A STATUTORY FORMULA FOR THE ADMISSION OF SIMILAR FACT EVIDENCE AGAINST A CRIMINAL ACCUSED

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A thesis submitted in total fulfilment of the requirements of the award of the degree of Doctor of Philosophy

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ABSTRACT

The law governing the admission, against a criminal accused, of what is referred to – sometimes inaccurately - as “similar fact evidence” has been allowed to acquire a complexity which is not wholly justified. This complexity has arisen as the result of two errors which have operated in tandem for the best part of two centuries. The first is to regard all instances in which a criminal accused’s additional (usually prior) misdeeds are disclosed to a court as “similar fact evidence”, when in fact many such disclosures involve facts which are far from similar. The second has been the attempt to rationalise and regulate the law on such disclosure along the lines of the purpose for which it is admitted, when in fact it is best approached from the standpoint of its natural relevance to the case as a whole.

This thesis corrects the first misconception, and identifies what is herein described as “similar fact evidence properly so called”. It then proceeds to a critical examination of the historical treatment, by common law courts around the world, of additional misdeeds of a criminal accused, and argues that the current state of confusion surrounding the subject is due primarily to the failure to acknowledge that relevance is the key to admissibility.

This has finally been recognised in both New Zealand and Canada. The Supreme Court of Canada, in its ruling in Handy, also gave detailed guidance to all future trial judges in that jurisdiction regarding those factors which made similar fact evidence so “relevant” to an issue in a case that it should be admitted, once the potential “prejudicial effect” had been similarly identified. Handy also finally gave due recognition to the “doctrine of chances” reasoning identified by the American jurist Wigmore a century earlier. These outcomes in both New Zealand and Canada are finally fused into a proposed statutory formula for the admission of “similar fact evidence properly so called”.

SIGNED CERTIFICATION

This thesis is submitted to Bond University in fulfilment of the requirements of the Degree of Doctor of Philosophy.

This thesis represents my own original work towards this research degree, except where due acknowledgement is made, and contains no material which has been previously submitted for a degree or diploma at this University or any other institution.

David J Field
ACKNOWLEDGMENTS

I am fortunate in that, during most of the preparation of this thesis, I had two supervisors. The first (in time) was Professor Lee Stuesser, of Bond University, and also Manitoba and Lakehead Universities in Canada. He was joined in due course by my academic colleague Professor William van Caenegam, Bond University.

To them both I acknowledge my grateful thanks, not only for their expert guidance and wise counsel, but also for their tact and diplomacy in suggesting endless amounts of much-needed editing, without which the end result would have been an ill-disciplined collection of volumes containing much unnecessary rhetoric and very little focus. The final thesis is still a long one, but hopefully one which suggests a navigable course through the rapids and torrents of two centuries of stormy water.

My other academic colleagues at Bond – not the least of whom is my son Iain, who demonstrated that it is possible to write a thesis while retaining one’s sanity – may now take comfort in the fact that I will no longer be using them as sounding boards for novel, if obscure, concepts. My wife Virginia may now also have unlimited access to our home computer. To them all – thank you for putting up with my five year obsession.
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