woods and Flanagan* (1963) 47 Cr. App. Rep. 205 at p. 211, *per* Edmund Davies J.

For an explicit judicial statement to a comparable effect in Canada, see the judgment of the Ontario Court of Appeal in *R.* v. *Bildson* (1966) 1 O.R. 787. *Cf.* the formulation of principle by the Court of Criminal Appeal of New South Wales *(R.* v. *Gunn (No. 2)* (1942) 43 S.R. (N.S.W) 27) and by the Supreme Court of New Zealand *(R.* v. *Spring* (1949) N.Z.L R. 736 where reference was made, at p. 741 *per* Hutchison J., to the risk that, on admission of similar fact evidence, the jury may be satisfied with insufficient proof of the charge against the accused).

10 *Harris* v. *Director of Public Prosecutions* (1952) 1 All E.R. 1044.

11 *Boardman* v. *Director of Public Prosecution* (1974) 3 All E.R. 887 at p. 893 *per* Lord Morris.

the interests of justice, evidence is admissible in spite of the fact that it may or will tend to show guilt in the accused of some offence other than that with which he is charged.[12] The rationale underlying the reception of similar fact evidence in these circumstances is that "If a jury are precluded by some rule of law from taking the view that something is a coincidence which is against all the probabilities if the accused person is innocent, then it would seem to be a doctrine of law which prevents a jury from using what looks like ordinary common sense."[13]

II. THE CONCEPT OF 'SIMILAR FACT' EVIDENCE

The basis of the admissibility of similar fact evidence depends on the improbability of coincidence. Thus, where the accused was charged with murdering his wife in her bath by drowning and there was no direct evidence of this other than opportunity, but two other wives could be proved to have been drowned in the same way, "no reasonable man would believe it possible that the accused had successively married three women, persuaded them to make wills in his favour, bought three suitable baths, placed them in rooms which could not be locked, taken each wife to a doctor and suggested to him that she suffered from epileptic fits, and then had been so unlucky that each of the three had had some kind of fit in the bath and been drowned."[14] It would likewise intolerably strain the credulity of the jury to be asked to believe that two boys mistakenly identified as the man who made indecent overtures to them an innocent man who was in fact a practising homosexual[15] or that a brother and sister who had committed incest frequently in the past later lived together, sleeping in the same bed, without committing incest.[16]

The basic principle is that the admission of similar fact evidence is exceptional and requires a strong degree of probative force.[17]

12 *Ibid.*

13 *R.* v. *Robinson* (1953) 37 Cr. App. Rep. 95 at p. 106, *per* Hallett J.

14 *R.* v. *Smith* (1914) All E.R. 262, *per* Lord Maugham, quoted by G.L. Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (3rd edition, 1963), p. 230.

15 *Thompson v. R.* (1918) A.C. 221.

16 *R.* v. *Ball* (1911) A.C. 47.

17 Confinement of the inclusionary rule to exceptional contexts has been clearly acknowledged by the Court of Appeal *(R.* v. *Hone Maaka Mokamoko* (1904) 23 N.Z.L.R. 829 at p. 832, *per* Stout C.J.) and by the Supreme Court *(Fogden* v. *Wade* (1945) N.Z.L.R. 724 at p. 726, *per* Blair J.) of New Zealand.

The spirit of circumspection enjoined upon courts with regard to the reception of similar fact evidence is reflected emphatically in the assertion, by the High Court of Australia, that "When in doubt a judge should remember that the admission of similar fact evidence is the exception rather than the rule" *(Markby v. R.* (1978) 52 A.LJ.R. 626 at p. 628, *per* Gibbs A.C.J.) Likewise, the courts of Ontario have been disposed to resolve a doubt in favour of the accused *(R. v. Hendershott and Welter* (1895) 26 O.R. 678). The attitude of the Appeal Division of the Supreme Court of New Brunswick has been indistinguishable *(R. v. Tripp)* (1971 5 C.C.C. (2d) 297 at p. 302, *per* Hughes J.A.).

On the whole, judicial attitudes in the Commonwealth have resisted extension of the limits within which similar fact evidence is admissible. A typical comment is that of the Court of Appeal of Manitoba: "It would be dangerous in the extreme to say that the protection which an accused enjoys against the introduction of evidence of other offences can be eroded or whittled down by grafting on a new or additional exception to the rules—namely, an exception based on credibility" *(R.* v. *Drysdale* (1969) 66 W.W.R. 664 at p. 672, *per* Freedman J.A.).

"This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence."[18] Where the accused who was charged with two robberies, each effected by means of a hold-up with the same car, was identified by a victim of the second crime, the English Court of Criminal Appeal held that the jury were entitled to consider the evidence identifying the accused as the perpetrator of the first robbery.[19] As the trial judge put it, "If Robinson is not a guilty man, he is a singularly unfortunate man. He is identified by different people in respect of two entirely different raids."[20]

The essential question in each case is whether "the similar fact evidence, taken together with the other evidence, would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in face of it."[21]

Several points are relevant to the determination of this question:

(i) An important consideration is the degree of similarity of the evidence which is offered as similar evidence.

The "striking resemblances" or "unusual features", disregard of which is repugnant to common sense, may consist either of the objective facts constituting the crime[22] or of a significant similarity

18 *Boardman's* case (1974) 3 All E.R. 887 at p. 897, *per* Lord Wilberforce.

19 *R,* v. *Robinson* (1953) 37 Cr. App. Rep. 95.

20 *Cf. R.* v. *Adami* (1959) S.A.S.R. 81; *R.* v. *Giovannone* (1960) 45 Cr. App. Rep. 31.

The admissibility of similar fact evidence for the purpose of repudiating the hypothesis of coincidence has been consistently acknowledged by Commonwealth courts. Where the accused was charged with the murder of her first husband by thallium poisoning, the admission of evidence relating to the death of her second husband by thallium poisoning was upheld by the Court of Criminal Appeal of New South Wales: *R.* v. *Fletcher* (1953) 53 S.R. (N.S.W.) 70. In another poisoning case the same court, admitting similar fact evidence, observed: "(The accused) was one common factor found in every instance, and this raises an overwhelming probability that she was the person responsible", *per* Street C.J. in *R.* v. *Grills* (1954) 73 W.N. (N.S.W.) 303 at p. 304. The rationale underlying reception of evidence consists of "straining coincidence too far" *(R.* v. *Adami* (1959) S.A.S.R. 81 at p. 86, *per* Napier C.J. and Mayo and Piper JJ.), in that "the point is reached at which reason rejects the hypothesis of mere coincidence, and the inference of a causal connection becomes irresistible" *(Jones* v. *Harris* (1946) S.A.S.R. 98 at p. 104, *per* Napier C.J.).

The Ontario High Court of Justice has pointed out that "The factor of coincidence or not surely has to take a significant part of its colour from the assessing of the similar fact evidence together with the existing evidence which directly implicates the accused" *(R.* v. *MaGee* (1980) 50 C.C.C. (2d) 470 at p. 477 *ad fin.*, *per* Morden J.). In similar vein the Court of Appeal of New Zealand has commented: "The multiplication of coincidences is so great that the jury might well regard the hypothesis excluded" *(R.* v. *Glass* (1945) N.Z.L.R. 496 at p. 506, *per* Kennedy J.).

21 *Boardman's* case (1974) 3 All E.R. 887 at p. 909, *per* Lord Cross.

22 *R. V. Smith* (1915) 84 L.J.K.B. 2153; *R.* v. *Straffen* (1952) 2 All E.R. 657.

as to method.[23] The similarity which is a requisite of admissibility of evidence pertaining to other transactions or incidents is itself a question of degree. For instance, "while it would certainly not be enough to identify the culprit in a series of burglaries that he climbed in through a ground floor window, the fact that he left the same humorous limerick on the walls of the sitting room, or an esoteric symbol written in lipstick on the mirror might well be enough."[24]

[23] *R. V. Sims* (1946) K.B. 531; *R.* v. *Davis and Murphy* (1971) 56 Cr. App. Rep. 249.

[24] *Boardman's* case (1974) 3 All E.R. 887 at p. 906, *per* Lord Hailsham. The Court of Criminal Appeal of Queensland has remarked: "It would be wrong to think that one must find absolute, essential sameness, for that would be to stipulate identity when only likeness and resemblance are required" *(R.* v. *Zaphir* (1978) Qd. R. 151 at p. 171, *per* Wanstall C.J.). The similarity that is required is "a similarity in such circumstances or conditions as might supposedly affect the result in question" *(Anderson* v. *Commissioner for Railways* (1960) S.R. (N.S.W.) 519 at p. 524, *per* Owen J.). The occasions must be "really comparable" *(R.* v. *Miles* (1943) 44 S.R. (N.S.W.) 198 at pages 199-200, *per* Jordan C.J.) so as to enable an inference to be drawn from the one to the other "as a matter of common sense" *(R.* v. *Button* (1936) 36 S.R. (N.S.W.) 534 at p. 539, *per* Jordan C.J.) on the basis of "the singular peculiarity of a number of features common to all the offences" *(R.* v. *Martin* (1956) V.L.R. 87 at p. 88, *per* Lowe, Gavan Duffy and Dean JJ.) or a "marked similarity, such a connection between them, that one can detect in them, as a whole, a system and a technique" *(R.* v. *Fogarty* (1959) V.R. 594 at p. 597, *per* O'Bryan J.).

In keeping with these principles it has been held in Australia that, in a case of forgery, all that is required is that the other offences should involve the use of forged documents *(R.* v. *Manning* (1933) 33 S.R. (N.S.W.) 285), it being immaterial whether the documents pertained to State or Commonwealth transactions *(Hardgrave* v. *R.* (1906) 4 C.L.R. 232). The Supreme Court of New South Wales has received similar fact evidence in connection with a charge as to keeping a house of ill-fame: *R.* v. *Turnbull* (1943) 44 S.R. (N.S.W.) 108.

The Canadian courts have postulated recent acts of the same character *(Rivet v. R.* (1915) 27 D.L.R. 695) "so connected by significant features that a general plan or scheme is seen to have been behind them as a natural explanation" *(R*, v. *McLean* (1906) 39 N.S.R. 147). The fact that the man in each of three cases was one seeking sexual gratification from a woman previously unknown to him, in her own home, in the middle of the day, in two cases without taking advantage of the opportunity to remove his glasses and his clothes was regarded by the Court of Appeal of British Columbia as warranting the reception of similar fact evidence: *R.* v. *Bird* (1970) 3 C.C.C. 340 at p. 345, *per* Branca J.A. A comparable conclusion was reached by the Ontario Court of Appeal in regard to charges of attempted murder when the evidence indicated that both victims were stabbed in the same manner after leaving the same tavern, one frequented by the accused, that both offences were committed less than a month apart a short distance from the tavern and that both offences had a sexual connotation *(R.* v. *Simpson* (1977) 35 C.C.C. (2d) 337) and by the Appeal Division of the Supreme Court of Alberta in respect of charges of forcibly seizing, raping and unlawfully assaulting, respectively, three girls, over a period of fifty five days, in a suburb of Calgary where the accused lived, the *modus operandi* in each case being substantially similar *(R.* v. *Lawson* (1971) 3 C.C.C. (2d) 372 at p. 379, *per* McDermid J.A.). An identical method of attack, in cases of rape, has been accepted by the Ontario Court of Appeal as evidence of sufficient similarity. *R* v. *Hatton* (1978) 39 C.C.C. (2d) 281 at p. 299, *per* Martin J.A. The Supreme Court of Canada has acquiesced in charges of gross indecency being tried together in circumstances where the victims were all young boys counselled by the accused, a former teacher and counselling officer, at his residence: *Guay* v. *R.* (1978) 42 C.C.C. (2d) 536.

On the other hand, the mere features of a quarrel with a woman and the actual or threatened use of a firearm do not render evidence admissible under this rubric, according to the ruling of the Quebec Court of Appeal, on a charge of attempted murder: *R.* v. *Tardif* (1978) 39 C.C.C. (2d) 444

The importance of the degree of similarity lies in the reflection that, the greater the similarity the less likely it would be that a large number of persons would commit the crime. "Similarity narrows the gap between proving the accused was a wrongdoer in general and proving he did this particular wrong."[25] It is a condition of admissibility of evidence that the resemblance between the acts should be so marked as to suggest a special technique pointing to the accused as the criminal.

This may be illustrated by reference to the case law. In *Makin* v. *Attorney-General for New South Wales*[26] a husband and wife were charged with murdering a baby. Its body was found buried in their garden and they were proved to have agreed to adopt it in consideration of the payment of a small premium by its parents. The accused contended that the child had died through natural causes. The Privy Council held that the prosecution was entitled to lead evidence that the bodies of other babies taken in for small premiums were found buried in the yards of houses occupied by the accused.[27] The similarity of the technique employed by the accused on each

at p. 446, *per* Montgomery J.A. Disparate bases of the initial agreement and the subsequent infliction of violence in a different manner constitute a significant divergence between the separate transactions in relation to charges of robbery and extortion: *R.* v. *Rosenberg and Scinocco* (1978) 42 C.C.C. (2d) 49 at p. 56, *per* Graburn Co. Ct. J. In the absence of strikingly similar features between an act of rape and one of breaking and entering into a woman's residence *(R.* v. *Willett* (1972) 10 C.C.C. (2d) 36 at p. 38 *ad fin*, *per* Gale C.J.O.) and among a series of fraudulent acts in connection with stock promotion *(R.* v. *Lynch, Malone and King* (1978) 40 C.C.C. (2d) 7 at pages 23-24, *per* Martin J.A.) the Ontario Court of Appeal has declined to admit evidence under this head.

Cross *(Evidence,* 5th edition, 1979) comments that the *post-Boardman* English decisions "tend to bear out Lord Wilberforce's fear that the decision, if regarded as an example, may have set the standard of striking similarity too low" (at p. 376). Thus, in a case of buggery and indecent assault where similar fact evidence was admitted, the purported similarity was confined to the provision of casual entertainment to the victims *(R.* v. *Inder* (1977) 67 Cr. App. Rep. 143). Criticism is likewise justified of a decision by the New Zealand Court of Appeal where, on a charge of indecent assault, the similarities among the victims consisted solely of their being step-grandchildren of the accused, of both sexes, but all below the age of puberty *(R.* v. *Anderson* (1978) 2 N.Z.L.R. 363; but see, for a stricter approach by the Supreme Court of New Zealand, *R. v. Geiringer* (1976) 2 N.Z.L.R. 398). On the other hand, the English Court of Appeal has observed: "We cannot think that two or more alleged offences of buggery or attempted buggery committed in bed at the residence of the alleged offender with boys to whom he had offered shelter can be said to have been committed in a uniquely or strikingly similar manner" *(R.* v. *Novak* (1976) 65 Cr. App. Rep. 107 at p. 111, *per* Bridge L.J.; *cf. R.* v. *Clarke* (1978) 67 Cr. App. Rep. 398 where the commission of the offences in the vicinity of the home of the victims was held to be insufficient). Conduct consisting of meeting a girl at a dance and making advances to her after driving her home in a car has been thought to lack "something in the nature of special features" *(R.* v. *Wilson* (1973) 58 Cr. App. Rep. 169 at p. 175, *per* Cairns L.J.). Where, by contrast, the means adopted for creating the opportunity to commit rape was the insertion of bogus advertisements in the press offering domestic employment or sending bogus answers to *bona fide* advertisements of that type, the High Court of Australia had no hesitation in admitting similar fact testimony: *Griffith* v *R* (1937) 58 C.L.R. 185 at pages 188-189.

[25] J.D. Heydon, *Cases and Materials on Evidence* (1975), p. 261.

[26] (1894) A.C. 57.

[27] R. Cross, *op. cit.*, p. 360.

occasion was striking. In *R.* v. *Straffen*[28] the accused was charged with strangling a young girl. The death occurred in a quiet country area at a time when the accused was in the area, having escaped for a short time from an institution for the criminally insane. The decision of Cassels, J. to admit evidence of two previous murders of young girls committed by the accused was upheld by the Court of Criminal Appeal. The similarities consisted of the following features: (a) each of the victims was a young girl; (b) each victim was killed by manual strangulation; (c) in each case there was no attempt at sexual interference or any apparent motive for the crime; (d) in none of the three cases was there evidence of a struggle; (e) no attempt was made in any of the cases to conceal the body. In *R.* v. *Smith*,[29] too, the similarity typifying the *modus operandi* was evident:[30] In each of these cases admissibility of evidence of the other crimes rested on the footing that it showed a disposition to commit murder by means of a particular technique.[31]

The applicability of this reasoning is vividly exemplified by the recent English case of *R.* v. *Mansfield*.[32] The accused was charged with causing three fires at hotels where he worked and lived. The question was whether a sufficient degree of similarity could be shown between the fires to justify trial of the charges on one indictment. The test was declared to be whether the evidence went beyond a tendency to commit crimes of the kind charged and was positively probative of the crime alleged. The court emphasized that only if the evidence of similar facts could not be explained away as coincidence did the question of admitting it as a method of proof fall to be considered.

In the latter event the major premise of the reasoning justifying the reception of similar fact evidence is that "Poisonings and fires, though often the result of accident, do not in ordinary human experience recur in the same family circle or in the case of the same occupier. Accordingly, evidence is allowed to prove the recurrence of such poisonings or such fires respectively without proof that the party concerned was more than 'involved' in order to show the high degree of improbability attending the hypothesis that the poisoning or fire under particular scrutiny was an accident."[33] The requisite

28 (1952) 2 All E.R. 657.

29 (1915) 84 L.J.K.B. 2153.

30 For the facts of the case, see the text at note 14, *supra.*

31 R. Cross, *op. cit*., p. 371-2.

32 (1978) 1 All E.R. 134.

33 *Martin* v. *Osborne* (1936) 55 C.L.R. 367 at p. 385, *per* Evatt J.

A necessary caution, however, is that the jury should be warned that they should regard similar fact evidence admitted for this purpose as "a matter which may go to cut down the suggestion that it is specially unlikely that the accused would do the act, not evidence that he did it" *(R.* v. *Hutton* (1936) 36 S.R. (N.S.W.) 534 at p. 542, *per* Jordan C.J.; *cf. Judd* v. *Sun Newspapers Ltd.* (1930) 30 S.R. (N.S.W.) 294 at p. 316, *per* Halse Rogers J.; *MacDonald* v. *R.* (1935) 52 C.L.R. 739 at pages 743-744, *per* Rich J). Canadian courts have emphasized consistently that the triers of fact should be alive to the legitimate purpose and object of similar fact evidence *(R.* v. *McLean* (1906) 39 N.S.R. 147; *R.* v. *Lovitt* (1907) 41 N.S.R. 240; *R.* v. *Parkin* (1922) 31 Man. R. 438; *R.* v. *Crawford* (1980) 54 C.C.C. (2d) 412).

The Court of Appeal of New Zealand has considered it important that the jury should be cautioned against the danger of supposing that the partial

nexus subsumes factors like the time and the character of the acts.[34]

Comparable reasoning was resorted to in the Sri Lankan case of *R.* v. *Seneviratne*[35] to justify admission of similar fact evidence. The accused was charged with cheating and criminal breach of trust in connection with a money transaction in which he acted as notary public for two of his clients. After leading the direct evidence available in the case, the Crown proposed to lead evidence of another instance in which the accused had cheated another client in a similar manner and committed breach of trust of sums of money raised by her through the accused. Jayewardene, A.J., held that evidence regarding the second transaction was admissible.[36]

These cases turn on application of the "hall-mark principle", the gist of which is a recurring technique or mode of operation. As the differences among the acts increase, the justification for reception of evidence relating to the accused's behaviour on other occasions becomes correspondingly slender. Thus, in a case of shopbreaking,[37] there is an insufficient nexus between the accused's previous housebreaking and that of which he is accused, if the former occurred five days earlier at a place twenty miles away.[38] The fact that each shopbreaking took place during the lunch hour when the shopkeeper was away, was held not to warrant invocation of the "hall mark" principle.[39] The English Court of Criminal Appeal has quashed a conviction[40] of obtaining a pony and cart by false pretences concerning the state of the accused's family and bank account, because evidence had been wrongly admitted concerning the obtaining of provender by false pretences with regard to the condition of the accused's business.[41] A conviction for obtaining money by the false pretence that it was needed to enable the accused to spend the night in Cheltenham was quashed on account of the wrongful admission of evidence relating to a previous obtaining of money by

deficiency of the evidence in respect of one charge in an indictment might be supplied by the fact that there are several counts in that position and that the evidence on any single count might be supplemented by assessing the evidence as a whole *(R.* v. *Muling* (1951) N.Z.L.R. 1022 at p. 1028, *per* Fair A.C.J.; *cf. R.* v. *Pickering* (1939) N.Z.L.R. 316 at p. 322, *per* Ostler J.). The view taken by the Supreme Court of South Australia, that there is no rule or practice requiring the trial judge to warn the jury against the inference that the accused is guilty of the offence charged because he has committed other like offences, and that the administering of a caution on these lines is entiretly a matter of discretion *(R.* v. *Kennewell* (1927) S.A.S.R. 287 at p. 302, *per* Murray C.J.) is incompatible with the balance of judicial authority in Commonwealth jurisdictions (see, for example, the emphatic statement by the Supreme Court of New South Wales in *R.* v. *Lovegrove* (1931) 49 W.N. (N.S.W.) 29 at p. 30, *per* Harvey C.J.).

[34] *R.* v. *Coombcs* (1960) 45 Cr. App. Rep. 36; *R. v. Wilson* (1973) 58 Cr. App. Rep. 169.

[35] (1925) 27 N.L.R. 100.

[36] (1925) 27 N.L.R. 100.

[37] *R.* v. *Brown, Smith, Woods and Flanagan* (1963) 47 Cr. App. Rep. 205.

[38] *cf. R.* v. *Macpherson and Resnick* (1964) 2 O.R. 101.

[39] *cf.* v. *Blackledge* (1965) V.R. 397.

[40] *R.* v. *Fisher* (1910) 1 K.B. 149.

[41] *cf. R.* v. *Holt* (1860) Bell C.C. 280; *R.* v. *Ellis* (1910) 2 K.B. 746; *R* v. *Baird* (1915) 11 Cr. App. Rep. 186; *R.* v. *Boothby* (1933) 24 Cr. App. Rep. 112; *R.* v. *Hamilton* (1939) 1 All E.R. 469.

the accused by means of the pretence that they had work elsewhere and required the money for the journey to that place.[42]

In a Sri Lankan case[43] a charge of cheating arose from a transaction under which the accused agreed to deliver to the complainant certain items of furniture. The complainant paid the consideration agreed upon but, after the lapse of several months, he had received neither the furniture nor the return of the money. The second transaction in respect of which evidence was tendered, was one under which the accused had offered to rent to another person a furnished house but, having accepted an advance, the adcused failed to give possession of the house or to return the money. The basis of the court's decision excluding evidence as to the accused's behaviour in connection with the second transaction was that the two situations were not sufficiently similar in character to warrant an inference as to the accused's intention on the first occasion being drawn from his conduct in regard to the second, and unrelated, matter.

The requirement relating to a "particular technique"[44] or "particular pattern"[45] is relative. Insistence on "a virtually complete similarity"[46] as a condition of admissibility of evidence regarding other instances or transactions has been criticised on grounds of policy, in that it places "too high a premium on versatility and too heavy a penalty on dullness".[47] However, the strictness of this requirement is unavoidable, since the reception of what purports to be similar fact evidence cannot be justified in circumstances where the means of committing a crime "might have been adopted by any one of an indefinite number of persons and where no other connection is shown to have existed".[48] The fundamental premise of the law is that evidence of the misconduct of a party on other occasions must not be given if the only reason why it is substantially relevant is that it shows a disposition towards wrongdoing in general, or the commission of the particular crime or civil wrong with which such party is charged.[49] The argument in favour of reception of evidence as to misconduct on other occasions has to be made to support a suggestion that the accused is disposed towards a particular

42 *R.* v. *Slender* (1938) 2 All E.R. 387.

43 *Dias* v. *Wijetunge* (1946) 47 N.L.R. 223.

44 *Boardman's* case (1974) 3 All E.R. 887 at p. 914, *per* Lord Salmon.

45 *Ibid.*

46 R. Cross, *op. cit.,* p. 358. It has been observed recently that "Evidence is admissible as similar fact evidence if, but only if, it goes beyond showing a tendency to commit crimes of this kind and is positively probative in regard to the crime charged." *(R. v. Ranee and Herron* (1975) 62 Cr. App. Rep. 118 at p. 121, *per* Lord Widgery, C.J.). "Such probative value is not provided by the mere repetition of similar facts; there has to be some feature or features in the evidence sought to be adduced which provides an underlying link. The existence of such a link is not to be inferred from mere similarity of facts which are themselves so common place that they can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration." *(R. v. Scarrott* (1977) 3 W.L.R. 629 at p. 634, *per* Scarman, L.J.). See also *R. v. Mustafa* (1977) Cr L.R. 282; *R.* v. *Tricoglus* (1977) Cr. L.R. 284.

47 D.W.L. in (1938) 54 *Law Quarterly Review* 335 at p. 336.

48 *R.* v. *Aiken* (1952) V.L.R. 265 at p. 268.

49 R. Cross, *op. cit.,* p. 355.

method, as opposed to a particular kind, of wrongdoing.[50] The sameness of the method, therefore, assumes crucial significance.

(ii) The argument based on the unlikelihood of coincidence derives validity not only from strong similarity between the similar fact evidence and the main evidence but from marked dissimilarity between all the events and what might ordinarily be expected to happen.[51] For this reason similar fact evidence is more readily admitted in unusual crimes than common ones — for example, poisoning,[52] incest,[53] unnatural sexual cases[54] and perverted murders.[55] "If crimes are common others may have committed them. If crimes are rare, most people are inhibited from committing them, and proof of lack of inhibition is very relevant".[56]

(iii) The number of previous or subsequent instances in respect of which evidence is available has a material bearing on the concept of "system". The essence of this concept has been explained judicially: "A system is not necessarily criminal: most men carry on business on a system, they may even be said to live on a system. Where, however, acts are of such a character that, taken alone, they may be innocent, but which result in benefit or reward to the actor and loss or suffering to the patient, repeated instances of such acts at least show that experience has fully informed the actor of all their elements and details, and it is only reasonable to infer that the act is designed and intentional, and its motive the benefit or reward to himself or the loss or suffering to some third person".[57]

50 *ibid.*

51 J.D. Heydon, *op. cit.,* p. 260.

52 *R. v.. Geering* (1849) 18 L.J.M.C. 215; *R.* v. *Garner* (1864) 3 F. & F. 681; *R. v. Cotton* (1873) 12 Cox C.C. 400; *R.* v. *Heeson* (1878) 14 Cox C.C. 40; *R.* v. *Flannagan and Higgins* (1884) 15 Cox C.C. 403. But see *R.* v. *Winslow* (1860) 8 Cox C.C. 397.

53 *R.* v. *Ball* (1911) A.C. 47; *McConville* v. *Bayley* (1914) 17 C.L.R. 509; *R.* v. *Power* (1940) Q.S.R. 111. But see *R.* v. *Flack* (1969) 2 All E.R. 784.

54 *Thompson* v. *R.* (1918) A.C. 221; *R.* v. *Sims* (1946) K.B. 531; *R.* v. *Hall* (1952) 1 K.B. 302; *R.* v. *King* (1967) 2 Q.B. 338; *Director of Public Prosecutions* v. *Kilbourne* (1973) A.C. 729; *Boardman* v. *Director of Public Prosecutions* (1974) 3 All E.R. 887. But see *R.* v. *Chandor* (1959) 1 Q.B. 545; *R.* v. *Horwood* (1970) 1 Q.B. 133.

55 *R. v. Straffen* (1952) 2 Q.B. 911; *R.* v. *Morris* (1969) 54 Cr. App. Rep. 69.

56 J.D. Heydon, *op. cit., p.* 261. The Supreme Court of Victoria has made the comment, in relation to separate charges of larceny as a bailee: "The mere similarity in the means adopted in the two cases, where those means might have been adopted in either case by any one of an indefinite number of persons, and where no other connection, either in the mind of the accused or in fact, is shown to have existed, cannot, we think, justify on the question of identity the combining of the evidence in the one case with that in the other" *(R.* v. *Aiken* (1925) V.L.R. 265 at p. 268, *per* Cussen J.).

57 *R.* v. *Bond* (1906) 2 K.B. 389 at p. 420, *per* Lawrence J.

The prominent features of the concept of "system" have been identified in Commonwealth decisions.

An essential requirement, according to the Court of Appeal of Manitoba, is a "complete and co-ordinated" scheme *(R.* v. *Christakos* (1946) 1 W.W.R. 166). The Ontario Court of Appeal was satisfied that an equivalent requirement had been established in a case involving a series of murders by arsenical poisoning *(R. v. Sternaman* (1898) 1 C.C.C. 1). A similar view was taken by the Supreme Court of Canada in a case where the accused, on being taken to the spot where X was buried, pointed out X's grave and then took the police to a place in the vicinity where the body of Y had been buried *(Boulet* v. *R.* (1976) 34 C.C.C. (2d) 397). Both bodies having been decom-

In exceptional circumstances one previous instance may suffice. In *R.* v. *Bond*[58] the accused, a doctor, had been convicted of using instruments with intent to procure the abortion of X. The trial judge admitted the evidence of Y that the accused had performed a similar operation on her nine months previously and, in the course of her examination-in-chief, she said he told her that he had "put dozens of girls right". Both X and Y were servants of the accused who had been pregnant by him. The court held that the evidence had been rightly received.

Ordinarily, however, "system" cannot be established by reference to an isolated act. In *R.* v. *Bond* there was a difference of opinion whether the evidence of Y would have been admissible, had it not been for the allegation concerning the accused's admission of having performed similar operations on numerous previous occasions.[59] Since an isolated act may be sufficient to support an argument based on the rarity of coincidences, some of the judges were prepared to admit evidence concerning the accused's conduct towards Y as tending to negative innocent intent towards X, even if the former's testimony had not referred to the admission of similar behaviour on other occasions.[60]

The number of instances required depends on the nature of the crime charged and the circumstances in which it is alleged to have been committed. Thus, although one previous abortion may be suffi-

posed by a caustic substance, it was held that the circumstances surrounding the two killings and burials suggested a 'system' indicative of premeditation (at p. 411 *ad fin., per* Beetz J.). The District Court of Newfoundland has postulated: "The specific connection must be in time and in the nature of the acts sought to be adduced and those constituting the offence. There must be some nexus, meaning a link, bond or tie constituting a relevant connection" *(R.* v. *Pottle* (1978) 39 C.C.C. (2d) 484 at p. 500, *per* Steele C.J.D.C.; cf. the decision by the Appeal Division of the Supreme Court of Nova Scotia in *R.* v. *Bain* (1970) 2 C.C.C. 49).

The essence of 'system', according to the Supreme Court of Victoria, is the consistent pursuit of the same criminal object *(R.* v. *Graham* (1915) V.L.R. 402). Where the accused, having conceived a scheme for defrauding a municipality, secured the assistance of several persons to effect his purposes, the Court of Criminal Appeal of Western Australia held that, although these persons were independent and perhaps unknown to one another, there was one comprehensive scheme or 'system' *(Rapley* v. *R.* (1914) 17 W.A.L.R. 36). In these circumstances, according to a ruling by the Supreme Court of New South Wales, the evidence discloses an indivisible conspiracy consisting of several distinct acts *(R.* v. *Bradford* (1887) 8 L.R. (N.S.W.) 33). Where the accused, in each instance, furthered a system of swindling by falsely representing himself as a bank officer for the purpose of obtaining clothes, the Supreme Court of South Australia entertained no doubt that the requisite *nexus* was demonstrable *(R.* v. *Reynolds* (1927) S.A.S.R. 228). The Supreme Court of Victoria reached a comparable conclusion in respect of a series of acts involving use of the identical poison in the same manner (R. v. *Davis* (1872) 3 V.R. (L) 95).

The Supreme Court of New Zealand has considered that an adequate foundation for the reception of similar fact evidence had been laid if "every fact founded on the hypothesis that (the accused) did commit these crimes fits into place as part of a logical, consistent pattern" *(R.* v. *Glass* (1945) N.Z.L.R. 496 at p. 498, *per* Fair J; *cf.* the decision of the New Zealand Court of Appeal in *Parker* v. *Wachner* (1917) N.Z.L.R. 440 — a case of fradulent misrepresentation).

58 (1906) 2 K.B. 389.

59 R. Cross, *op. cit.,* p. 385.

60 R. Cross, *op. cit.,* pages 385-386.

cient, several previous burglaries committed in a commonplace manner may not be enough.[61]

The structural framework of the South Asian codified systems is of comparative interest. Sections 14 and 15 of the Evidence enactments in India, Malaysia, Singapore and Sri Lanka serve a similar purpose. Section 14 admits facts showing the existence of any state of mind or body when the existence of such a state of mind or body is in issue or is relevant.[62] Section 15 enables the introduction of evidence operating to exclude a defence like accident in cases where, at first glance, the question whether an act has been committed intentionally or accidentally admits of some doubt.[63]

Section 14 is significantly wider in scope than section 15. Where evidence in regard to an act is sought to be led under section 14, the act may be an isolated act, there being no requirement relating to a series of acts. The latter element is a feature of section 15. Where, in addition to the act referred to in the indictment, only one other act of a similar kind is proved to have been committed by the accused, evidence relating to the other act may be given in appropriate cases under section 14, whatever interpretation is adopted of the phrase "series of occurrences" which forms an essential element of section 15. There may thus be situations to which section 14 applies, even though the distinct requirements of section 15 cannot be established.[64]

In the context of section 15 there has been no unanimity in the Sri Lankan decided cases as to the interpretation of the word "series". In *R.* v. *Seneviratne*[65] the majority of the court[66] construed "series" as denoting that more than one act (other than that referred to in

61 J.D. Heydon, *op. cit., p. 262.*

The general principle is that "If there was an isolated instance of delinquency, or there were in the end steps missing from that series" *(R.* v. *O'Kane* (1910) V.L.R. 8 at p. 13, *per* Madden C.J., evidence relating to other events would not be admissible. Although, as a rule, a single prior act is insufficient *(Re Shelburne and Queen's Election (Dom.), Cowe* v. *Fielding* (1906) 37 S.C.R. 604), the Court of Appeal of Alberta has, exceptionally, received evidence of a single similar act in connection with a charge of conspiracy to set fire to a building with intent to defraud *(R.* v. *Wilson* (1911) 4 Alta L.R. 35).

The Court of Criminal Appeal of New South Wales has taken the view that smallness of the number of other instances "goes to weight rather than to admissibility" and that "weight must depend not merely on the number of repetitions but also on the degree of similarity to be found between the two or more sets of occurrences" *(R.* v. *Fletcher* (1953) 53 S.R. (N.S.W.) 70 at p. 73, *per* Owen J.). A comparable approach to evidence of a single similar act has been adopted, *obiter,* by the Supreme Court of Canada *(Brunet* v. *R.* (1918) 57 S.C.R. 83). It is submitted, however, that the highly prejudicial character of evidence of this type renders preferable the contrary view, expressed by the King's Bench Division in England *(R.* v. *Bond* (1906) 2 K.B. 389 at p. 405, *per* Kennedy J.) and by the Court of Appeal of New Zealand *(R.* v. *Powell, Iremonger and Kinley* (1957) N.Z.L.R. 1 at p. 7, *per* Finlay J.) that the number of instances affects the admissibility, and not merely the weight, of the evidence sought to be adduced.

62 See the text at note 5, *supra.*

63 See the text at note 6, *supra.*

64 See, for example, *R.* v. *Seneviratne* (1925) 27 N.L.R. 100.

65 (1925) 27 N.L.R. 100.

66 Schneider and Dalton, JJ.

the indictment) would have to be proved.[67] However, the minority[68] was of opinion that two acts in all (the act charged and one other act) amount to a number of acts and would be sufficient to constitute a "series".[69]

The Sri Lankan cases cover a variety of situations extending from those where one similar act besides that charged in the indictment has been held sufficient,[70] to those where no fewer than one hundred and fifty similar incidents were alleged to have taken place.[71] As a general rule, however, the courts of Sri Lanka have required a minimum of two acts, other than that charged, to constitute a "series".[72] A flexible attitude is desirable. A Sri Lankan judge has observed: "Whether or not an act forms part of a series appears to depend entirely on the class of acts which are in question, and where the question is one of housebreaking in a particular neighbourhood on a particular night, I think that one other act is sufficient to constitute a 'series' of similar occurrences".[73]

Although the comment has been made by the Sri Lankan courts that "Evidentiary facts are admissible to prove the intention regarding the f*actum probandum* by showing what is described variously as 'system', 'design', 'course of conduct' or 'practice' ",[74] the use of these terms should not be allowed to obscure the fact that "the basic test is a high degree of relevance, and this depends on all the evidence".[75] It is vital, therefore, to prevent the law from degenerating into a mosaic of technical rules regulating such matters as the number of acts comprising a "system" and the methods by which an adequate nexus can be established between the primary evidence and the purported similar fact evidence.

(iv) A resilient criterion should govern the degree of proximity in time postulated by the law. The nature of the crime is the decisive consideration. As a Scottish court has aptly remarked, "A man whose course of conduct is to buy houses, insure them and burn them down, or to acquire ships, insure them and scuttle them, or to purport to marry women, defraud and desert them, cannot repeat the offence every month, or even perhaps every six months".[76] In general, however, the length of the interval between the acts detracts from the strength of the nexus.[77]

67 (1925) 27 N.L.R. 100 at p. 113, *per* Schneider, J.

68 Jayewardene, A.J.

69 (1925) 27 N.L.R. 100 at p. 134, *per* Jayewardene, A.J.

70 *Jayewardene* v. *Diyonis* (1915) 18 N.L.R. 239; *Esufali & Co.* v. *Samarang Sea and Fire Insurance Co.* (1925) 26 N.L.R. 402.

71 *R.* v. *Waidyasekera* (1955) 57 N.L.R. 202.

72 See, for example, *R.* v. *Wijeratne* (1935) 6 C.W.R. 314; *R.* v. *Jarlis* (1951) 52 N.L.R. 457.

73 *R.* v. *Siyaris* (1928) 30 N.L.R. 92 at pages 93-94, *per* Lyall-Grant, J.

74 *R.* v. *Seneviratne* (1925) 27 N.L.R. 100 at p. 113, *per* Schneider, J.

75 J.D. Heydon, *op. cit., p. 261.*

76 *Moorov* v. *H.M. Advocate* 1930 J.C. 68 at p. 89, *per* Lord Sands.

77 *R.* v. *Adamson* (1911) 6 Cr. App. Rep. 205.

The principle applicable was formulated by the Supreme Court of Victoria in a case where, at the trial of the accused for the murder of his wife, evidence of previous quarrels and assaults was sought to be led: "If the incident is isolated and at a considerable distance of time before the death, it may afford no evidence at all of relations between the parties at

(v) The likelihood of repetition of the offence in question is integral to the concept of "system". This accounts for the regularity with which similar fact evidence has been received in cases involving charges of homosexual conduct.[78]

Lord Sumner has observed that "Persons who commit (homosexual) offences seek the habitual gratification of a particular perverted lust which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity".[79] In *R.* v. *Sims*[80] this statement was relied on as a basis for the admission of evidence of homosexual misconduct on the part of the accused on a homosexual charge without any reference to pattern or technique. Such evidence may take the

the time of the death which could have any bearing on motive or intention. If it is not too remote, and its existence along with other incidents or circumstances related in evidence tends to establish a climate (of antipathy), the evidence of the incident is relevant" *(R.* v. *luliano* (1971) Y.R. 412 at p. 416, *per* Winneke C.J. and Little and Gowans JJ.). In a case involving fraudulent conversion of trust funds the Supreme Court of Queensland pointed out that, if the other act is "outside a reasonable limit of time" *(R.* v. *Hally* (1962) Qd. R. 214 at p. 227, *per* Gibbs J.), the requisite *nexus* is destroyed.

The adequacy of the *nexus,* in point of time, depends on the circumstances. An interval of three years between acts of violence directed against children of the accused *(R. v. Miller* (1951) V.L.R. 346 at pages 352-3, *per* Martin J.), of several months between similar acts of robbery *(Latour* v. *R.* (1976) 33 C.C.C. (2d) 377 at p. 382, *per* de Grandpre J.), and of a little more than a year between violent acts involving firearms directed against, respectively, the spouse and a female companion of the accused *(R.* v. *Tardif* (1978) 39 C.C.C. (2d) 444 at p. 446, *per* Montgomery J.A.) has been considered by the Supreme Court of Victoria, the Supreme Court of Canada and the Court of Appeal of Quebec, respectively, to render the other act too remote as to time. On the other hand, as long an interval as five years in the case of acts of abortion characterized by strikingly similar features *(R.* v. *Pollard and Tinsley* (1909) 19 O.L.R. 96), fifty five days within which acts of forcibly seizing, raping and unlawfully assaulting three different girls were committed by the accused *(R.* v. *Lawson* (1971) 3 C.C.C. (2d) 372 at p. 379, *per* McDermid J.A.), and two years separating offences of incest committed by the accused against his adopted daughter *(Wilkinson* v. *R.* (1947) N.Z.L.R. 412 at p. 416, *per* Callan J.) have been held by the Court of Appeal of Ontario, the Appeal Division of the Supreme Court of Alberta and the Court of Appeal of New Zealand, respectively, not to militate against proximity of the other act or acts.

The New Zealand Court of Appeal has set out its approach to this question as follows: "Remoteness of time is doubtless one of the elements to be taken into account in determining whether a coincidence is suspicious as being beyond the ordinary operation of the law of chances.. . But the effect of time in this respect must depend on the nature of the events in question" *(R. v. Smythe* (1923) N.Z.L.R. 314 at p. 325, *per* Salmond J.; *cf. dicta* by Northcroft J., on behalf of the Supreme Court of New Zealand, in *Reddecliffe v. North Canterbury Hospital Board* (1946) N.Z.L.R. 368 at p. 374).

There is no general principle, the Court of Appeal of British Columbia has pointed out, that evidence of similar acts is to be excluded merely because the acts were subsequent to the offence charged *(R.* v. *Ross* (1958) 121 C.C.C. 284). This principle was followed by the Supreme Court of Canada in a case *(Alward and Mooney* v. *R.* (1977) 35 C.C.C. (2d) 392) where, however, it was commented that the acts in question were "remarkably similar and well-nigh contemporaneous robberies" (at p. 398, *per* Spence J.; *cf. R.* v. *Suchan and Jackson* (1952) 104 C.C.C. 193).

[78] See the cases cited at note 53, *supra.*

[79] *Thompson* v. *R.* (1918) A.C. 221 at p. 235.

[80] (1946) K.B. 531 at p. 540.

form either of an explicit assertion by the accused as to his abnormal propensity[81] or of real evidence like powder puffs[82] or indecent photographs[83] found in the possession of the accused.

Dicta in *R.* v. *Sims* support the sweeping proposition that evidence of homosexuality is always admissible on charges relating to homosexual offences. Indeed, Lord Goddard regarded sodomy as "a crime in a special category".[84] The high-water mark of this principle was reached in *R.* v. *King.*[85] Two boys alleged that the defendant met them in a public lavatory in the afternoon and committed acts of indecency and that by arrangement he met them again in the evening, took them to his flat for the night and indulged in further acts of indecency. The defendant denied the afternoon meeting but admitted the evening meeting and also that he took the boys home and that he slept in the same bed as one of them. However, he denied any act of indecency. In cross-examination, he responded affirmatively to the question: "Are you a homosexual?" The Court of Appeal held that the question and answer were properly received.

Nevertheless, the modern law leaves no room for doubt that the *ratio decidendi* of *R.* v *Sims* is to be interpreted restrictively. The prevailing view is that evidence of homosexual disposition is admissible only when there is a strikingly similar technique.[86] In *R.* v. *Horwood*[87] the accused was convicted of attempting to procure the commission with himself of an act of gross indecency by a fourteen year old boy. The accused gave the boy a lift along a country road. The boy said that they got out to look for rabbits when the accused made the proposal and he ran away. According to the accused, he got out to urinate and, on returning to the car, found the boy missing. At a police interview the accused was asked whether he was a homosexual. He replied: "I used to be. I'm cured now." The Court of Appeal held in this case that the question and answer ought not to have been admitted. O'Connor, J. distinguished *R.* v. *King* as an exceptional case: "In the present case *(R.* v. *Horwood)* the nature of the admitted association, namely, the appellant taking the boy for a drive in his motor car in broad daylight can be contrasted with that in *R.* v. *King,* taking the boy home and getting into bed with him".

Strong support for the narrower interpretation of *R.* v. *Sims* is furnished by the statement of Lord Hailsham in *Director of Public Prosecutions* v. *Kilbourne:*[88] "With the exception of one incident, each accusation bears a resemblance to the other and shows not merely that (the accused) was a homosexual which would not have been enough to make the evidence admissible, but that he was one whose proclivities in that regard took a particular form".[89] In

81 *R.* v. *King* (1967) 2 Q.B. 338.
82 *Thompson* v. *R.* (1918) A.C. 21.
83 *R.* v. *Twiss* (1918) 2 K.B. 853.
84 (1946) K.B. 531 at p. 540.
85 (1967) 2 Q.B. 338.
86 See the text at note 88, *infra.*
87 (1970) 1 Q.B. 133.
88 (1973) A.C. 729.
89 at p. 751.

Boardman v. *Director of Public Prosecutions*[90] reference was made in the House of Lords to the "purely passive role"[91] said to have been adopted by the accused towards the act of sodomy suggested or performed as an element of "striking resemblance"[92] between the testimony of the two boys. This had been described by the trial judge as a feature "of a particular, unusual kind".[93] The implication is that the evidence was admitted because it showed "not merely that the accused was a homosexual, but also that he proceeded according to a particular technique".[94] The House of Lords has now categorically declared that "There is not a separate category of homosexual cases"[95] and that "The rules of logic and common sense must be the same for all trials where 'similar fact' or other analogous evidence is sought to be introduced".[96]

Contemporary *mores* have played a large part in facilitating this conclusion. Lord Simon of Glaisdale has remarked that, in judging whether one fact is probative of another, "experience plays as large a part as logic".[97] As Lord Wilberforce has pointed out, "What is striking in one age is normal in another; the perversions of yesterday may be the routine of tomorrow".[98] It has been juducially recognized in England that "Public attitudes and public habits, particularly in regard to homosexuality, themselves have changed".[99]

In an evaluation of the law from the standpoint of policy, it would appear that the broad view emerging from the *dicta* in *R.* v. *Sims* is exposed to criticism on several grounds: (1) Lord Sumner's analogy of homosexual propensity with a physical defect is inaccurate, since the former may be transient or intermittent, while the latter normally exists throughout life; (2) the menace of blackmail militates convincingly against adoption of the broad view; (3) a tendency to homosexuality does not necessarily entail promiscuity.[1]

90 (1974) 3 All E.R. 887.
91 At p. 907, *per* Lord Hailsham.
92 *Ibid.*
93 At p. 988 *ad fin., per* Lord Hailsham.
94 At p. 894, *per* Lord Morris, quoting R. Cross, *Evidence* (3rd edition, 1967), p. 319.
95 *Boardman's* case (1974) 3 All E.R. 887 at p. 907 *ad fin., per* Lord Hailsham.
96 *Ibid.* This conclusion seems to have been foreshadowed in a strand of Commonwealth authorities. The Supreme Court of Victoria has held that, at a trial for buggery, evidence that there were found in a room occupied by the accused articles of female attire which he admitted belonged to him, was inadmissible, in that it demonstrated mere propensity *(R.* v. *du Barry* (1952) V.L.R. 524 at pages 524-525, *per* Herring C.J.). In the light of authority in Victoria *(R.* v. *Staiano* (1919) 25 A.L.R. (C.N.) 21) and in Queensland *(R.* v. *Organ* (1925) Q.S.R. 95), the decision by the Supreme Court of South Australia that, on charges relating to homosexual acts, the accused may be asked in cross-examination whether he had ever suffered from the temptation to indulge in homosexual practices but that questions could not be put to him tending to show that he had actually succumbed to this temptation *(R.* v. *Turner* (1947) S.A.S.R. 74 at p. 79, *per* Napier C.J.), is open to criticism.
97 *Director of Public Prosecutions* v. *Kilbourne* (1973) A.C. 729 at p. 756.
98 *Boardman's* case (1974) 3 All E.R. 887 at p. 898.
99 *R. v. Morris* (1969) 54 Cr. App. Rep. 69 at p. 79.
1 J.D. Heydon, *op. cit.,* p 265.

(vi) The question arises whether criminal or delinquent behaviour with the same person is a *sine qua non* of invocation of "system". In Sri Lanka the rigid view has been taken in an isolated case[2] that the previous instance must involve the accused's conduct with the same person, but this does not represent the balance of judicial authority. The problem arises directly in the case of sexual offences. On a charge of incest, evidence of intercourse with a relation other than the one mentioned in the charge will generally be inadmissible,[3] but this is because such evidence does no more than show incestuous propensity.[4] Similarly, general homosexual tendencies will only be admissible in exceptional circumstances.[5] But evidence of intercourse on other occasions with the person mentioned in the charge is admissible because it is highly relevant as indicating a propensity to commit incest or an unnatural offence with a particular person.[6]

The concept of "system" should be viewed not in a metaphysical light but pragmatically. The crux of "system" is that "There is a point in the ascending scale of probability when it is so near to certainty, that it is absurd to shy at the admission of the prejudicial evidence".[7] In all these cases it is for the judge to ensure that a properly instructed jury, applying their minds to the facts, can come to the conclusion that they are satisfied that to treat the matter as pure coincidence by reason of the 'nexus', 'pattern' or 'system' is an

2 *R.* v. *Jarlis* (1951) 52 N.L.R. 457.

3 *R.* v. *Flack* (1969) 2 All E.R. 784.

4 R. Cross, *op. cit.,* p. 358-9.

5 J.D. Heydon, *op. cit.,* p. 264; for an example, see *R.* \ *King, supra.* Evidence of previous homosexual tendencies was admitted by an Australian court in *R.* v. *Jeffries* (1946) 47 S.R. (N.S.W.) 284 and by a Canadian court in *R.* v. F *sub nomine R ex rel; Taggart* v. *Forage* (1969) 2 C.C.C. 4.

The principle now established is that "evidence that an offence of a sexual character was committed by A against B cannot be supported by evidence that an offence of a sexual character was committed by A against C, or against C, D and E." *(Bcardman's* case (1975) A.C. 441 at p. 443, *per* Lord Wilberforce).

This principle has taken firm root in Commonwealth law.

In relation to a charge of murder of a three year old child, who had been living as a member of the accused's household, the Manitoba Court of Appeal held that, although evidence that the accused had beaten the same child severely in the past could be received, evidence of the accused's acts of cruelty towards other children living in his house and towards a dog was clearly inadmissible *(R.* v. *Drysdale* (1969) 66 W.W.R. 664). On a charge of indecent assault, the Ontario Court of Appeal held that it was impermissible to lead evidence as to a previous act of *fellatio* by the accused with a different young girl *(R.* v. *Deslaurier* (1977) 36 C.C.C. (2d) 327 at p. 329, *per* Brooke J.A.). The adduction of evidence of acts of *fellatio* by the accused with two brothers was considered proper by the Court of Appeal of Newfoundland only because of the extreme brevity of the interval between these acts *(R. v. Pottle* (1978) 49 C.C.C. (2d) 113).

This distinction between misconduct by the accused with the person named in the indictment and with other persons has been applied by the courts of Queensland *(R.* v. *Allen* (1937) St. R. Qd. 32; *R.* v. *Power* (1940) Q.S.R. 111) and New Zealand *(R.* v. *McLean* (1978) 2 N.Z.L.R. 358).

6 *R.* v. *Ball* (1911) A.C. 47; *R. v. Shellacker* (1914) 1 K.B. 414; *R.* v. *Allen* (1937) St. R. Qd. 32.

7 J. Stone, *The Rule of Exclusion of Similar Fact Evidence* (1933) 46 Harv. L.R. 954 at pages 983-984.

"affront to common sense".[8] In this the ordinary rules of logic and common sense prevail,[9] whether the case is one of burglary and the burglar has left some signature as the mark of his presence,[10] or false pretences, and the pretences alleged have too many common characteristics to have happened coincidentally,[11] or whether the dispute is one of identity and the accused in a series of offences has some notable physical features or behavioural or psychological characteristics,[12] or is in possession of incriminating articles like a jemmy,[13] a set of skeleton keys[14] or, in abortion cases, the apparatus of the abortionist.[15]

III. THE CONCEPTS OF 'RELEVANCE' AND 'ADMISSIBILITY'

(a) Exclusion of Evidence Relating to Other Instances on the Ground of Irrelevance

Evidence may be excluded on the ground of irrelevance when "the evidence is thought to have inadequate probative value so far as such misconduct is concerned, for it is then *a fortiori* inadequate in relation to the allegation of misconduct which is being considered by the court".[16]

8 *Boardman's* case (1974) 3 All E.R. 887 at p. 906, *per* Lord Hailsham; *cf.* the statement by the Court of Criminal Appeal of New South Wales, in connection with a charge of assault: "A sufficient *nexus* existed between the various instances of the defendant's conduct, in that they were all directed to the same person and more especially to attempts by him to run away, so as to suggest that, more probably than not, on the occurrence of another instance of the complainant attempting to run away, he would be treated with the cruelty which had been manifested on earlier occasions" *(R.* v. *Garner* (1964) 1 N.S.W.R. 1131 at p. 1133, *per* Sugerman J.).

9 *Ibid.*

10 *R.* v. *Whiley* (1804) 2 Leach 983; *R.* v. *O'Meally* (1953) V.L.R. 30; *R.* v. *Ducsharm* (1956) 1 D.L.R. 732.

11 *R.* v. *Rhodes* (1899) 1 Q.B. 77; *R.* v. *Ollis* (1900) 2 Q.B. 758; *R.* v. *Wyatt* (1904) 1 K.B. 188; *R.* v. *Hurren* (1962) 46 Cr. App. Rep. 323. But see *R.* v. *Sagar* (1914) 3 K.B. 1112.

12 See the cases cited at note 53, *supra.*

13 *R.* v. *Taylor* (1823) 17 Cr. App. Rep. 109.

14 *R.* v. *Hodges* (1957) 41 Cr. App. Rep. 218; *R.* v. *Hannam* (1963) 49 M.P.R. 262.

15 *R.* v. *Palm* (1910) 4 Cr. App. Rep. 253; *R.* v. *Starkie* (1922) 2 K.B. 295; *R.* v. *Ross and McCarthy* (1955) S.R. Qd. 48; *R.* v. *Powell, Iremonger and Kinley* (1957) N.Z.L.R. 1. *Cf. Brunet* v. *R.* (1928) S.C.R. 375; *R.* v. *Campbell* (1947) 2 C.R. 351.

16 R. Cross, *op. cit.,* p. 357.

The basic criteria governing relevancy have been defined by the Supreme Court of Victoria: "First, did the marked similarity which is necessary to justify the admission of evidence in such cases exist in the features proved in the particular case? Second, is the jury satisfied that the accused was the person who had performed the other similar acts? Third, is the jury in the instant case satisfied that the accused was the person who committed the crime charged?" *(R.* v. *Salerno* (1973) V.R. 59 at p. 62, *per* Winneke C.J.).

With regard to the second question, an acquittal of the accused by a court of competent jurisdiction on charges founded on the previous acts is conclusive.

In an Australian case *(Kemp* v. *R.* (1951) 83 C.L.R. 342) the accused was charged with indecent assault on a boy aged thirteen years on three counts in respect of separate occasions. The accused was acquitted on the first and second counts but was convicted on the third count. The conviction was set aside and a new trial ordered. At that trial, in proof of similar acts by the accused, evidence was admitted pertaining to the occasions

In *Harris* v. *Director of Public Prosecutions*[17] the accused was charged with eight larcenies of money committed in May, June and July 1951 from a certain office in an enclosed market at times when most of the gates were shut and the accused, a police officer, might have been on solitary duty there. In each case the same means of access were used and only part of the amount which might have been taken, was taken. No thefts occurred while the accused was on leave. The accused was found by two detectives in the immediate vicinity of the office at the time of the last larceny. Though they were well known to him, he avoided them for a period sufficient to hide marked money taken from the office till and found in a coal bin near where he was first seen. The accused was convicted only on the eighth count. He appealed against conviction to the Court of Criminal Appeal unsuccessfully and to the House of Lords successfully on the ground that evidence of the first seven thefts was irrelevant to the eighth. The *ratio decidendi* is contained in the observation by Lord Simon: "The fact that someone perpetrated the earlier thefts when the accused may have been somewhere in the market does not provide material confirmation of his identity as the thief on the last occasion".[18]

In *Noor Mohamed* v. R.[19] the appellant had been convicted of murdering A, the woman with whom he had been living. He was a goldsmith, lawfully possessed of cyanide for the purpose of his business, and A certainly met her death through cyanide poisoning although there was no evidence that the poison had been administered by the accused. He was on bad terms with her, and there was a suggestion that she might have committed suicide. The Judicial Committee advised that the conviction should be quashed because the judge had wrongly admitted evidence designed to show that the accused had previously caused the death of his wife, G, by tricking her into taking cyanide as a cure for toothache.[20] Lord Simon, referring to *Noor Mohamed's* case, has remarked: "The Board there took the view that the evidence as to the previous death of the accused's wife was not relevant to prove the charge of murdering another woman".[21]

in respect of which the accused had been acquitted. In appeal, the High Court of Australia set aside the conviction on the ground that similar fact evidence had been improperly let in. The principle relied on by the High Court was that the accused must be taken to have been innocent of the charges covered by the first and the second counts of the indictment for such a purpose as that for which the evidence was tendered *(cf.* the opinion of the Privy Council in *Sambasivam* v. *Public Prosecutor, Federation of Malaya* (1950) A.C. 458 at p. 479). The effect of the doctrine of issue estoppel based on acquittal was considered by the High Court of Australia in *R.* v. *Wilkes* (1948) 77 C.L.R. 511 at pages 518, 519; *cf.* the decision of the Supreme Court of South Australia in *R.* v. *Bowering* (1942) S.A.S.R. 145.

With regard to the third question, the Court of Appeal of Quebec has excluded similar fact evidence on the ground that this evidence did not unequivocally establish that there was no mistake in the identification of the accused: *Holmes v. R.* (1949) 95 C.C.C. 73; *cf.* the approach of the Supreme Court of Victoria in *R.* v *Martin* (1956) V.L.R. 87 at p. 88.

17 (1952) A.C. 694.

18 At p. 711.

19 (1949) A.C. 182.

20 See also *R.* v. *Patel* (1951) 2 All E.R. 29; *R.* v. *Fletcher* (1953) S.R. (N.S.W.) 70.

21 *Harris* v. *Director of Public Prosecutions* (1952) A.C. 694 at p. 708.

R. v. *Chandor*[22] was a case where a Croydon schoolmaster was charged with indecent assaults on three of his pupils, A, B and C. A alleged that the incident affecting him occurred in the lake district, and the defence to this count was that the meeting never took place. The accused admitted that he had been with B and C in Croydon at the material times, but denied the occurrence of the incidents to which they deposed. The English Court of Criminal Appeal, holding that the jury were not entitled to consider the evidence of B and C when deciding on the count concerning A, said: "Evidence that an offence was committed by the accused against B at Croydon could not be any evidence that the accused met A in the lake district and committed an offence there".[23]

In these cases evidence pertaining to previous behaviour was excluded on the ground that it was irrelevant to the alleged act, in that it did not tend to prove the act charged. It is on this basis that evidence of consensual intercourse has been considered irrelevant to a charge of rape[24] and evidence that the accused was a Communist atheist hostile to missionaries has been excluded in deciding whether he was likely to publish seditious words.[25]

Evidence tending to show good conduct of a party on other occasions is frequently excluded because it is insufficiently relevant, having regard to the collateral issues it might raise.[26] However, the previous misconduct, to be relevant, need not necessarily be criminal or tortious.[27]

The case law clearly demonstrates that relevance is a question of degree and, therefore, often a matter of opinion. A conviction of housebreaking with intent to commit rape has been quashed by the English Court of Criminal Appeal on the ground that evidence which the trial judge had considered to be of some relevance as showing lustful disposition at the time of the alleged crime was in fact irrelevant.[28]

Several Sri Lankan decisions illustrate the exclusion of evidence on the footing of irrelevance. Where the accused was charged with having committed three acts of gross indecency with three different persons within a period of twelve months,[29] Maartensz, A.J., stated as a ground for not letting in evidence as to previous acts, that the evidence "was not tendered to show a guilty passion between the accused and any of the boys or to rebut the suggestion of an innocent association, but merely to show that the accused is likely to have committed the offence with which he is charged".[30] In regard to a charge of keeping a brothel, evidence that the accused persons

22 (1959) 1 Q.B. 545.
23 *Per* Lord Parker, C.J.
24 *R.* v. *Rodley* (1913) 3 K.B. 468.
25 *Cooper* v. *R.* (1961) 105 C.L.R. 177.
26 R. Cross, *op. cit.,* p. 356.
27 *Griffin v. R.* (1937) 58 C.L.R. 185.
28 *R.* v. *Rodley* (1913) 3 K.B. 468; *cf, R.* v. *Horry* (1949) N.Z.L.R. 791. See also *Holcombe* v. *Hewson* (1810) 2 Camp. 391; *Hollingham* v. *Head* (1858) 4 C.B.N.S. 388.
29 *R.* v. *Wickremasinghe* (1934) 36 N.L.R. 135.
30 At p. 137.

had been leading immoral lives elsewhere has been considered inadmissible.[31] Where a village official was charged with receiving an illegal gratification from a party to a village tribunal case, the prosecution was not permitted to call other persons to testify that they had given similar unlawful gratifications to the accused.[32] The effective reason for exclusion of similar fact evidence in each of these cases was that it lacked sufficient probative force in respect of establishment of the offence charged in the indictment.

(b) 'Relevance' Distinguished from 'Admissibility'

There is English and Commonwealth judicial authority in support of a broad rule of inclusion founded upon the virtual equation of relevance with admissibility. Representative of this approach is the comment by Lord Goddard that "Evidence is admissible if it is logically probative, that is, if it is logically relevant to the issue whether the prisoner has committed the act charged".[33] But this proposition is unacceptable, since "the expression 'logically probative' may be understood to include much evidence which English law deems to be irrelevant".[34] Evidence which, notwithstanding its logically probative force, falls within the ambit of the traditional exclusionary rules, is typified by such categories of evidence as hearsay, secondary evidence of documents and testimony barred by the rules governing confessions.[35] The true principle regulating similar fact evidence is that all evidence tending to show a disposition towards a particular crime must be excluded unless it is justified by a high degree of relevance, in all the circumstances of a case.[36] This principle remains valid, despite the logical probative value attaching to the evidence.

Relevance has to be distinguished from admissibility for, even if it is relevant, evidence as to past misbehaviour is inadmissible if its only relevance is to show that the actor has a base disposition, which has no particular bearing on some issue at the trial.[37] If relevant evidence is defined as "evidence which makes the matter which requires proof more or less probable",[38] it is clear that the

31 *Herat* v. *Ran Menika* (1916) 2 C.W.R. 69.

32 *Tennekoon* v. *Dingiri Banda* (1917) 3 C.W.R. 364.

33 *R.* v. *Sims* (1946) K.B. 531 at p. 537.

34 *Noor Mohamed* v. *R.* (1949) A.C. 182 at p. 194, *per* Lord du Parcq.

35 *Boardman's* case (1974) 3 All E.R. 887 at p. 902, *per* Lord Hailsham.

36 *cf. R. v. Hall* (1952) 1 K.B. 302 at p. 306, *per* Lord Goddard.

37 J.D. Heydon, *op. cit.,* p. 255.

38 *Director of Public Prosecutions v. Kilbourne* (1973) A.C. 729 at p. 756, *per* Lord Simon of Glaisdale.

The Supreme Court of New South Wales has remarked: "Whether the existence of one fact makes the existence of another probable or improbable is a matter of common sense, to be determined according to the common experience of mankind in the relevant community" (*R.* v. *Hutton* (1936) 36 S.R. (N.S.W.) 534 at p. 539, *per* Jordan C.J.). Where the accused was charged with killing an elderly man with a baseball bat, the Canadian courts refused to admit evidence that, about a month later, the accused and a friend were involved in a fight with another man and that the accused struck the latter with a jack handle (*R.* v. *Reynolds* (1978) 44 C.C.C. (2d) 129). In this case the Ontario Court of Appeal reasoned: "This evidence does not logically tend to prove the appellant's guilt of the offence with which he was charged, except by the forbidden reasoning that he was likely, from his criminal conduct or character, to have committed it" (at p. 136, *per* Martin J.A.).

concept of admissibility covers a much more limited area. There can be no doubt that evidence which satisfies the criterion of relevance, according to this definition, can well be excluded by Lord Herschell's formulation of the law in *Makin's* case.[39] "That what was declared

At the trial of the accused, a practising midwife, on a charge of having caused the death of a woman by an attempt to procure her abortion, the Supreme Court of Western Australia held that evidence had been wrongly admitted of the discovery of three infant *foeti* buried in the gardens of premises occupied by the accused *(R.* v. *Smith* (1898) 1 W.A.L.R. 43). The basis of this ruling was that the presence of the *foeti* was quite consistent with an innocent explanation. The Canadian courts have insisted that the inference from the previous act must be unequivocal *(R.* v. *Barbour* (1938) S.C.R. 465; *cf. R.* v. *McNulty* (1910) 22 O.L.R. 350).

In keeping with this principle the Court of General Sessions in the Judicial District of York, Ontario, at a trial on a charge of assault arising out of an incident during a game of hockey, declined to permit the prosecution to introduce evidence of the accused's prior conduct during other games of a similar nature *(R.* v. *Williams* (1977) 35 C.C.C. (2d) 103 at p. 107, *per* Allen, Co. Ct. J.). The Ontario Court of Appeal has held that, on a charge of operating a vessel dangerously, evidence of previous incidents of reckless or dangerous operation of the boat by the accused is "clearly inadmissible" *(R.* v. *Arato* (1972) 9 C.C.C. (2d) 243 at p. 244, *per* Schroeder J.A.). On a charge of capital murder in relation to which the theory of the Crown was that the deceased police officer was murdered during the investigation of a kidnapping committed by the accused, evidence of a plan by the accused to kidnap another person and of involvement in a bank robbery in which the accused had asked an accomplice to kill a policeman, was considered inadmissible by the Supreme Court of Canada *{Ambrose* v. *R.; Hutchinson* v. *R.* (1976) 30 C.C.C. (2d) 97 at p. 105, *per* Spence J.). On a charge of theft *(R.* v. *Morrison* (1923) 33 B.C.R. 244) and cruelty to a child *(R.* v. *Lapierre and Roy* (1897) 1 C.C.C. 413), evidence relating to previous acts of theft and cruelty to another child by the accused has been excluded by the courts of Canada. For a similar approach to previous acts of gross indecency and indecent assault, see *R.* v. *Boynton* (1935) O.W.N. 11 and *R.* v. *Iman Din* (1910) 15 B.C.R. 476. The Supreme Court of Canada has held that, at a trial for murder by means other than shooting, a witness for the prosecution ought not to have been allowed to testify that the accused, after the events in question, had told the witness that the accused had shot a man once and might do so again *(Lizotte* v. *R.* (1951) S.C.R. 115).

The logical relevance of an item of evidence depends on the whole of the evidence in the case and on the defence put forward by the accused. Where, on a charge of rape, the complainant had answered the accused's advertisement for a live-in housekeeper and the accused, while admitting intercourse, alleged that the complainant had been willing, the Supreme Court of New Zealand refused to allow the Crown to lead the evidence of five other women who had responded to similar advertisements and all of whom spoke of violence, sexual advances and the taking of liquor by the accused *(R.* v. *Holloway* (1980) 1 N.Z.L.R. 315). The Court emphasized that the issue at the trial must be consent or lack of it, and that the attitude of the five women on other occasions had no logical bearing on this issue (at p. 320, *per* McMullin J.).

[39] See footnote 1, *supra; cf.* the decision of the Supreme Court of Victoria in *Molyneux* v. *McPherson* (1902) 23 A.L.T. 228, *per* Holroyd J.

In a perceptive judgment the Supreme Court of Victoria pointed out that "This rule of exclusion is based not on grounds of relevancy but on reasons of policy and fairness to an accused person" *(R.* v. *Lowery and King* (No. 3) (1972) V.R. 939 at p. 945, *per* Winneke C.J.). Thus, it was stated that, although similar fact evidence may be excluded when tendered by the Crown in proof of guilt, there was no reason of policy or fairness which required or justified the exclusion of evidence relevant to establish the innocence of the accused *(ibid).* The basis of this distinction is the principle that "It is fundamental to the administration of criminal justice that a person accused be completely free to meet the charge against him by all legitimate and relevant means" (at p. 945, *per* Winneke C.J.).

to be inadmissible in the first sentence of this passage is nevertheless relevant, *i.e.* logically probative, can be seen from numerous studies of offences in which recidivists are matched against first offenders".[40]

A feature of the codified systems of India, Sri Lanka, Malaysia and Singapore is their adoption of Stephen's approach[41] which endeavours to set out the rules concerning the matters that may be proved *coram judice* entirely in terms of relevancy. Sections 14 and 15 of the Evidence Ordinance of Sri Lanka, which control the reception of similar fact evidence, are placed in the setting of a Chapter[42] entitled "Relevancy of Facts". The disadvantage attendant on this approach is that it suggests by implication that the basis of exclusion of evidence not conforming with the requisites of the applicable provisions is its irrelevance to the offence charged. This obscures the fact that cogent considerations of policy frequently necessitate the exclusion of evidence, the relevance of which is indisputable.

The mode of formulation of the inclusionary rule embodied in sections 14 and 15 of the Evidence Ordinance of Sri Lanka involves explicit reference to the concept of "relevancy". This gives the Sri Lankan and other codified South Asian systems a facile veneer which could impede a proper appreciation of the complexity of the issues underlying reception or exclusion of similar fact evidence.

The substantial objection to the structure and terminology of South Asian law is that it treats relevance and admissibility, within the framework of similar fact evidence, as synonymous concepts. From a comparative standpoint, it is of interest to note that a similar approach is reflected in some South African decisions.[43] Admissibility, however, "signifies that the particular fact is relevant and something more — that it has also satisfied all the auxiliary tests and extrinsic policies".[44]

Admissibility depends on a hybrid criterion, in that (i) the evidence must have a sufficiently high degree of relevancy, and (ii) the evidence should not contravene any exclusionary rule predicated on grounds of policy.

In regard to element (i), it is important to note the variable quality of the standard of legal relevance. "Lawyers are never concerned with the question of whether one fact is relevant to prove

This degree of latitude, it is clear, is inappropriate in cases where an accused person seeks to adduce similar fact evidence with a view to incriminating a co-accused. Where the accused, N, charged with arson, wished to elicit that his co-accused, B, had admitted on five occasions to having started fires himself, the English Court of Appeal endorsed the view of the trial judge that B's propensity to commit arson was irrelevant to the question put in issue by the defence — namely, whether N (whose defence was that he was asleep in his hostel at the time) was present when the fire commenced *(R. v. Neale* (1977) 65 Cr. App. Rep. 304).

40 *Director* of *Public Prosecutions v. Kilbourne* (1973) A.C. 729 at p. 757, *per* Lord Simon of Glaisdale. *Cf. Lowery* v. *R.* (1973) 3 All E.R. 662.

41 J.F. Stephen, *Digest of the Law of Evidence* (12th edition) article 1.

42 Chapter II.

43 See, for example, *R.* v. *Troskie* 1920 A.D. 466 at p. 468, *per* Innes, C.J.

44 J.H. Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd edition, 1940), volume I, p. 300.

another in an absolute sense; what matters to them is whether it is sufficiently relevant to justify its being heard by the court".[45] Lord du Parcq has justly remarked that "Logicians are not bound by the rules of evidence which guide English Courts".[46] Varying gradations of relevance are not adequately catered for by the inelastic formulation coupled with the definition of "relevancy",[47] embedded in the South Asian codes of evidence.

So far as element (ii) is concerned, the point which warrants emphasis is that the exclusion of evidence may be required by considerations which have nothing to do with the logical or probative relevance of the evidence tendered. These considerations include: (1) the grave prejudicial effect of the evidence which may be "out of proportion to its true evidential value"; (2) the multiplicity of collateral issues giving rise to delay, complexity and unjustifiable expense; and (3) the element of surprise which may involve unfairness to the accused. A factor of practical importance in the context of jury trials is that "It is so easy to collect from a mass of ingredients, not one of which is sufficient, a totality which will appear to contain what is missing".[49]

Consequently, the reports are replete with instances in which similar fact evidence that is undoubtedly relevant, judged by the canons of logic, has been considered inadmissible as a matter of law or in the exercise of judicial discretion.[50]

(c) Multiple Connotations of Relevance

Lord Hailsham has made the helpful observation: "What is not to be admitted is a chain of reasoning and not necessarily a state of facts. If the inadmissible chain of reasoning be the only purpose for which the evidence is adduced as a matter of law, the evidence itself is not admissible. If there is some other relevant, probative purpose than the forbidden type of reasoning, the evidence is admitted, but should be made subject to a warning from the judge that the jury must eschew the forbidden reasoning".[51]

In keeping with this premise a distinction may appropriately be recognized, in the interest of clarity and sound policy, between two types of similar fact evidence, the reception of which is governed

45 L.H. Hoffmann, *Similar Facts after Boardman* (1975) 91 Law Quarterly Review 193 at p. 204.

Relevance is anterior to admissibility. As the Supreme Court of South Australia put it, "The probative value of the testimony tendered concerns its logical relationship to some issue" *(Evans* v. *F.* (1964) S.A.S.R. 130 at p. 133, *per* Mayo J.). The Court of Appeal of New Zealand has observed: "Relevancy to an issue is the fundamental test" *(R.* v. *Powell, Iremonger and Kinley* (1957) N.Z.L.R. 1 at p. 6, *per* Finlay J.).

46 *Noor Mohamed* v. *R.* (1949) 1 All E.R. 365 at p. 371.

47 See the Evidence Ordinance of Sri Lanka, No. 14 of 1895, section 3.

48 *R.* v. *Christie* (1914) A.C. 545 at p. 559, *per* Lord Moulton.

49 *R.* v. *Bailey* (1924) 2 K.B. 300 at p. 305, *per* Lord Hewart, C.J.

50 *R.* v. *Butler* (1846) 2 Car. & Kir. 221; *R.* v. *Oddy* (1851) 2 Den. 264; *R.* v. *Winslow* (1860) 8 Cox C.C. 397; *R. v. Barron* (1913) 9 Cr. App. Rep. 236; *Perkins* v. *Jeffery* (1915) 2 K.B. 702; *Akerele* v. *R.* (1943) A.C. 255; *R.* v. *Ferrier* (1968) 112 Sol. Jo. 519.

51 *Boardman's* case (1974) 3 All E.R. 887 at pages 905-906.

by distinct considerations. The first type envisages similar fact evidence, the primary relevance of which consists of propensity,[52] while the second contemplates similar fact evidence having substantial relevance otherwise than through propensity.[53] In both contexts the evidence pertaining to previous instances is logically probative, but its admissibility cannot be determined by a uniform criterion.

In the first category of case the line of reasoning which may be resorted to for the purpose of demonstrating relevance is that a person who has at several times in the past done the very kind of act of which he is accused on the occasion in question, can be shown to have a propensity to commit the act charged. It may be reasonably argued that "a man who has such a propensity is, *ceteris paribus,* more likely to have done it on the instant occasion than one who has not".[54] But propensity is conditioned by such subjective factors as volition, exercise of self-control and individual reactions to situations and relationships. On the other hand, instances of the second category are susceptible to the application of objective norms, in that the extent of unlikelihood of the coincidence of identical or similar accidents may be assessed in accordance with ordinary experience.

The fundamental question in all cases concerning similar fact evidence is whether the intrinsic probative value of the evidence offered is sufficient to justify relegation of the drawbacks which may attend its reception. The primary disadvantage is potential prejudice which almost invariably results from the introduction of similar fact evidence; and it may readily be recognized that the risk of prejudice is substantially greater in the former type of case than it is in the latter. Accordingly, it is consistent with the policy objectives of the law to require a greater degree of relevancy as a condition of admissibility of similar fact evidence in the former situation than in the latter.[55]

The basis of reception of similar fact evidence in the second category of case is demonstrably less speculative and capable of greater verifiability in conformity with objective criteria, than the footing on which its admission is sought in the first type of case. The second category envelops several classes of case: (1) those in which a variety of incidents represents, cumulatively, the "same transaction"; (2) those where evidence relating to other occasions has the effect of reinforcing testimony about matters collateral to the main issue; and (3) those in which the non-severability of a confession is relied on as the basis of inclusion of evidence as to misconduct on other occasions. These warrant separate treatment.

(1) Where the accused is charged with maliciously shooting at X, evidence that he had attacked X on the same day may be admissible if all the attacks can be reasonably viewed as incidents of

52 Z. Cowen and P.B. Carter, *Essays on the Law of Evidence* (1956), p. 141.
53 Z. Cowen and P.B. Carter, *op. cit.,* p. 151.
54 Z. Cowen and P.B. Carter, *op. cit.,* p. 133.
55 *R. v. Bond* (1906) 2 K.B. 389 at p. 417, *per* Bray, J. *Cf. R.* v. *Mortimer* (1936) 25 Cr. App. Rep. 150 at p. 157.

one transaction.[56] A threat of rape and the completed act of rape may be linked by the nexus of a continuing transaction.[57] The amorphous concept[58] relating to the "same transaction" has been held to warrant the reception of evidence as to the discovery of the proceeds of a robbery at a place where a subsequent crime was committed.[59] If the interception of a parcel is inextricably interlinked with the abstraction of currency notes from an envelope contained in the larger parcel, evidence as to interference with the parcel is admissible in connection with the charge of theft.[60] Burglaries at a series of railway booking-offices committed during the same night cannot be satisfactorily disentangled for the purpose of adducing evidence separately at trials on distinct indictments.[61] The principle of inclusion rests on the premise that "If crimes do so intermix, the court must go through the details".[62]

In each of these cases the evidence admitted had a relevande other than its contribution to the proof of base disposition on the part of the accused. The essential ground on which the evidence was received was that it pertained to an incident in the transaction forming the subject-matter of the charge. It is on this footing that the participation of the accused in an independent crime committed

56 *R.* v. V*oke* (1823) Russ. & Ry. 531; *R.* v. *O'Malley* (1964) Qd. R. 226; *cf. R. v. O'Brien* (1920) 20 S.R. (N.S.W.) 486; but see *R.* v. *Cook* (1886) 12 V.L.R. 650.

This is a familiar concept in Commonwealth jurisdictions.

The Court of Appeal of British Columbia has applied an inclusionary principle in respect of evidence pertaining to "part of a larger fraudulent scheme" *(R.* v. *Melnyk* (1948) 2 D.L.R. 274). Where the complainant alleged in effect one continuous transaction — her defilement over a period of years — evidence that the accused and the complainant in relation to a charge of sexual intercourse with a female under fourteen years of age contrary to section 146(1) of the Canadian Criminal Code were on a particular occasion found together in bed, apparently asleep, has been treated as admissible by the Ontario Court of Appeal, notwithstanding that the incident took place ten months after the complainant became fourteen years old *(R. v. Williams* (1973) 12 C.C.C. (2d) 453). The rationale supporting reception of this evidence was that the accused was not entitled to avail himself of the artificial severance of the transaction upon the complainant's attaining the age of fourteen years on the question of the admissibility of separate acts constituting a sustained transaction (at p. 458, *per* Jessup J.A.).

The Supreme Court of South Australia has admitted evidence relating to "parts of a whole — incidents in a larger transaction" *(R. v. Adami* (1959) S.A.S.R. 81 at p. 86, *per* Napier C.J., Mayo and Piper JJ.). The Supreme Court of Victoria has acted on the principle that, where one party puts in evidence as to part of a transaction, the other party is entitled to lead evidence as to the rest of the transaction in order to show the true complexion of the transaction as a whole *(R.* v. *O'Donoghue* (1917) V.L.R. 449).

The Court of Appeal of New Zealand has laid down the rule that evidence of similar and unconnected facts is necessarily admissible if such facts are, in point of historical and circumstantial connection, inseparable parts of the transaction which the jury has to investigate *(R.* v. *Powell* (1957) N.Z.L.R. 1).

57 *R.* v. *Reardon* (1864) 4 F. & F. 76.

58 *R.* v. *Malik* (1968) 1 All E.R. 582.

59 *R. v. O'Meally* (1953) V.L.R. 30.

60 *R.* v. *Salisbury* (1831) 5 C. & P. 155.

61 *R. v. Cobden* (1862) 3 F. & F. 833.

62 *R.* v. *Whiley* (1804) 2 Leach 983. *Cf. R.* v. *Ellis* (1826) 6 B. & C. 145; *R.* v. *Bleasdale* (1848) 2 Car. & Kir. 765; *R.* v. *Firth* (1869) L.R. 1 C.C.R. 172; *R.* v. *Henwood* (1870) 11 Cox C.C. 526; *R.* v. *Flynn* (1955) 21 C.R. 1.

in the same locality as that in which the offence charged was perpetrated, may be proved if the accused denies his presence in the neighbourhood at the material time,[63] but not otherwise,[64] provided that the jury is adequately directed as to the limited use which should be made of this testimony.[65]

A conceptual difference may be noticed between similar fact evidence and evidence relating to a continuing[66] or identical transaction. In an Australian case[67] the employees of a timber camp went on a drunken orgy lasting several hours. One was found near death next morning, having been struck eight or nine times on the head with a bottle; kerosene had been poured on him and his clothes ignited. Several circumstances connected the accused with the crime. The High Court of Australia held that evidence of violent assaults by the accused on other employees, including the deceased, during the orgy, all of which were brutal blows to the head, was admissible, not as similar fact evidence but because it disclosed a connected series of events to be regarded as one transaction. In this case it was suggested in the charge to the jury that the crime, in its circumstances, was of a description which showed that it must have been committed by a man of a particular disposition and that such a disposition amounted to a specific means of identifying the offender. In appeal, Dixon, J. approached the matter differently. Although of the opinion that the fact that the assailant concentrated his attack on the deceased's head did not warrant any inference as to any such specific connection with the prior acts of the accused as to afford an identifying mark of the kind justifying the admission of similar fact evidence, Dixon J. found no difficulty in letting in the evidence on the basis of the unifying element characterizing the transaction.

The difference between the two concepts is given expression in the South Asian codified systems which incorporate a provision, distinct from that controlling similar fact evidence, to cater for incidents of one transaction. Explicit provision is made in India, Malaysia, Singapore and Sri Lanka that "Facts which though not in issue are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places".[68] The Sri Lankan courts have identified such *indicia* as "proximity of time and unity of place",[69] "a community of purpose and a continuity of action"[70] and "the relation of the acts to one another in point of purpose or as cause and effect or as principal and subsidiary acts"[71] as elements of the concept of

63 *R.* v. *Ducsharm* (1956) 1 D.L.R. 732.

64 *R.* v. *Rogans* (1916) 35 N.Z.L.R. 265 at p. 304, *per* Deniston, J.; *cf R.* v. *Horry* (1949) N.Z.L.R. 791.

65 *R.* v. *Ward* (1963) Qd. R. 56.

66 *Brown* v. *Eastern and Midland Rail Co.* (1889) 22 Q.B.D. 391; *Ex parte Burnby* (1902) 2 Q.B. 458; *R.* v. *Brady and Ram* (1964) 3 All E.R. 616; *Dale* v. *Smith* (1967) 2 All E.R. 1133.

67 *O'Leary* v. *R.* (1946) 73 C.L.R. 566; *cf. R.* v. *Ciesielski* (1972) 1 N.S.W.L.R. 504.

68 See section 6 of the codes referred to at note 6, *supra.*

69 *R.* v. *Aman* (1920) 21 N.L.R. 375 at p. 377, *per* Bertram, C.J.

70 *Don Wilbert* v. *Sub-Inspector of Police, Chilaw* (1965) 69 N.L.R. 448 at p. 450, *per* Alles, J.

71 *Jonklaas* v. *Somadasa* (1943) 44 N.L.R. 227 at p. 230, *per* Wijeyewardene, J.

the "same transaction". The recognition of this principle as a basis of inclusion of evidence by the law of Sri Lanka is wholly independent of the *facta probanda* regulating the admissibility of similar fact testimony.

(2) In a case where the accused was charged with having had carnal knowledge of a girl aged fourteen, the girl, giving evidence said that the accused told her that he had previously done the same thing to another girl under sixteen years of age.[72] Cross-examination of the accused in regard to the latter statement was held to be proper. In a prosecution for forgery[73] accomplices giving evidence for the prosecution described the fraudulent scheme of which the forgery was a part and related a conversation with the accused in which he stated to them that some years earlier he had forged another will in pursuance of a similar scheme. Questions put to the accused in cross-examination about this other forgery, were held to be legitimate. In another case[74] a woman was convicted of manslaughter by performing an illegal operation on the prosecutor's wife. The prosecutor said that he had been given the accused's address by another woman who stated that the accused had performed an illegal operation on her. The accused's defence was that the only time she had seen the prosecutor was when he called to inquire about accommodation, and it was held that the accused had been properly cross-examined concerning the alleged operation on the other woman.

The purpose of the cross-examination in each of these cases was to furnish support for an inference relating to matters collateral to the guilt of the accused on the occasion in question.

(3) Where the accused, in a confession, the truth of material portions of which can be proved, acknowledges not only his guilt of the crime alleged but his complicity in other offences, the confession may be received as evidence indicating his participation in the latter offences. The rationale is that "Confirmation in material points produces ample persuasion of the trustworthiness of the whole".[75]

In an English case[76] the accused was convicted of murdering his child. One of the items of evidence against him was a statement which he had made to the police to the effect that he had murdered his wife as well as his child and concealed their bodies in the same place. The Court of Criminal Appeal held that the entirety of this confession had been properly read to the jury because the wife's body was found near that of her child.

It is evident from this analysis that, both in principle and on the basis of policy, the distinction between similar fact evidence the

72 *R.* v. *Chitson* (1909) 2 K.B. 945.
This principle of inclusion is part of Commonwealth law. Where the commission of one act, criminal or otherwise, furnishes, *per se,* evidence of the commission of another act, the Supreme Court of Alberta has considered it admissible to prove the perpetration of the latter act *(R.* v *Minchin* (1914) 7 Alta L.R. 148).

73 *R.* v. *Kennaway* (1917) 1 K.B. 25.

74 *R. v. Lovegrove* (1920) 3 K.B. 643.

75 J.H. Wigmore, *op. cit.,* volume III, pages 338-339

76 *R.* v. *Evans* (1950) 1 All E.R. 610.

primary relevance of which is through propensity, and similar fact evidence having substantial relevance otherwise than through propensity, is supportable. However, while it cannot be disputed that the latter kind of similar fact evidence is received with much less inhibition than the former, Lord Herschell's exposition of the principle applicable, in *Makin's* case,[77] is to some extent misleading, in that it suggests that a condition of admissibility of similar fact evidence is its relevance in some manner otherwise than by facilitating proof of disposition.

Instances are discoverable in which the relevance of evidence admitted by the English courts consisted exclusively of the suggestion that the accused, on the occasion referred to in the indictment, succumbed to his proved disposition. *R.* v. *Straffen*[78] is one illustration of such a situation. *R.* v. *Ball*[79] provides another. The accused, a brother and sister, were convicted of incest committed during certain periods in 1910. The main prosecution evidence was that the accused, who held themselves out as married, were seen together at night in a house which had only one furnished bedroom, containing a double bed showing signs of occupation by two persons. The brother had been seen coming from the bedroom in a half-dressed state, while the woman was in nightdress. The similar fact evidence admitted by Scrutton, J. was that three years later, before incest was made criminal, the accused had lived together as man and wife sharing a bed, and that a baby had been born, the accused being registered as its parents. Lord Loreburn, L.C. said: "I consider that this evidence was clearly admissible to establish the guilty relations between the parties and the existence of a sexual passion between them as elements in proving that they had illicit connection in fact on or between the dates charged". There is no doubt, *ex facie* this statement, that the sole relevance of the previous incestuous relationship was (i) to prove a disposition on the part of the accused persons to commit incest, and (ii) to suggest that the opportunity of committing incest was exploited by them on the occasion in question.

Hoffmann formulates the proposition that "Similar fact evidence will be admissible *either* (i) if it has a relevance in addition to showing the accused's disposition *or* (ii) if it shows only the accused's disposition but this is highly relevant to the issue of guilt".[80] The merit of this approach to the definition of the scope of the inclusionary rule is that, while emphasizing the need for a distinction between similar fact evidence relating exclusively to disposition and similar fact evidence relevant in some other way, and permitting reception of the latter category of evidence in a wider variety of circumstances than the former, it recognizes, in correspondence with the case law, that the admission of similar fact evidence of exceptional probative value but pertaining altogether to disposition, is not precluded absolutely.[81] A *lacuna* in the method of formulating the ex-

77 See note 1, *supra.*
78 See note 27, *supra.*
79 (1911) A.C. 47.
80 L.H. Hoffmann, *The South African Law of Evidence* (2nd edition, 1970), pages 38-39.
81 *cf.* clauses 3(1) and 3(2) of the draft Bill annexed to the 11th Report of the English Criminal Law Revision Committee.

clusionary rule, adopted by the American Federal Rules, that "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith",[82] is that this contingency has not been provided for. A similar criticism is justifiable in respect of the South Asian codes of evidence on this point.

IV. PROOF OF THE ACTUS REUS

In regard to this aspect of the law there is a basic difference between the position in England and in other Common Law jurisdictions, on the one hand, and that under the codified systems of South Asia, on the other.

The ambit of the inclusionary rule is appreciably narrower under the systems deriving from the Indian Evidence Act. Section 14 of the Codes of Evidence in force in India, Malaysia, Singapore and Sri Lanka allows the admission of similar fact evidence only when it demonstrates the existence of a state of mind or body. A condition precedent of the reception of evidence in terms of section 15 is that doubt exists whether an act was "accidental or intentional, or done with a particular knowledge or intention".

These provisions do not enable the reception of evidence to establish either the occurrence of the main fact or the identity of the actor. This is clearly illustrated by the Sri Lankan case of *R.* v. *Wijesinghe.*[83] The accused was charged in one indictment with having cheated three different milk vendors and obtained money on false pretences on three different occasions within one year. The prosecution endeavoured, unsuccessfully, to call witnesses to prove that the accused had committed other offences of the same kind. In *Wijesinghe's* case the doubt concerned not the intention with which the accused had committed the act but the question whether he had perpetrated the act at all. Ennis, J., said: "Where evidence is admitted, it is admitted only to show the absence of accident or the presence of intention, but not to prove the original fact itself. For instance, where an accused was charged with burning down his house in order to obtain money for which it was insured, evidence that the accused had lived in a number of houses successively which he had insured and that in each of them a fire had occurred, is admissible to show that the fire in the case under trial was not accidental; but that evidence is not admissible to prove the main fact that the accused set fire to the house".[84]

It is of interest, comparatively, to note the broadly similar reasoning of the South African courts. The Appellate Division has observed that "The repetition of the acts is admissible to prove not the commission of the act in issue but its nature, its commission being proved by other admissible evidence".[85] The Cape courts have asserted that "Normally similar conduct shows only propensity and therefore is not admissible to prove the *actus reus* in question".[86]

82 Rule 404(b) of the American Federal Rules.
83 (1919) 21 N.L.R. 230.
84 At p. 232.
85 *R.* v. D. 1958 (4) S.A. 364 (A.D.) at p. 369, *per* Hoexter, J.A.
86 5. v. *B.* 1976 (2) S.A. 54 (C) at p. 59.

By contrast, under the English common law, the *actus reus* itself may be proved by similar fact evidence of adequate cogency. In *Makins* case[87] evidence relating to the discovery of the bodies of other infants in the yards of houses occupied by the accused was admitted not to support an inference as to the intention with which the accused had acted but to establish that the baby, whose death was the subject of the charge, had been murdered. In a series of cases[88] evidence of previous or subsequent deaths from arsenical poisoning has been admitted (a) to show that the death in question was not brought about by natural causes, and (b) to connect the accused with the commission of the crime.

The gist of the reasoning in support of reception of similar fact evidence in these cases is "the argument from the point of view of the doctrine of chances — the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain all".[89] Thus, in *R.* v. *Smith,*[90] the accused's con-

87 See note 1, *supra.*

88 See the cases cited at note 51, *supra; cf. R.* v. *Armstrong* (1922) 2 K.B. 555.

89 J.H. Wigmore, *op. cit.,* volume III, section 302, p. 196.

The question whether similar fact evidence is admissible to establish the *actus reus* of the offence charged has given rise to controversy in Commonwealth jurisdictions.

This question is answered in the negative in some Canadian decisions. The Court of Appeal of Manitoba has said: "The basis of admissibility of evidence of similar facts is that the main fact is either confessed by the accused or is *prima facie* proved *aliunde,* and that the accused might seek to show that the act was not a criminal one" *(R.* v. *Hrechuk* (1950)) 98 C.C.C. 44 at p. 47, *per* Dysart J.A.). In an abortion case the Supreme Court of Canada declined to receive similar fact evidence on the ground that no question arose as to the intent of the accused in performing the operation, the sole question being whether the accused was the person who did perform it *(Brunet* v. *R.* (1829) S.C.R. 375). This view has also been taken by the Court of Appeal of British Columbia *(R.* v. *Campbell* (1946) 3 W.W.R. 369). In the context of charges of possession of stolen goods belonging to the former employer of the accused — charges which the accused endeavoured to refute by relying on a plea of colour of right — the Supreme Court of Canada stressed that similar fact evidence was "admissible solely on the issue of 'honest belief" *(Hewson* v. *R.* (1978) 42 C.C.C. (2d) 507 at p. 513, *per* Ritchie J.). One of the reasons why the Court of Appeal of Saskatchewan rejected similar fact evidence at a trial on a charge of murder of an infant was that the accused denied striking the blow which caused death and that the identity of the perpetrator of the act was not satisfactorily established *(R.* v. *Demyen (No. 2)* (1976) 31 C.C.C. (2d) 383 at p. 395, *per* Culliton C.J.S.).

However, an affirmative answer to the question is stated or implied in other Canadian judgments. The Ontario Court of Appeal upheld the reception of evidence as to protracted and bitter quarrels in the past as a means of establishing that it was the accused who beat his common law wife to death, despite his protestations to the contrary *(R.* v. *MacDonald* (1974) 20 C.C.C. (2d) 144 at pages 153-154, *per* Arnup J.A.). Similar fact evidence has been admitted by Canadian courts in order to facilitate proof of the *actus reus* of murder *(R.* v. *Leforte* (1961) 36 C.R. 181), the offence of uttering seditious words *(R.* v. *Barron* (1919) 12 Sask. L.R. 66) and that of causing a noxious discharge of fumes or odours *(R.* v. *Chinook Chemicals Corp. Ltd.* (1974) 17 C.C.C. (2d) 559).

A negative answer has been given in several cases decided by the courts of Australia. A clear statement is that of the Supreme Court of Victoria: "The evidence of the doing of similar acts cannot be given to prove the *factum* of the crime charged, but only to prove the state of mind in which

tention was not that he had caused the woman's death by accident, but that her death had been caused by a heart attack. The object of admission of evidence having a bearing on the deaths of his previous "brides" was to prove the *actus reus* on the occasion in question.

The view that similar fact evidence is never admissible to prove the *actus reus,* is diametrically at variance with the statement by Lord Atkinson: "Surely, in an ordinary prosecution for murder, you can prove previous acts or words of the accused to show he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him".[91]

An explicit Commonwealth authority for the admission of similar fact evidence to establish, in their entirety, the elements of the *actus reus* is the Australian case of *Martin* v. *Osborne.*[92] The accused was charged with operating a commercial transport vehicle without a licence. Such a vehicle was defined as one in which passengers were carried for a reward. It was proved that the vehicle was driven by the accused at the material time, but there was no direct evidence that he received a reward. He was carrying passengers on a journey from Ballarat to Melbourne, and he stopped at various places *en*

an act proved to be done *aliunde* was done" *(R.* v. *Herbert* (1916) V.L.R. 343 at p. 346, *per* Madden C.J.). Disallowing similar fact evidence in the context of a charge of sodomy, the Supreme Court of South Australia remarked: "It would be tendering evidence of the former commission of similar acts not to shew the *mens rea* with which the act was committed but to shew the commission of the act itself. We are of opinion that such evidence is not receivable" *(R.* v. *Young* (1923) S.A.S.R. 35 at p. 42, *per* Murray C.J.) The South Australian Supreme Court has observed that, in all cases where similar fact evidence may be received legitimately, "proof had first been given of the prisoner having done the act which, if done knowingly, constituted a crime" *(R.* v. *Slater* (1922) .S.A.S.R. 494 at p. 498 *ad fin., per* Murray C.J.).

On the other hand, the Court of Criminal Appeal of Queensland has baldly declared that similar fact evidence is "admissible as evidence tending itself to prove the commission of the offence" *(R.* v. *Allen* (1937) St. R. Qd. 32 at p. 47, *per* Douglas J.). The Supreme Court of South Australia, departing from the attitude adopted in some of its previous decisions, has subscribed to the view that similar fact evidence is admissible "not only to prove malice aforethought but also to prove that the appellant was responsible for the death of the deceased" *(R. v. Hissey* (1973) 6 S.A.S.R. 280 at p. 289, *per* Bray C.J. and Hogarth and Mitchell JJ.). On a charge of wilful murder the High Court of Australia has held that proof of the accused's motive for the killing, emerging from previous acts, may properly be used, in conjunction with other attendant circumstances, as evidence both that the deceased was killed and that her death was brought about by the accused *(Plomp* v. *R.* (1963) 110 C.L.R. 234). The adduction of similar fact evidence to prove the *factum* of the offence of using indecent language *(Lineham* v. *Schroeter* (1949) S.A.S.R. 205) and of offences constituted by Licensing Acts *(Krummel* v. *Kidd* (1905) V.L.R. 193) has been countenanced by Australian courts.

Notwithstanding slender authority to the contrary *(R.* v. *Crutchley* (1950) N.Z.L.R. 497 at p. 511, *per* Hutchison J.), the consensus of judicial opinion in New Zealand favours the admission of similar fact testimony to demonstrate the *actus reus (R.* v. *O'Shaughnessy* (1912) 31 N.Z.L.R. 928; *R.* v. *Anderson* (1951) N.Z.L.R. 439 at p.445—both cases of abortion).

90 See note 14, *supra.*

91 *R.* v. *Ball* (1911) A.C. 47, *arguendo.*

92 (1936) 55 C.L.R. 367. *Cf.* for Canadian law, *R.* v. *Theal* (1882) 21 N.B.R. 449, *R.* v. *Sunfield* (1907) 15 O.L.R. 252, *Baker* v. *R.; Sowash* v. *R.* (1926) S.C.R. 92.

route where passengers boarded and alighted from the vehicle. Evidence of similar journeys on the last two days preceding that covered by the charge was held by Evatt, J. to have been rightly admitted, and the conviction of the accused was upheld. This conclusion, which cannot be made to accord with the structure and content of the principles contained in the South Asian codes, has been accepted as applicable to English law.[93]

Ironically, there are contexts in which similar fact evidence is received by English law if the accused denies physical participation in the crime, but not if he admits the *actus reus.* This is borne out by a comparison of *Makin* v. *Attorney-General for New South Wales*[94] and *R.* v. *Smith*[95] with *R.* v, *Harrison-Owen.*[96] In the first two cases the defence put forward by the accused persons was not the absence of volition in regard to physical acts on their part which resulted in death, but the lack of any physical behaviour which was causally linked with the deaths. Similar fact evidence was admitted in these cases to prove the *actus reus* which was vigorously denied by the accused. On the other hand, the accused, in *Harrison-Owen's* case, did not contest the commission of the *actus reus.* The accused was found in a dwelling-house about one o'clock in the morning. At his trial for burglary he pleaded by way of defence that he had no recollection of entering the house and must have done so in a state of automatism, and he gave evidence to this effect. Stable, J. thereupon directed counsel for the prosecution to put to the accused a number of previous convictions of housebreaking and larceny. The Court of Criminal Appeal quashed the conviction on the basis that the evidence of previous convictions was wrongly admitted. This was held to be so because the accused sought exoneration from liability not on the ground that there was no act imputable to him but on the distinct ground that his act was unaccompanied by the requisite element of intention or blameworthy knowledge. *Harrison-Owen's* case, although doubted by Lord Denning,[97] has been followed recently in Western Australia.[98]

In general, however, it would seem consistent with sound policy that similar fact evidence should be received with less stringency when the *actus reus* is conceded by the accused than in circumstances involving the denial of both the *actus reus* and the *mens rea* by the accused. The reason for the distinction is that "the disposition of the accused will make his innocence a much stranger coincidence if he admits the *actus reus* but denies some part of the *mens rea* than if he denies the *actus reus".*[99] This difference can be given practical expression by requiring that the degree of similarity should be materially greater, and hence the reception of evidence more strictly controlled, in the latter situation than in the former. An analogous distinction, pertinent to the kind of similar fact evidence adduced rather than to

93 R. Cross, *op. cit.,* p. 388.
94 See note 1, *supra.*
95 See note 14, *supra.*
96 (1951) 2 All E.R. 726.
97 *Bratty* v. *Attorney-General for Northern Ireland* (1963) A.C. 386 at p. 410.
98 *Tedge* v. *R. (No. 2)* (1979) W.A.R. 89 at p. 92, *per* Burt C.J., and at p. 94, *per* Brindsen, J.
99 J.D. Heydon, *op. cit.,* p. 260.

the extent of similarity, is reflected in the proposal by the English Criminal Law Revision Committee that, where the *actus reus* of the crime charged is admitted, evidence of the accused's misconduct on other occasions should be admissible to prove *mens rea* or to negative lawful excuse, although it shows only a disposition to commit the kind of offence charged.[1]

These nuances cannot be accommodated within the framework of the South Asian systems which inflexibly preclude the admission of similar fact evidence to establish any aspect of the *actus reus.*

V. CATEGORIES OF 'SIMILAR FACT' EVIDENCE

The statement by Lord Herschell in *Makin's* case that similar fact evidence is admissible when "it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused"[2] has encouraged the compartmentalization of similar fact evidence in subsequent judicial decisions.

The purpose for which similar fact evidence has been received in the decided cases may be readily classified.

(a) Proof of the Intentional Quality of the Accused's Act

Where the accused was charged with murdering a female cyclist by driving his car into her, evidence that he had driven his car into other female cyclists on the previous day, and later on the same day, has been admitted to show that he intended to knock the deceased down.[3] The combination of instances rendered the plea of accident implausible.

1 See 11th Report, paragraphs 70-101. For criticism of this proposal, see C. Tapper (1973) 36 Modern Law Review 56. The recommendation of the English Criminal Law Revision Committee has been defended by R. Cross (1973) Crim. L. Rev. 400.

2 (1894) A.C. 57 at p. 65; *cf. R.* v. *Belliveau* (1954) 36 M.P.R. 154.

3 The courts of Canada have admitted similar fact evidence for the purpose of proving intent in the context, *inter alia,* of charges of conspiracy to defraud *(R. v. Sheppard* (1893) 4 Que. Q.B. 470), obtaining goods by false pretences *(R.* v. *Komienski* (1903) 12 Que. K.B. 463), wilfully setting fire with intent to defraud *(R. v. Beardsley* (1905) 5 O.W.R. 584), concealing assets in fraud of creditors *(R.* v. *Goodman* (1916) 26 Man. R. 537), theft of bonds *(R.* v. *Doughty* (1921) 50 O.L.R. 360), obtaining money by a worthless cheque *(R.* v. *Levine* (1922) 3 W.W.R. 428), fraudulent conversion *(R.* v. *Thompson* (1923) 16 Sask. L.R. 288), defrauding customs *(R.* v. *Zizu Natanson* (1927) 21 Sask. L.R. 518), unlawfully keeping liquor for sale *(R.* v. *Publicover* (1930) 53 C.C.C. 265), obtaining money by false pretences *(R.* v. *Hamilton* (1931) 3 D.L.R. 121, *R.* v. *Penney* (1944) 60 B.C.R. 348), arson *(R.* v. *Pinsk* (1935) 1 D.L.R. 307), maintenance and champerty *(R.* v. *Bordoff* (1938) 76 Que. S.C. 74) conspiracy to commit perjury *(R.* v. *Rabicz* (1943) 1 W.W.R. 753) and forgery *(R.* v. *Ross* (1958) 28 C.R. 351). The admissibility of similar fact evidence to establish intent is settled *(R.* v. *McBerney* (1897) 29 H.S.R. 327, *R.* v. *Collyns* (1898) 3 Terr. L.R. 82, *R.* v. *Labrie* (1919) 29 Que. K.B. 442; *R. v. Stawycznvj* (1933) 41 Man. R. 281, *R.* v. *Sommers (No. 9)* (1958) 26 W.W.R. 261).

Australian law is indistinguishable: *cf. Lee* v. *Castner* (1882) 3 L R. (N.S.W.) 460; *R.* v. *Hattam* (1913) 13 S.R. (N.S.W.) 410; *Canning* v. *Taylor* (1967) Tas. S.R. 42. Australian courts have permitted the adduction of similar fact evidence to prove intent in relation to charges of obtaining money by means of a valueless cheque *(R.* v. *Gill* (1906) 8 W.A.L.R. 96),

(b) Rebuttal of a Plea of Ignorance or Mistake of Fact

The decided English cases[4] make it clear that a principal's plea that he was unaware of the fraudulent practices of his agent may be rebutted by proof of similar conduct of the agent on other occasions from which the principal invariably benefited,[5] and a plea that false statements concerning the financial position of a business were prompted by excessive optimism rather than an intent to defraud has been held to warrant the reception of evidence concerning the obtaining of subscriptions to a business with the same name by means of similar statements on an earlier occasion.[6]

The object of reception of such evidence is to exclude the hypothesis of a *bona fide* error: "It is not conclusive, for a man may be many times under a similar mistake, or may many times be the dupe of another; but it is less likely that he should be so often, than once, and every circumstance that shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last".[7]

Several Sri Lankan decisions illustrate the admission of similar fact evidence on this ground. In *R* v. *Arnolis*[8] the accused had agreed with a timber merchant to sell the latter a certain quantity of timber. The accused went with another person to a timber store, opened the store and loaded carts with timber. Evidence was received at the trial to prove that the accused had sold timber unlawfully removed from the same store to other persons on previous occasions. Bertram, C.J. observed: "It was relevant as evidence of a systematic course of dealing by the accused inconsistent with a possible defence on the part of the accused, namely, that he had innocently fetched the carts, or that he had on this occasion innocently lent himself to the scheme of the real thief".[9] In *Jayakody* v. *Sub-Inspector of Police, Hettipola*[10] it was held that, where a person is charged with the offence of having abducted a girl in order that she might be forced or seduced to have illicit intercourse, evidence of similar acts of abduction of other girls by the accused could be led by the prosecution if it was elicited in cross-examination of the girl that she was taken away by the accused by reason of a mistake. Samera-

falsification of accounts *(R.* v. *Garsed* (1859) 5 S.C.R. (N.S.W.) 78 note (e)), frequenting a street for the purpose of betting *(O'Donnell* v. *Boland* (1904) 29 V.L.R. 655), obtaining money or property by false pretences *(R.* v. *Stevens* (1896) 13 W.N. (N.S.W.) 8, *R.* v. *Hull* (1902) Q.S.R. 1, *R.* v. *Rowe* (1909) 9 S.R. (N.S.W.) 747), fraudulent misrepresentation regarding shares in a company *(Elrich* v. *Queensland Linseed Industries Ltd.* (1935) Q.W.N. 26), fraudulent understatement of income for purposes of tax *(McGovern* v. *Galt* (1948) V.L.R. 285) and abortion *(R.* v. *Ross, McCarthy and McCarthy* (1955) St. R. Qd. 48).

4 R. Cross, *op. cit.,* p. 381.

5 *Blake* v. *Albion Life Assurance Society* (1878) 4 C.P.D. 94; *cf. Barnes* v. *Meritt & Co.* (1899) 15 T.L.R. 419; *R.* v. *Boyle and Merchant* (1914) 3 K.B. 339. See also *R.* v. *Cooper* (1849) 3 Cox C.C. 547.

6 *R.* v. *Porter* (1935) 25 Cr. App. Rep. 59.

7 *R.* v. *Francis* (1874) L.R. 2 C.C.R. 128 at p. 131, *per* Coleridge J.; *R.* v. *Gregg* (1964) 49 W.W.R. 732.

8 (1921) 23 N.L.R. 225.

9 At p. 228.

10 (1969) 75 N.L.R. 160.

wickrame, J., emphasized that this evidence was relevant not to show that the accused was a person whose disposition was such that he was likely to have abducted the girl on the day in question, but only in order to rebut the defence of mistake or accident.[11] In *Jayawardene* v. *Diyonis*[12] Wood Renton, C.J. remarked: "The appellants admitted that opium had been found in their physical possession. Their defence was that its presence was accidental. It was open, therefore, to the prosecution to negative this defence by proving previous instances in which the appellants had been in possession of, and had been dealing with, opium".[13] In *Rosalin Nona* v. *Perera*[14] the accused was charged under the Brothels Ordinance with rendering assistance in the management of a brothel. The prosecution led evidence to show (i) that on a previous occasion the accused had accosted a person and taken him to the brothel, and (ii) that on two other occasions the accused had been seen in front of the brothel speaking to the person responsible for the management of the brothel. Dias, J. was of opinion that the accused's guilty intent could be proved by reference to these items of evidence.[15]

11 At pages 163-164.

12 (1915) 18 N.L.R. 239.

13 At p. 240.

14 (1946) 47 N.L.R. 523.

15 *cf. Wickremasuriya* v. *Seryhamy* (1922) 4 C.L. Recorder 83.

The courts of Canada have admitted evidence of similar facts to prove knowledge on the part of the accused on the occasion relevant to the charge, in connection with receiving stolen property *(R.* v. *Brown* (1861) 21 U.C.Q.B. 330), making forged documents *(R.* v. *Chasson* (1876) 16 N.B.R. 546), failure to account for money received *(R.* v. *Wilder* (1933) 1 W.W.R. 191), possession of materials for making counterfeit money *(R.* v. *Petryshen and Saiko* (1956) 115 C.C.C. 217) and unlawful possession of bonds *(R.* v. *McPherson; R.* v. *Resnick* (1964) 2 O.R. 101).

In Australia guilty knowledge has been established by similar fact evidence in relation to charges of fraudulant conversion *(R.* v. *Finlayson* (1812) 14 C.L.R. 675), assisting in the maintenance of a common gaming house *(McCann* v. *Jeffery* (1922) V.L.R. 682), licensing offences *(Almond* v. *Allchurch* (1925) S.A.S.R. 53), feloniously receiving stolen property *(R.* v. *Emmett* (1905) V.L.R. 718) and the sale of Indian hemp *(R.* v. *Pfitzner* (1976) 15 S.A.S.R. 171). The Supreme Court of Victoria has formulated the principle that evidence of the commission of similar acts is relevant to the offence charged where the essence of the offence consists not only of the overt act done but of the accompanying state of knowledge *(R.* v. *Herbert* (1916) V.L.R. 343). However, the need for circumspection in applying this principle is underscored in the assertion by the High Court of Australia: "To hold that evidence that a person accused of one crime had committed a similar crime is admissible because it shows his knowledge or experience would virtually destroy the fundamental exclusionary rule embodied in the first of the principles stated in *Makin* v. *A-G (N.S.W.)": Markby* v. *R.* (1978) 52 A.L.J.R. 626 at p. 630, *per* Gibbs A.C.I.

The Court of Appeal of New Zealand has permitted the introduction of similar fact evidence in order to establish "knowledge of a specialized kind" *(R.* v. *Reddaway* (1948) N.Z.L.R. 1118 at p. 1128, *per* Fair J.). On a charge of obtaining goods by false pretences, the New Zealand Court of Appeal considered proper the leading of evidence as to nine other dishonoured cheques issued by the accused during the preceding three weeks, as having a direct bearing on the accused's state of mind when he issued the cheque on which the charge was founded *(R.* v. *Le Vard* (1955) N.Z.L.R. 266 at p. 270, *per* Hutchison J.). Similar fact evidence has been received to establish that the manager of a sauna bath was aware that the premises were used as a place of resort for purposes of homosexual acts *(R.* v. *Katavitch* (1977) 1 N.Z.L.R. 436). Where a tally clerk, charged with theft, put forward the defence that he had purchased the goods in shops, the Court of Appeal of New Zealand had no doubt that the prosecution was entitled to prove that,

(c) Refutation of an Innocuous Explanation as to Purpose

Where the accused has been found in possession of arsenic,[16] forged deeds[17] or housebreaking implements[18] and an innocent explanation is tendered by the accused for his possession, evidence of his participation in previous or subsequent crimes of the kind alleged in the indictment is admissible for the purpose of imputing a criminal intention to the accused on the occasion in question.

(d) Negation of a Plea of False Identification

In *Thompson* v. *R.*[19] evidence as to previous homosexual behaviour was admitted as "tending to show the probability of the truth of the boy's story as to identity".[20] *R. v. Hall*[21] was a case where the appellant was convicted of acts of gross indecency on different occasions with C, B and R. So far as the latter was concerned, the appellant's defence was that he had never seen R. It was held that the evidence of C and B concerning acts done to them by the accused in circumstances similar to those narrated by R had been rightly admitted by the trial judge. The basis on which this evidence was admitted was that "It was for the jury to say whether R was a liar or a witness of truth, and in deciding that question they were entitled to take into account the evidence given by B and C".[22] In *R.* v. *Davis and Murphy*[23] evidence of visual identification of the accused was held to have been confirmed by testimony relating to his complicity in an independent crime in which a strikingly similar technique had been employed. In *R.* v. *Morris*[24] a recurring pattern was thought to re-

in the same house, on the same occasion, a considerable quantity of other merchandise was also found, "of a generally similar kind, all imported goods which had passed over the wharves, all new, most in mint condition, and many of the kinds of goods in numbers quite unusual in any normal course of housekeeping" *(Coyle* v, *R.* (1972) N.Z.L.R. 574 at p. 575, *per* Turner J.).

16 *R.* v. *Armstrong (1922) 2* K.B. 555.

17 *R.* v. *Mason* (1914) 10 Cr. App. Rep. 169.

18 See the cases cited at note 112, *supra.*

19 (1918) A.C. 221.

20 At pages 225-226, *per* Lord Finlay.

21 (1952) 1 K.B. 302.

22 At p. 308, *per* Lord Goddard, C.J.

23 (1971) 56 Cr. App. Rep. 249.

24 (1969) 54 Cr. App. Rep. 69.

Similar reasoning has been adopted by Commonwealth courts.

At a non-capital murder trial where it appeared that death may well have been caused by a homosexual with certain characteristics, and the identity of the person who caused the death was in issue, the Ontario Court of Appeal upheld the admission of evidence that the accused had indulged in homosexual acts on previous occasions *(R.* v. *Glynn* (1971) 5 C.C.C. (2d) 364 at p. 366, *per* Gale C.J.O.). However, the Quebec Court of Appeal has pointed out that, when an alibi is offered in defence by the accused, and the issue is the identity of the offender, proof of similar acts is justified only if they are shown to be directed at the alibi or at demonstrating that there was no mistake in the identification of the accused *(R.* v. *Rabinovitch* (1952) 103 C.C.C. 392).

The Supreme Court of Victoria has held that, where fourteen thefts had so marked a similarity to one another as to suggest strongly that they had been committed by the same person, and there was evidence that the accused had committed one or more of them, the evidence tendered as to thefts other than those with which he was charged, was admissible for the purpose of identifying the accused as the perpetrator of the offences *(R.* v. *Fogarty* (1959) V.R. 594 at p. 597, *per* O'Bryan J.). The basis of the in-

inforce circumstantial evidence pointing to the accused as the perpetrator of the crime.

(e) Rebuttal of the Defence of Innocent Association

If the relationship between two persons is capable of an innocent interpretation as well as one involving criminal liability, the existence of a guilty passion between them may be proved by having recourse to previous or subsequent acts. Similar fact evidence has been admitted to establish the nature of the relationship existing between the parties, in England[25] and in other Commonwealth jurisdictions, in the context of such charges as rape,[26] incest,[27] indecent assault,[28] sodomy,[29] fraud[30] and murder.[31] This evidence is received "for the purpose of supplying a background... or of explaining or making intelligible the course of conduct pursued".[32]

However, the compartmentalization of grounds on which similar fact evidence is admissible, is open to serious objection in terms of

clusionary principle in this context is that the other instances "indicated such a mark or stamp as to indelibly point to (the accused) as being the person who was concerned in the commission of the offence" *(R.* v. *Blackledge* (1965) V.R. 397 at p. 399, *per* Winneke CJ. and Hudson and Gowans JJ.). Thus, the Supreme Court of Queensland has declared that "The finding of burglarious tools in the accused's possession would not be admissible in evidence if they merely showed a general burglarious propensity, but if an inference can be drawn from the type of tools found which tends to connect the accused with the crime or the criminal, the finding would be admissible" *(R.* v. *Sullivan and Robertson* (1939) St. R. Qd. 285 at p. 299, *per* Philp, J.). The High Court of Australia has emphasized that, in all cases where evidence of the possession of tools for the commission of crime is admitted, it is to identify the accused with the crime charged against him *(Thompson and Wran* v. *R.* (1968) 42 A.L.J.R. 16 at p. 18, *per* Barwick C.J. and Menzies J.). The Supreme Court of Victoria *(R.* v. *Johnson* (1938) V.L.R. 37) and the Court of Criminal Appeal of New South Wales *(R.* v. *Apps* (1969) 89 W.N. (N.S.W.) (Pt. 1) 444) have admitted similar fact evidence in rebuttal of a plea of mistaken identity. The applicable rationale was spelt out by the Queensland Court of Criminal Appeal: "If you accept the evidence that an act of sodomy took place in reference to the complainant, then as the culprit, whoever he was, was a pervert, evidence of acts of the accused on other occasions showing that he was a pervert may be looked at as evidence of identity of the accused with the culprit who did the act on the complainant" *(R.* v. *Witham* (1962) Qd. R. 49 at p. 56, *per* Hanger J.).

25 *Weatherley* v. *Weatherley* (1854) 1 Ecc. & Ad. 193; *Boddy* v. *Boddy and Graver* (1860) 30 L.J.P. & M. 23; *Wales* v. *Wales* (1900) P. 63; *R.* v. *Stone* (1910) 6 Cr. App. Rep. 89; *R.* v. *Bloodworth* (1913) 9 Cr. App. Rep. 80; *R.* v. *Hewitt* (1925) 19 Cr. App. Rep. 64; *R.* v. *Marsh* (1949) 33 Cr. App. Rep. 185.

26 *cf. R.* v. *Fitzgibbon* (1895) 11 V.L.R. 232; *R.* v. *Home* (1903) 6 W.A.L.R. 9; *Trickett* v. *Walker* (1938) S.A.S.R. 107n.; *R.* v. *Stelmasczuk* (1948) 8 C.R. 430.

27 *R.* v. *Goldsworthy* (1896) 7 Q.L.J. (N.C.) 42; *R.* v. *Bechaz* (1899) 24 V.L.R. 639; *R.* v. *Gallant* (1922) 55 N.S.R. 344; *R.* v. *Pegelo* (1934) 48 B.C.R. 146; *R.* v. *Beddoes* (1952) 103 C.C.C. 131; *R.* v. *Thompson* (1954) 110 C.C.C. 95.

28 *R.* v. *Whitehead* (1897) 23 V.L.R. 239; *R.* v. *Parkin* (1922) 31 Man. R. 438; *R.* v. *Allen* (1937) St. R. Qd. 32.

29 *R.* v. *Herbert* (1916) V.L.R. 343.

30 *R. v. Cooper* (1975) 22 C.C.C. (2d) 274.

31 *Wilson* v. *R.* (1970) 123 C.L.R. 334; *R.* v. *Hissey* (1973) 6 S.A.S.R. 280.

32 *R.* v. *Jansen* (1970) S.A.S.R. 531 at p. 539, *per* Bray C.J. and Walters and Wells JJ.

policy. At the highest level of judicial authority a closed list of cases has been considered unacceptable.[33] Lord Morris has declared: "Just as a closed list need not be contemplated, so also where what is important is the application of principle, the use of labels or definitive descriptions cannot be either comprehensive or restrictive".[34]

The English and Scottish cases have made a useful contribution to the identification of the elements of "system". While a mere succession of facts, in the sense of repetition, is generally insufficient,[35] the additional elements required have been described as "underlying unity",[36] "unity of intent, project, campaign or adventure"[37] and "part of the same criminal conduct".[38] But these criteria which "must only be used as guides to principle",[39] do not lend themselves to mechanical or pedantic application. The principle must be applied with caution,[40] having regard to the circumstances of each case. The governing considerations are, for example, "the number of instances involved, any interrelation between them, the intervals or similarities of time, circumstances and the details and character of the evidence".[41] But to demand a nexus in time, in method or in circumstance to enable an inference to be drawn[42] is, in the final analysis, "only another way of saying that similar fact evidence must be highly relevant to the issue of guilt".[43]

The assumption that similar fact evidence is received to rebut particular defences leads to confusion of thought and may produce anomalous results. Lord Wilberforce has expressly disapproved of this approach.[44] The illogicality inherent in rigid stratification is illustrated by the fact that, on charges of abortion, evidence that the accused had performed other abortions is admissible if the accused's defence is that he performed the operation in respect of which he is charged with innocent intent,[45] but not if the accused pleads that he had nothing to do with the prosecutrix on the occasion in question.[46] This distinction does not seem defensible rationally. Lord Hailsham has thought it unrealistic to differentiate between cases involving a plea of innocent association and cases of unqualified denial, since "the permutations are too various to admit of universally appropriate labels".[47]

33 *Harris* v. *Director of Public Prosecutions* (1952) A.C. 694 at p. 705, *per* Viscount Simon.
34 *Boardman's* case (1974) 3 All E.R. 887 at p. 893.
35 At p. 905, *per* Lord Hailsham; *cf. H.M. Advocate* v. *A.E.* 1937 J.C. 96.
36 *Moorov* v. *H.M. Advocate* 1930 J.C. 68.
37 *Ibid.*
38 *R.* v. *Sims* (1946) K.B. 531.
39 *Boardman's* case (1974) 3 All E.R. 887 at p. 894, *per* Lord Morris.
40 *Ogg* v. *H.M. Advocate* 1938 J.C. 152 at p. 158.
41 *Boardman's* case (1974) 3 All E.R. 887 at p. 905, *per* Lord Hailsham.
42 D.T. Zeffertt, *Similar Fact Evidence in Criminal Proceedings* (1977) 94 South African L.J. 399.
43 R.B. Sklar, *Similar Fact Evidence — Catchwords and Cartwheels* (1977) 23 McGill L.J. 60 at pages 61-62.
44 *Boardman's* case (1974) 3 All E.R. 887 at p. 896.
45 R. Cross, *op. cit.,* p. 388-9.
46 *Brunet* v. *R.* (1928) S.C.R. 161; *R.* v. *Campbell* (1947) 2 C.R. 351.
47 *Boardman's* case (1974) 3 All E.R. 887 at p. 905.

A compelling objection to the unimaginative use of categories is that demarcation of the circumstances in which a defence may be considered potentially open to the accused, frequently entails conceptualism of the least helpful type. Lord Sumner has stated: "The mere theory that a plea of 'not guilty' puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice"[48] However, the question whether the defence must actually have been raised by the accused before evidence of his misconduct on other occasions can be admitted to rebut it, has been variously answered in the affirmative[49] and in the negative.[50]

A similar controversy has arisen in Sri Lanka. *R.* v. *Waidyasekera*[51] was a prosecution for causing the death of a woman by an act done with intent to cause miscarriage. A nurse who was employed under the accused, gave evidence that during the ten months of her service there were about one hundred and fifty cases in which the accused had cause miscarriage. The Court of Criminal Appeal stated: "Under our law the prosecution may adduce all proper evidence tending to prove the charge against the accused, including evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, without waiting for the accused to set up a specific defence calling for rebuttal".[52]

48 *Thompson* v. *R.* (1918) A.C. 221 at p. 231; *cf.* for Australian law, *Smith* v. *Commonwealth Life Assurance Society Ltd.* (1935) 35 S.R. (N.S.W.) 552 at pages 556-557, *per* Jordan C.J.; *R.* v. *Hutton* (1936) 36 S.R. (N.S.W.) 534 at p. 541, *per* Jordan C.J.

49 *R,* v. *Cole* (1941) 165 L.T. 125.

50 *R.* v. *Sims* (1946) K.B. 531.

The position in most Commonwealth jurisdictions is more flexible than that in England. Notwithstanding the English rule that evidence as to other occasions should not be admitted "unless and until the defence of accident or mistake, or absence of intention... is definitely put forward" *(Perkins* v. *Jeffery* (1915) 2 K.B. 702 at p. 709), there is Canadian authority to the effect that it is not necessary to withhold evidence of similar acts until the defence puts forward a case of innocent or lawful purpose *(R.* v. *Anderson* (1935) 64 C.C.C. 205; *R.* v. *Cline* (1956) 115 C.C.C. 18). The argument in support of this latter position is that the Crown should not split its case by giving in rebuttal, instead of in-chief, confirmatory evidence in its possession *(Leblanc v. R.* (1975) 29 C.C.C. (2d) 97 at p. 104, *per* Dickson J.).

There is no hard and fast rule in Canada *(Holmes* v. *R.* (1949) 95 C.C.C. 73), and much depends on the circumstances of the case *(R.* v. *Durston* (1948) 91 C.C.C. 364). The Supreme Court of Manitoba has pointed out that admissibility has often to be decided without any clear indication of the particular defence to be set up *(R.* v. *Tass* (1946) 2 W.W.R. 97). The Canadian Supreme Court has commented: "The Crown should not adduce evidence of other similar facts unless it appears from what was said at the time of arrest or from the evidence presented by the Crown at trial or from the evidence of defence witnesses that the defence which the evidence of similar acts is intended to refute is really in issue" *(Leblanc* v. *R.* (1975) 29 C.C.C. (2d) 97 at p. 104, *per* Dickson J.).

The Court of Appeal of New Zealand, adopting a similar attitude, has held that the essential condition of admissibility is that the evidence tendered should pertain to an issue raised in substance in the case and that this condition may be satisfied if a general denial by the accused necessarily raises a particular defence to the crime alleged *(R. v. Hare* (1952) N.Z.L.R. 688).

51 (1955) 57 N.L.R. 202.

52 At p. 212, *per* Basnayake, A.C.J.

The approach based on the classification of categories is fundamentally misconceived, since the legitimate distinction is between degrees, rather than kinds, of relevance.[53] The crucial question is whether "the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed to make it desirable in the interest of justice that it should be admitted".[54]

The formulation of the applicable principle in the South Asian codes which emphasize discrete mental elements like intention, knowledge, good faith, negligence, rashness, ill will and goodwill[55] and the question whether an act was accidental or intentional,[56] may be justifiably criticized on the basis that it serves unwittingly to entrench the approach characterized by stratification into watertight compartments. A similar criticism may be made of the principle enshrined in the American Federal Rules, that similar fact evidence may be admitted for such purposes as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident".[57] The true principle, however, is that "Evidence of abnormal propensity may, in the circumstances of a particular case, be of such

[53] L.H. Hoffmann, *Similar Facts after Boardman* (1975) 91 L.Q.R. 193 at p. 200.

The flexibility of the applicable rules is underlined in the statement by the Court of Appeal of New Zealand that the admissibility of similar fact evidence "is necessarily a matter of degree, discretion and judgment; hard and fast rules cannot be evolved; common sense is not to be codified... The price of this approach is some uncertainty in borderline cases, but some uncertainty is inevitable with questions of relevance or degrees of relevance" *(R.* v. *Davis* (1980) 1 N.Z.L.R. 257 at p. 263, *per* Cooke J.). The potential for development of the law is preserved by the attitude of the Canadian Supreme Court that "There is no closed list of the sort of cases where such evidence is admissible" *(Guay* v. *R.* (1978) 42 C.C.C. (2d) 536 at p. 547, *per* Pigeon J.).

The criteria underlying the methods of classification adopted in the case law represent no more than rough guidelines. This has been recognized by the Court of Appeal of Ontario: "The so-called exceptions to the exclusionary rule are better described as classes of cases not reached by the rule. The fact that these classes may be assembled into helpful lists should not suggest that the list is exhaustive, or the classes are separate, watertight compartments" *(R.* v. *Schell and Paquette* (1977) 33 C.C.C. (2d) 422 at 426, *per* Zuber J.A.). The indefensibility of some of the distinctions entrenched in the decided cases, as a matter of logic, and the pragmatic basis of these distinctions have been conceded by the Court of Appeal of New Zealand: "There is no logical or legal difference between evidence adduced to prove the guilt of the accused and evidence adduced to rebut a defence open to him... Sometimes one method of formulating the general principle may be the more convenient and illuminating, and sometimes the other, but in essence the two formulas are identical" *(R.* v. *Whitta* (1921) N. Z.L.R. 519 at pages 524, 525).

The paramountcy of policy considerations and subjective assessments is an inarticulate premise of judicial attitudes in the Commonwealth. The Ontario Court of Appeal has aptly commented: "This area of the law is one of great difficulty, and the path for which the cases are the guideposts does not seem... to have always proceeded in a straight line towards a readily definable destination" *(R.* v. *MacDonald* (1974) 20 C.C.C. (2d) 144 at p. 151, *per* Arnup J.A.).

[54] *Harris* v. *Director of Public Prosecutions* (1952) 1 All E.R. 1044 at p. 1047, *per* Viscount Simon; *cf.* D.T. Zeffertt, *op. cit.,* p. 408, note 53; *cf. Mood Music Publishing Co. Ltd. v. de Wolfe Ltd.* (1976) 1 All E.R. 763 at p. 766, *per* Lord Denning, M.R.

[55] See the Evidence Ordinance of Sri Lanka, section 14.

[56] Evidence Ordinance of Sri Lanka, section 15.

[57] Rule 404 (b).

probative force as to warrant its reception"[58] and that the categories which are a feature of the case law merely illustrate the application of this principle.

The ossification of categories blurs the fluctuating standard of legal relevance and the importance of considerations of policy in excluding relevant similar fact evidence on the ground of potential prejudice. Thus, although a clearly proved disposition to commit a particular crime may be inadmissible if there is nothing to connect the accused with the crime charged,[59] an extremely tenuous connection, like possible opportunity, may be sufficient, if the surrounding circumstances, in their cumulative effect, have an overwhelming probative impact.[60] These gradations are not catered for by the conceptually neat, but pragmatically inadequate, enumeration of categories which represents a characteristic of the codified South Asian systems.

VI. EXCLUSIONARY DISCRETION

There is impeccable judicial authority suggesting that, as a matter of practice, even where similar fact evidence is technically admissible, it may be excluded when its potentiality to prejudice the accused outweights its probative value.[61] Viscount Simon has stated: "This proposition flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused."[62]

A similar distinction between technical admissibility and fairness to the accused has been made in this context by the Sri Lankan courts: "When evidence of previous conduct is given, although it may be strictly relevant, the evidence may be so trivial or so remote as to be practically valueless. In such cases it is the duty of the trial judge to decide whether such evidence should be shut out altogether".[63] This has been propounded not as a rule of law but as a caution intended to ensure that a fair and dispassionate trial would not be jeopardized by the reception of evidence likely to generate prejudice wholly incommensurate with the value of the evidence sought to be adduced.

There are contexts in which exclusionary discretion, recognized in explicit terms, serves a salutary purpose in criminal proceedings.[64] Lord Reading, C.J. has stated: "The principles of the law of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials, and which have acquired their force

58 D.T. Zeffertt, *op. cit.,* p. 407.
59 D.T. Zeffertt, *op. cit.,* p. 403, note 30.
60 See the case cited at note 27, *supra.*
61 *Harris* v. *Director of Public Prosecutions, supra; cf. R.* v. *Barron* (1913) 24 Cox C.C. 83; *R.* v. *Christie* (1914) A.C. 545.
62 *Harris* v. *Director of Public Prosecutions* (1952) A.C. 694 at p. 707.
63 *R.* v. *Jarlis* (1951) 52 N.L.R. 457 at p. 461, *per* Dias, J.
64 The reception of confessions and the precautionary rule requiring corroboration of an accomplice's testimony are examples.

by the constant and invariable practice of judges when presiding at criminal trials. They are rules of practice and discretion".[65]

It is submitted, however, that an exclusionary discretion, distinct from the criteria governing admissibility, is superfluous in the area of similar fact evidence, since the element of discretion is subsumed in the rules which regulate admissibility. Especially after *Boardman's* case it is clear that if evidence is of such a nature that it is not worthy of being admitted because its probative force is not so strong as to warrant its admission despite the disadvantages of admitting it, it is inadmissible.[66] In a case decided after *Boardman* v. *Director of Public Prosecutions* the English Court of Appeal has commented: "The criminal courts have been very careful not to admit such evidence unless its probative force is so strong that it should be received in the interests of justice: and its admission will not operate unfairly to the accused".[67]

So far as the structural framework of the law is concerned, since the principles controlling admissibility are themselves founded on a compromise between relevance and potential prejudice, it is sub-

65 *Director of Public Prosecution* v. *Christie* (1914) 10 Cr. App. Rep. 141 at pages 164-165.

The crucial importance of judicial discretion as a factor relevant to exclusion of similar fact evidence has been recognized consistently by the courts of Comomnwealth jurisdictions.

The Court of Appeal of Ontario has considered it "abundantly clear that the purely legal rule is subject to an overriding discretion in the trial judge" *(R.* v. *Benwell, Jarman, Dupuis, Dowds and Frost* (1973) 9 C.C.C. (2d) 158 at p. 168, *per* Aylesworth J.A.). A danger attendant on reception of similar fact evidence, of which the trial judge should be conscious, is that "an atmosphere of guilt may be created which would indeed prejudice the accused" *(Koufis* v. *R.* (1941) 76 C.C.C. 161 at p. 170, *per* Taschereau J.). As the Supreme Court of Canada has pointed out, the accused would be unjustifiably prejudiced by similar fact testimony introduced ostensibly to refute a possible defence but in truth to bolster the case for the Crown *(Leblanc* v. *R.* (1975) 29 C.C.C. (2d) 97 at p. 104, *per* Dickson J.).

The decision governing reception or exclusion depends on weighing the degree of legal relevance of the evidence tendered as against its likely prejudicial effect. The Supreme Court of Victoria has considered it axiomatic that "A judge presiding at a criminal trial possesses a discretion to exclude admissible evidence where the prejudicial effect thereof so far outweighs any probative value it may have as to make it dangerous to admit the evidence" *(R.* v. *White* (1969) V.R. 203 at p. 206, *per* Winneke C.J.; *cf.* for the law of New Zealand, *Maxwell* v. *Smith* (1935) N.Z.L.R. s. 47 at s. 49, *per* Kennedy J.; *R.* v. *Te One* (1976) 2 N.Z.L.R. 510 at p. 515, *per* Cooke J.). Elaborating on this principle, the Supreme Court of Victoria has observed that a trial judge should exclude similar fact evidence in the exercise of his discretion "either because the probative force is very small and the prejudice very great though the evidence is relevant to an issue really in contest, or because the evidence is relevant to an issue formally existing but not in fact in contest" *(R.* v. *Yuille* (1948) V.L.R. 41 at p. 46, *per* Gavan Duffy J.). Certainly, "where the only likely practical effect of admitting evidence is not really to support the case for the prosecution but to produce an unwarranted prejudice against the accused, it should be rejected" *(R.* v. *Aiken* (1925) V.L.R. 265 at p. 270, *per* Cussen J.; *cf.* the judgment of the Court of Criminal Appeal of South Australia in *R.* v. *Pullman* (1942) S.A.S.R. 262). In these circumstances, in the words of a Queensland court, the trial judge has "the right and, indeed, the duty" *(R.* v. *Hally* (1962) Qd. R. 214 at p. 227, *per* Gibbs J.) to exclude the evidence.

66 D.T. Zeffertt, *op. cit.,* p. 403, note 30.

67 *Mood Music Publishing Co. Ltd.* v. *de Wolfe Ltd.* (1976) 1 All E.R. 763 at p. 766, *per* Lord Denning, M.R.

mitted that the element of discretion is better conceived of as an integral aspect of these principles than as a gloss on them. Indeed, this approach seems to have been foreshadowed in some English decisions[68] which do not recognize an overriding exclusionary discretion separable from the substantive rules. Matters such as unreliability or staleness of the evidence[69] or doubt as to the criminal character of the accused's behaviour on previous occasions[70] — which have been sometimes treated as relevant to the exercise of discretion — can be taken into account properly within the framework of the rules bearing on admissibility.

VII. CONCLUSIONS

The following conclusions are warranted by this analysis of English and Commonwealth Law and the codified South Asian systems:

(1) A basic feature of the South Asian systems consists of their approach to the formulation of the inclusionary rules relating to similar fact evidence solely in terms of the concept of "relevance". This approach obscures (a) the varying standard of legal relevance, and (b) the applicability of general considerations of policy and a wide range of empirical factors in excluding logically probative evidence on the footing of disproportionate potential prejudice,

(2) In particular, the criteria underlying reception of similar fact evidence which find expression in the codified South Asian systems do not readily accommodate the dichotomy, desirable in principle, between different types of similar fact evidence — for example, similar fact evidence the primary relevance of which is through propensity and similar fact evidence having substantial relevance in some other manner. A uniform and immutable standard should not govern the admission of these categories of similar fact evidence which are convincingly distinguishable in terms of the purpose for which they are sought to be adduced and their probable impact on the jury in the evaluation of the totality of the evidence in the case.

(3) The statutory formulation contained in the codified systems is incomplete, in that it does not provide for the reception, in exceptional circumstances, of similar fact evidence of compelling probative force but pertaining exclusively to disposition — a kind of similar fact evidence which the English and Commonwealth courts have not been inclined to exclude absolutely.

(4) The canon of inclusion evolved by English and Commonwealth law is more extensive in scope than that embodied in the South Asian systems, not only for the reason spelt out in conclusion (3), above, but because the codified systems differing in this respect from English and Commonwealth law, inflexibly debar the reception of similar fact evidence for the purpose of establishing *either* the occurrence of the main fact *or* the identity of the actor. Thus, similar fact evidence has an intrinsically narrower dimension under the South Asian systems than in English, Canadian, Australian and New Zealand law, since the

68 *Hales* v. *Ken* (1908) 2 K.B. 601; *Perkins* v. *Jeffery* (1915) 2 K.B. 702.
69 *R.* v. *Cole* (1941) 165 L.T. 125.
70 *R.* v. *Doughty* (1965) 1 All E.R. 560.

former systems link the admission of similar fact evidence exclusively with the determination of the state of mind or body of the perpetrator of the act.

(5) The distinction drawn by English and Commonwealth law between acts of the accused which are alleged to be accidental and those which are said to be involuntary, with the object of confining the reception of similar fact evidence rigidly to the former area, is not defensible from a rational standpoint and may be dispensed with according to the formulation adopted by the South Asian codes.

(6) The stratification and compartmentalization of defences — which represent a tacit feature of the codified systems — give the law the appearance of a patchwork and render difficult the identification of the general principle, permutations of which control the admission of similar fact evidence to prove states of mind like intention, knowledge, good faith, negligence and rashness. The unreflecting use of categories stultifies the overall objectives of the law by allowing scope for linguistic and tactical manipulation and by encouraging futile controversy in regard to such matters as the number of instances constituting a "system" and the circumstances in which a specific defence may be considered potentially available to the accused. Moreover, the mechanical use of categories is exposed to the compelling objection that it engenders the misconception that kinds of relevance should be distinguished, when the true distinction is between degrees of relevance.

(7) The *Makin* formulation which apparently propounds a general exclusionary rule and recognizes limited qualifications to its applicability, has the disadvantage of enhancing the importance of catchwords and labels, and distracting attention from the fundamental question — whether the relevance of the similar fact evidence tendered, in all the circumstances of the case, sufficiently outweighs the prejudice attendant on its reception. The resilience and malleability of the Common Law have enabled the English and Commonwealth courts gradually to repudiate the fetters of the *Makin* formulation and to adopt a broader approach, culminating in the *Boardman* ruling. By contrast, the elements of stratification characterizing the statutory provisions applicable in South Asia deprive the courts in these jurisdictions of a comparable degree of flexibility and scope for initiative.

(8) Despite judicial observations to the contrary in most jurisdictions, discretion on the part of the courts to rule out similar fact evidence on the ground of unjustifiable prejudice to the accused should be viewed as an essential element of the substantive rules regulating admissibility rather than as a supplementary basis of exclusion.

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