The Reception of 'Similar Fact' Evidence in Criminal Proceedings: a Comparative Analysis of the English Common Law and a Codified Asian System

G. L. PEIRIS

1. The Foundations of the Law

The principles of the English common 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 purposes for which the adduction of evidence of other crimes is legitimate.[3] This exposition of the 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

1. *Makin* v. *Attorney–General for New South Wales* (1894) A. C. 57 at p. 65, *per* Lord Herschell, L. C.
2. *Boardman* v. *Director of Public Prosecutions* (1974) 3 All E. R. 887 at p. 903, *per* Lord Hailsham..
3. R. Cross, *Evidence* (4th edition, 1974), p. 318.
4. *Boardman*'s case (1975) A. C. 421 at p. 461, *per* Lord Salmon

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]

The English common 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 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]

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5. Evidence Ordinance, section 14.
6. Evidence Ordinance, section 15
7. *Maxwell v. Director of Public Prosecutions* (1935) A. C. 309 at 317 *per* Viscount Sankey L. C.
8. *R. v. Ball* (1911) A. C. 47 at p. 71; cf. *R. v. Fisher* (1910) I 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.
10. *Harris v. Director of Public Prosecutions* (1952) I All E. R. 1044
11. *Boardman v. Director of Public Prosecutions* (1974) 3 All E. R. 887 at p. 893, *per* Lord Morris.
12. Ibid.
13. *R. v. Robinson* (1953) 37 Cr. App. Rep. 95 at p. 106, *per* Hallett, J.

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 drowing 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. "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."[17] 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.[18] 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."[19]

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

14. R. *v. Smith* (1914 – 15) 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. 240.
15. *Thompson v. R.* (1919) A. C. 221.
16. R. *v. Ball* (1911) A. C. 47
17. *Boardman's* case (1974) 3 All E. R. 887 at p. 897, *Per* Lord Wilberforce.
18. *R v. Robinson* (1953) 37 Cr. App. Rep. 95
19. of R. v. *Adami* (1959) S.A.S.R. 81; R. v. *Giovannone* (1960) 45 Cr. App Rep. 31.

which he is charged or would point so strongly to this guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in face of it."[20]

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 fact evidence.

The "striking resemblances" or "unusual features", disregard of which is repugnant to common sense, may consist either of the objective facts[21] or of a significant similarity.[22] 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."[23]

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."[24] 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*[25] 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.[26] The similarity of the technique employed by the accused on each occasion was striking. In *R.* v. *Straffen*[27] the accused

20. *Boardman's* case (1974) 3 All E. R. 887 at p. 909, *per* Lord Cross.
21. *R. v. Smith* (1915) 84 L. J. K. B. 2153; R. *v. Straffen* (1952) 2 All E. R. 657
22. R. *v. Sims* (1946) K. B. 531; *R. v. Davis and Murphy* (1971) 56 Cr. App. Rep. 249.
23. *Boardman's* case (1974) 3 All E. R. 887 at p. 905, *Per* Lord Hailsham.
24. J. D. Heydon, *Cases and Materials on Evidence* (1975), p. 261
25. (1894) A. C. 57
26. R. Cross, *op. cit.*, p. 325
27. (1952) 2 All E. R. 657

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*,[28] too, the similarity typifying the *modus operandi* was evident.[29] 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.[30]

The applicability of this reasoning is vividly exemplified by the recent English case of *R.* v. *Mansfield*.[31] The accused was charged with causing three fires at hotels were 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 in 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."[32] The requisite nexus subsumes factors like the time and the character of the acts.[33]

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28. (1915) 84 L. J. K. B. 2153
29. For the facts of the case, see the text at note 14, *supra*
30. R. Cross, *op. cit*, p. 325
31. (1978) 1 All E. R. 134
32. *Martin v' Osborne* (1936) 55 C. L. R. 367 at p. 385, *Per* Evatt, J.
33. *R. v. Coombes* (1960) 45 Cr. App. Rep. 36; *R. v. Wilson* (1973) 58 Cr. App. Rep. 169.

Comparable reasoning was resorted to in the Sri Lankan case of R. v. *Seneviratne*[34] 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, E and Mrs. P. On 21st December 1920 the accused raised a sum of Rs. 5,000 for E on the primary mortgage of a land, the lender being one W. Within a few weeks the accused informed E that W had recalled the loan and that Mrs. P was willing to lend a sum of Rs. 6,250 on a primary mortgage of the same land. Accordingly, on 21st January 1921, a bond was executed by E for this sum, of which Rs. 750 was paid to E and Rs. 5,000 was retained by the accused to pay off W and to obtain a cancellation of his bond, which the accused failed to do. The accused's explanation was that he paid Rs. 750 to Mrs. P at the request of E, and that with the latter's consent he kept the balance which was not sufficient to obtain a discharge of W's bond. E denied having given authority to the accused to make any payment to Mrs. P or to use the balance. 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. Jayawardene, A.J., held that evidence regarding the second transaction was admissible.[35]

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[36] 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.[37] 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.[38] The English Court of Criminal Appeal has quashed a conviction[39] 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

34. (1925) 27 N. L. R. 100
35. See particularly at p. 130
36. *R. v. Brown, Smith, Woods and Flanagan* (1963) 47 Cr. App. Rep. 205.
37. cf. *R. v. Macpherson and Resnick* (1964) 20. R. 101.
38. cf. *R. v. Blackledge* (1965) v. R. 397
39. *R. v. Fisher* (1910) 1 K. B. 144

business.[40] 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 the accused by means of the pretence that they had work elsewhere and required the money for the journey to that place.[41]

In a Sri Lankan case[42] 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 accused 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"[43] or "particular pattern"[44] is relative. Insistence on "a virtually complete similarity"[45] as a condition of admissibility of evidence regarding other instances or transactions has been criticized on grounds of policy, in that it places "too high a premium on versatility and too heavy a penalty on dullness".[46] However, the strictness of this requirement is unavoidable, since the reception of what

40. 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.

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

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

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

44. *ibid.*

45. R. Cross, *op. cit.* , p. 314. It has been observed recently that "Evidence is admissible as similar fact evidence if, but only if, it goes beyond showing a tendency to comints crimes of this kind and is positively probative in regard to the crime charged." (*R. v. Rance* (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 commonplace 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).

46. D. W L. in (1938) 54 L. Q. R. 335 at P. 336

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."[47] 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.[48] 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 method, as opposed to a particular kind, of wrongdoing.[49] 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.[50] For this reason similar fact evidence is more readily admitted in unusual crimes than common ones – for example, poisoning,[51] incest,[52] unnatural sexual cases[53] and perverted murders.[54] "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."[55]

(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

47. R. v. Aiken (1952) V. L. R. 265 at p. 268
48. R. Cross, *op. cit.*, p. 310
49. *ibid*
50. J. D. Heydon, *op. cit.*, p. 260
51. R. 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. 408. R. v. Flannagan and Higgins (1884) 15 Cox C. C. 403 But see R. v. Winslow (1860) 8 Cox C. C. 397
52. R. v Ball (1911) A. C. 47; Mc Conville 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.
53. Thompson v. R. (1918) A. C. 221; R. v. Sims (1946) K. B. 531; R. v. Hall (1952) 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.
54. R. v. Straffen (1952) 2 Q. B. 911; R v. Morris (1969) 54 Cr. App. Rep. 69
55. J. H. Heydon, *op. cit.*, p. 261

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."[56]

In exceptional circumstances one previous instance may suffice. In R. v. *Bond*[57] 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.[58] 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.[59]

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 sufficient, several previous burglaries committed in a commonplace manner may not be enough[60].

The structural framework of Sri Lankan law is of interest. Sections 14 and 15 of the Evidence Ordinance 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.[61] Section 15 enables the introduction of evidence operating to exclude a

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56. R *v.* *Bond* (1906) 2 K. B. 389 at p. 420, *Per* Lawrence, J.
57. (1906) 2 K. B. 328
58. R. Cross, *op. cit.* p. 328
59. R. Cross, *op. cit.* pages 328-329
60. J. D. Heydon, *op. cit.*, p. 262
61. See the text at note 5, *supra*

defence like accident in cases where, at first glance, the question whether an act has been committed intentionally or accidentally admits of some doubt.[62]

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.[63]

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*[64] the majority of the court[65] construed "series" as denoting that more than one act (other than that referred to in the indictment) would have to be proved.[66] However, the minority[67] 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".[68]

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,[69] to those where no fewer than one hundred and fifty similar incidents were alleged to have taken place.[70] 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."[71] 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

62. See, the text at note 6, *Supra*
63. See, example, *R. v. S neviratne* (1925) 27 N. L: R. 100
64. (1925) 27 N. L. R. 100
65. Schneider and Dalton, JJ.
66. (1925) 27 N. L. R. 100 at P. 113, *Per* Schneider, J.
67. Jayewardene, A. J.
68. (1925) 27 N. L. R. 100 at p. 134, *per* Jayewardene, A. J.
69. *Jayewardene v. Diyonis* (1915) 18 N. L. R. 239: *Esufali & Co. v. Samarang Sea and Fire Insurance Co.* (1925) 26 N. L. R. 402
70. *R. v. Waidyasekera* (1955) 57 N. L. R. 202
71. See for example, *R. v. Wijeratne* (1935) 6 C. W. R. 314; *R v. Jarlis* (1951) 52 N. L. R. 457.

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."[72]

Although the comment has been made by the Sri Lankan courts that "Evidentiary facts are admissible to prove the intention regarding the *factum probandum* by showing what is described variously as 'system', 'design', 'course of conduct' or 'practice',"[73] 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."[74] 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."[75] In general, however, the length of the interval between the acts detracts from the strength of the nexus.[76]

(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.[77]

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."[78] In R. v. *Sims*[79] this statement was relied on as a basis for the admission of evidence of homosexual misconduct on the part of the accused on a homo-

72. R. v. *Siyaris* (1928) 30 N. L. R. 92 at pages 93-94, *Per* Lyall Grant, J.
73. R. v. *Seneviratne* (1925) 27 N. L. R. 100 at p 113, per Schneider, J.
74. J. D. Heydon, *op. cit.*, p. 261
75. *Moorov v. H. M. Advocate* 1930 J.C. 68 at p. 89, *per* Lord Sands.
76. R. v. *Adamson* (1911) 6 Cr. App. Rep. 205
77. See the cases cited at note 53, *supra.*
78. *Thompson v. R.* (1918) A. C 221 at p. 235
79. (1946) K. B. 531 at p. 540

sexual charge without any reference to pattern or technique. Such evidence may take the form either of an explicit assertion by the accused as to his abnormal propensity[80] or of real evidence like powder puffs[81] or indecent photographs[82] found in the possession of the accused.

Dicta in R. v. *Sims* support the sweeping proposition that evidence of homosexuality is always admissible on homosexual charges. Indeed, Lord Goddard regarded sodomy as "a crime in a special category".[83] The high-water mark of this principle was reached in R. v. *King*.[84] 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 where there is a strikingly similar technique.[85] In R. v. *Horwood*[86] 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."

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80. R. v. King (1967) 2 Q. B. 338
81. Thompson v. R. (1918) A. C. 221
82. R. v. Twiss (1918) 2 K. B. 853.
83. (1946) K. B. 531 at p. 540
84. (1967) 2 Q. B. 338
85. See the text at note 88, *infra*.
86. (1970) 1 Q. B. 133

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*[87]: "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."[88] In *Boardman* v. *Director of Public Prosecutions*[89] reference was made in the House of Lords to the "purely passive role"[90] said to have been adopted by the accused towards the act of sodomy suggested or performed as an element of "striking resemblance"[91] between the testimony of the two boys. This had been described by the trial judge as a feature "of a particular, unusual kind."[92] 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".[93] The House of Lords has now categorically declared that "There is not a separate category of homosexual cases"[94] 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."[95]

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."[96] As Lord Wilberforce has pointed out, "What is striking in one age is normal in another; the perversions of yesterday may be the routine or the fashion of tomorrow."[97] It has been judicially recognized in England that "public attitudes and public habits, particularly in regard to homosexuality, themselves have changed."[98]

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. Lord Sumner's analogy of homosexual propensity with a physical defect is inaccurate, since the former may be

87. (1973) A. C. 729
88. At. p. 751
89. (1974) 3 All E. R. 887
90. At p. 907, *per* Lord Hailsham
91. *ibid.*
92. At p. 899 *ad fin.*; per Lord Hailsham
93. At p. 894, *per* Lord Morris, quoting R. Cross, *Evidence* (3rd edition, p. 319)
94. *Boardman's* case (1974) 3 All E. R. 887 at p. 907 *ad fin.*, *per* Lord Hailsham
95. *ibid.*
96. *Director of Public Prosecutions* v. *Kilbourne* (1973) A. C. 729 at P. 656
97. *Boardman's* case (1974) 3 All E. R. 887 at p. 898
98. R. V. *Morris* (1969) 54 Cr. App. 69 at p. 79

transient or intermittent, while the latter normally exists throughout life. The menace of blackmail militates convincingly against adoption of the broad view. A tendency to homosexuality does not necessarily entail promiscuity.[99]

(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[100] 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,[101] but this is because such evidence does no more than show incestuous propensity.[102] Similarly, general homosexual tendencies will only be admissible in exceptional circumstances.[103] 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.[104]

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."[105] 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 so that they are sure that to treat the matter as pure coincidence by reason of the 'nexus', 'pattern' or 'system' is an "affront to common sense."[106] In this the ordinary rules of logic and common sense prevail,[107] whether the case is one of burglary and the burglar has left a "signature" as the mark of his presence,[108] or false pretences, and the pretences alleged have too many

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99. J. D. Heydon, *op. cit.* , p. 265
100. *R. v. Jarlis* (1951) 52 N. L. R. 457
101. *R. v. Flack* (1969) 2 All E. R. 784
102. R. Cross, *op. cit.* , p. 314
103. J. D. Heydon, *op cit.* , p. 264; for an example, see *R. v. King, supra.*
104. *R. v. Ball* (1911) A. C. 47; *R. v. Shellacker* (1914) 1 K. B. 414; *R. v. Allen* (1937) St. R. Qd. 32
105. J. Stone, *The Rule of Exclusion of similar Fact Evidence* (1933) 46 Harvard Law Review 954 at pages 983 - 984
106. *Boardman's* case (1974) 3 All E. R. 887 at p. 906, per Lord Hailsham
107. *ibid*
108. *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

common characteristics to have happened coincidentally,[109] 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,[110] or is in possession of incriminating articles like a jemmy,[111] a set of skeleton keys[112] or, in abortion cases, the apparatus of the abortionist.[113]

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."[114]

In *Harris* v. *Director of Public Prosecutions*[115] 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."[116]

109· 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. *Hu ren* (1962) 46 Cr. App. Rep. 323. But see *R.* v. *Sagar* (1914) 3 K. B. 1112.

110· See the cases cited at note 53, *supra*

111· *R. v. Taylor* (1923) 17 Cr. App. Rep. 109

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

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

114· R. Cross, *op. cit.*, p. 312

115· (1952) A. C. 694

116· At p. 711

In *Noor Mohamed* v. R.[117] 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.[118] 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 mudering another woman."[119]

R. v. *Chandor*[120] 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 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."[121]

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[122] 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.[123]

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117. (1949) A. C. 182
118. See also R. v. *Patel* (1951) 2 All E. R. 29; R v. *Fletcher* (1953) S. R. v. N. S. W 70
119. *Harris* v. *Director of Public Prosecutions* (1952) A. C. 694 at p. 708.
120. (1959) 1 Q. B. 545
121. Per Lord Parker, C. J.
122. R. v. *Rodley* (1913) 3 K. B. 468.
123. *Coopr* v. R. (1961) 105 C. L. R. 177

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.[124] However, the previous misconduct, to be relevant, need not necessarily be criminal or tortious.[125]

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.[126]

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,[127] 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".[128] In regard to a charge of keeping a brothel, evidence that the accused persons had been leading immoral lives elsewhere has been considered inadmissible.[129] 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.[130] 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 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".[131]

124· S. Cross, *op. cit.* , p. 311

125· *Griffin* v. *R.* (1937) 58 C. L. R. 185

126· 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. 338

127· R. v. *Wickremasinghe* (1934) 36 N·L. R. 135

128· At p. 137

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

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

But this proposition is unacceptable, since "the expression 'logically probative' may be understood to include much evidence which English law deems to be irrelevant."[132] 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.[133] 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.[134] 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 bad disposition, which has no particular bearing on some issue at the trial.[135] If relevant evidence is defined as "evidence which makes the matter which requires proof more or less probable",[136] it is clear that the 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.[137] "That what was declared 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".[138]

A feature of the codified systems of India, Sri Lanka, Malaysia and Singapore is their adoption of Stephen's approach[139] which endeavours to set out the rules concerning the matters that may be proved *coram iudice* 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[140] entitled "Relevancy of Facts". The disadvantage attendant on this approach is that it suggests by implication that the basis

131. R. v. *Sims* (1946) K. B. 531 at p. 537
132. *Noor Mohamed R. v.* (1949) A. C. 182 at p. 194, *per* Lord du Parcq
133. *Boardman's* case (1949) 3 All E. R. 887 at p. 902, *per* Lord Hailsham
134. cf R. v. *Hall* (1952) 1 K. B. 302 at p. 306, *per* Lord Goddard
135. J. D. Heydon, *op. cit.*, p. 255
136. *Director of Public Prosecutions* v. *Kilbourne* (1973) A. C. 729 at p. 756, *per* Lord Simon of Glaisdale
137. See note, 1, *supra*
138. *Director of Public Prosecutions* v. *Kilbourne* (1973) A. C. 729 at p. 757, *per* Lord Simon of Glaisdale. Cf. *Lowery* R. v. (1973) 3 All E. R. 662.
139. J. F. Stephen, *Digest of the Law of Evidence* (12th edition) article 1.
140. Chapter II

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 Sri Lankan 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.[141] Admissibility, however, "signifies that the particular fact is relevant and something more, that it has also satisfied all the auxiliary tests and extrinsic policies."[142]

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 another in an absolute sense: what matters to them is whether it is sufficiently relevant to justify its being heard by the court."[143] Lord du Parcq has justly remarked that "Logicians are not bound by the rules of evidence which guide English Courts."[144] Varying gradations of relevance are not adequately catered for by the inelastic formulation, coupled with the definition of "relevancy",[145] embedded in the South Asian codes of evidence.

So for 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

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

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

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

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

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

tendered. These considerations include: (1) the grave prejudical effect of the evidence which may be "out of proportion to its true evidential value";[146] (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."[147]

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.[148]

(e) 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."[149]

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 by distinct considerations. The first type envisages similar fact evidence, the primary relevance of which consists of propensity,[150] while the second contemplates similar fact evidence having substantial relevance otherwise than through propensity.[151] 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

146. R·v·*Christie* (1914) A·C·545 at p· 559, *per* Lord Moulton
147. R·v·*Bailey* (1924) 2 K·B· 300 at p·305, *per* Lord Hewart, C·J·
148. R· v· *Butler* (1846) 2 Cav. and Kiv·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* R·v·(1943) A·C·253; R·v·*Ferrier* (1968) 112 Sol·Jo·519·
149. *Boardman's* case (1974)3 All E·R· 887 at pages 905–906
150. Z·Cowen ond P· B·Carter *Essays on the Law of Evidence* (1956) p· 141·
151. Z·Cowen and P·B·Carter, *op·cit·*, p· 151·

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."[152] 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.[153]

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 one transaction.[154] A threat of rape and the completed act of rape may be linked by the nexus of a continuing transaction.[155] The amorphous concept[156] relating to the "same transaction" has been held to warrant the reception of evidence

152. Z. Cowen and P. B. Carter, *op. cit.*, p. 133

153. *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. 189.

154. *R. v. Voke* (1823) Russ. & Ry. 531; *R. v. O'Malley* (1964) Qd. R. 226

155. *R. v. Rearden* (1864) 4 F. & F 76

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

as to the discovery of the proceeds of a robbery at a place where a subsequent crime was committed.[157] 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.[158] 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.[159] The principle of inclusion rests on the premise that "If crimes do so intermix, the court must go through the details."[160]

In each of these cases the evidence admitted had a relevance other than its contribution to the proof of bad 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 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,[161] but not otherwise,[162] provided that the jury is adequately directed as to the limited use which should be made of this testimony.[163]

A conceptual difference may be noticed between similar fact evidence and evidence relating to a continuing[164] or identical transaction. In an Australian case[165] 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

157. *R. v. O Mealley* (1953) V. L. R. 30
158. *R. v. Salisbury* (1831) 5 C. & p. 155
159. *R. v. Cobden* (1862) 3 F. & F. 833
160. *R. v. Whiley* (1804) 2 Leach 983. Cf. *R. v. Ellis* (1826) 6 B. & C. 145; *R. v Bleasdale* (1840) 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.
161. *R. v. Ducsharm* (1956) 1 D. L. R. 732
162. *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.
163. *R. v. Ward* (1963) Qd. R. 56
164. *Brown v. Eastern and Midland Rail Co.* (1889) 22 Q. B. D. 391, *Ex parte Burnby* (1901) 2 Q. B. 458; *R. v. Brady and Ram* (1964) 3 All E. R. 616; *Dale v. Smith* (1967) 2 All E. R. 1133
165. O' *Leary v. R.* (1946) 73 C. L. R. 566

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 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 one transaction.

The difference between the two concepts is given expression in the law of Sri Lanka which incorporates a provision, distinct from that controlling similar fact evidence, to cater for incidents of one transaction. Explicit provision, based on the Indian Evidence Act, 1872, is made in 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."[166] The Sri Lankan courts have identified such *indicia* as "proximity of time and unity of place",[167] "a community of purpose and a continuity of action"[168] and "the relation of the acts to one another in point of purpose or as cause and effect or as principal and subsidiary acts"[169] as elements of the concept of 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.[170] Cross-examination of the accused in regard to the latter statement was held to be proper. In a prosecution for forgery[171] accomplices giving evidence for the prosecution described the

166. Evidence Ordinance, section 6.
167. *R. v. Aman* (1920) 21 N. L. R. 375 at p. 377, *per* Bertram, C. J.
168. *Don Wilbert v. Sub-Inspector of Police, Chilaw* (1965) 69 N. L. R. 448 at p. 450, *per* Alles J.
169. *Jonklaas v. Jomadasa* (1943) 44 N. L. R. 227 at p. 230, *per* Wijeyewardene, J.
170. *R. v. Chitson* (1909) 2 K. B. 945
171. *R. v. Kennaway* (1917 1 K. B. 25

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[172] 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."[173]

In an English case[174] 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 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,[175] is to

172. R. v. *Lovegrove* (1920) 3 K. B. 643
173. J. H. Wigmore, *op. cit.*, volume 111, pages 338-339
174. R. v. *Evans* (1950) 1 All E. R. 610

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*[176] is one illustration of such a situation. *R.* v. *Ball*[177] 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."[178] 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 disposi-

175. See note 1, *supra*
176. See note 27, *supra*
177. (1911) A. C. 47
178. L. H. Hoffmann, *The South African Law of Evidence* (2nd edition, 1970), pages 38, 39.

tion, is not precluded absolutely.[179] A lacuna in the method of formulating the exclusionary 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 there with",[180] 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 that under the codified systems of South Asia.

The ambit of the inclusionary rule is appreciably narrower under the systems deriving from the Indian Evidence Act. Section 14 of the Evidence Ordinance of 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 case of *R. v Wijesinghe*.[18] 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 witnessess 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."[182]

179. cf clauses 3 (1) and 3 (2) of the draft Bill annexed to the 11th Report of the English Criminal Law Revision Committee
180. Rule 404 (b) of the American Federal Rules
181. (1919) 21 N. L. R. 230
182. At p. 232

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."[183] The Cape courts have asserted that "Normally similar conduct shows only propensity and therefore is not admissible to prove the *actus reus* in question."[184]

By contrast, under the English common law, the *actus reus* itself may be proved by similar fact evidence of adequate cogency. In *Makin's* case[185] 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[186] 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 them all."[187] Thus, in R. v. *Smith*,[188] the accused's contention 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."[189]

183. R. v. D. 1958 (4) S. A. 364 (A. D.) at p. 369, *per* Hoexter, J. A.
184. S. v. B. 1976 (2) S. A. 54 (C) at p. 59
185 See note 1, *supra*
186. See the cases cited at note 51, *supra*; cf R v. Armstrong (1922) 2 K. B. 555
187. J. H. Wigmore, *op. cit.*, volume 111, section 302, p. 196.
188. See note 14, *supra*
189. R. v. Ball (1911) A. C 47, *arguendo*

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*. [190] 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 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.[191]

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*[192] and *R. v. Smith*[193] with *R.* v. *Harrison-Owen*.[194] 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

190. (1936) 55 C. L. R. 367
191. R. Cross, *op. cit*, p. 330
192. See note 1, *supra*
193. See note 14, *supra*
194. (1951) 2 All E. R. 726

his act was unaccompanied by the requisite element of intention or blameworthy knowledge. *Harrions-Owen's* case, although doubted by Lord Denning,[195] has been followed recently in Western Australia.[196]

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*."[197] 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 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.[198]

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"[199] 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:

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195. *Bratty* v. *Attorney-General for Northern Ireland* (1963) A. C. 386 at p. 410
196. *Tedge* v. R. (No. 2) (1979) W. A. R. 89
197. J. D. Heydon, *op. cit.*, p. 260
198. See 11th Report, paragraphs 70-101
199. (1894) A. C. 57 at p. 65

(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. [200] The combination of instances rendered the plea of accident implausible.

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

The decided English cases [201] 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, [202] 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.[203]

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."[204]

Several Sri Lankan decisions illustrate the admission of similar fact evidence on this ground. In *R. v. Arnolis* [205] 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

200. R. v. *Mortimer* (1936) 25 Cr. App. Rep. 150

201. R. Cross, *op. cit.*, p. 327

202. *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

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

204. R. v. *Farncis* (1874) L. R. 2. C. C. R. 128 at p. 131, *per* Coleridge J. cf R. v. *Gregg* (1964) 49 W. W. R 732

205. (1921) 23 N. L. R. 225

lent himself to the scheme of the real thief." [206] In *Jayakody* v. *Sub-Inspector of Police, Hettipola* [207] 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. Samerawickrame, 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.[208] In *Jayawardene* v. *Diyonis*[209] 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."[210] In *Rosalin Nona* v. *Perera* [211] the accused was charged under the Brothels Ordinance with rendering assistance in the management of a brothel. The prosecution led evidence tc 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.[212]

(c) Refutation of an Innocuous Explanation

Where the accused has been found in possession of arsenic,[213] forged deeds [214] or housebreaking implements, [215] 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.

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206. At p. 228
207. (1969) 75 N. L. R. 160
208. At pages 163-164
209. (1915) 18 N. L. R. 239
210. At p. 240
211. (1946) 47 N. L. R. 523
212. cf *Wikremasuriya* v. *Seryhamy* (1922) 4 C. L. Recorder 83
213. R. v. *Armstrong* (1922) 2 K. B. 555
214. R. v. *Mason* (1914) 10 Cr. App. Rep. 169
215. See the cases cited at note 112, *supra*

(d) Negation of a Plea of False Identification

In *Thompson* v. R. [216] 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".[217] *R.* v. *Hall* [218] 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." [219] In *R.* v. *Davis and Murphy* [220] 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* [221] a recurring pattern was thought to reinforce 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 in this context in Sri Lanka,[222] England [223] and in other Commonwealth jurisdictions like New Zealand, [224] Australia [225] and Ireland.[226]

However, compartmentalization of grounds on which similar fact evidence is admissible, is open to serious objection in terms of policy. At the highest level of judicial authority a closed list of cases has been consi-

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216. (1918) A. C. 221
217. At pages 225-226, *per* Lord Finlay
218. (1952) 1 K. B. 302
219. At p. 308, *per* Lord Goddard, C. J.
220. 1971) 56 Cr. App. Rep. 249
221. (1969) 54 Cr. App. Rep. 69
222. *R.* v. *Jaris* (1951) 52 N. L. R. 457
223. *Weatherly* v. *Weatherly* (1854) 1 Ecc. & Ad. 193; *Boddy* v. *Boddy and Grover* (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
224. *R.* v. *Ratchujui* (1947) N. Z. L. R. 581; *R.* v. *Hare* (1952) N. Z. L. R. 588
225. *R.* v. *Whitam* (1962) S. R. Qd. 49
226. *Attorney-General* v. *Dempsey* (1961) I. R. 288

dered unacceptable.[227] 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."[228]

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, [229] the additional elements required have been described as "underlying unity",[230] "unity of intent, project, campaign or adventure"[231] and "part of the same criminal conduct".[232] But these criteria which "must only be used as guides to principle",[233] do not lend themselves to mechanical or pedantic application. The principle must be applied with caution,[234] 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."[235] But to demand a nexus in time, in method or in circumstance to enable an inference to be drawn[236] is, in the final analysis, "only another way of saying that similar fact evidence must be highly relevant to the issue of guilt".[237]

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.[238] 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,[239] but not if the accused pleads that he had nothing to do with the prosecutrix on the

227· *Harris* v·*Director of Public Prosecutions* (1952) A·C·694 at p· 705, *per* Viscount Simon

228· *Boardman's* case (1974) 3 All E. R. 887 at p. 893

229· At p. 905, *per* Lord Hailsham; cf *H. M. Advocate* v·A. E. 1937 J. C. 96

230· *Moorov* v·A. M. *Advocate* 1930 J. C. 68

231· *ibid.*

232· *R.* v. *Sims* (1964) K. B. 531

233· *Boardman's* case (1974) 3 All E. R. 887 at p. 894 *per* Lord Morris

234· *Ogg* v. H. M. *Advocate* 1938 J. C. 152 at p. 158

235· *Boardman's* case (1974) 3 All E. R. 887 at q. 905, *per* Lord Hailsham

236· See the valuable article by D. T. Zeffertt, *Similar Fact Evidence in Criminal Proceedings* (1977) 94 South African L. J. 399

237· R. B. Sklar, *Similar Fact Evidence - Cacthwords and Cartwheels* (1977) 23 McGill L. J. 60 at pages 61-62

238· *Boardman's* case (1974) 3 All E. R. 887 at p. 896.

239· R. Cross. *op. cit.*, p. 333

occasion in question.[240] 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."[241]

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."[242] 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[243] and in the negative.[244]

A similar controversy has arisen in Sri Lanka. R. v. *Waidyasekera*[245] 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 caused 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."[246]

The approach based on the classification of categories is fundamentally misconceived, since the legitimate distinction is between degrees, rather than kinds, of relevance.[247] The crucial question is whether "the

240. *Brunet* v. R. (1928) S. C. R. 161 R. v. *Campbell* (1947) 2 C. R. 351
241. *Boardman's* case (1974) 3 All E. R. 887 at p. 905
242. *Thompson* v R. (1918) A C. 221 at p. 231
243. R. v. *Cole* (1941) 165 L. T. 125
244. R v. *Sims* (1946) K. B. 531
245. (1955) 57 N. L. R. 202
246. At p. 212, *per* Basnayake, A. C. J.
247. L. H. Hoffmann, *Similar Facts after Boardman* (1975) 91 L. Q. R. 193 at p. 200

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."[248]

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[249] and the question whether an act was accidental or intentional,[250] 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 purposes such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."[251] The true principle, however, is that "Evidence of abnormal propensity may, in the circumstances of a particular case, be of such probative force as to warrant its reception"[252] 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,[253] an extremely tenuous connection, like possible opportunity, may be sufficient, if the surrounding circumstances, in their cumulative effect, have an overwhelming probative impact.[254] These gradations are not catered for by the conceptually neat, but pragmatically inadequate, enumeration of categories which represent 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 outweighs its

248. *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; of *Mood Music Publishing Co. Ltd.* v. *de Wolfe Ltd.* (1976) 1 All E. R. 763 at p. 766, *per* Lord Denning, M. R
249. See the Evidence Ordinance of Sri Lanka, section 14
250. Evidence Ordinance of Sri Lanka, section 15
251. Rule 404 (b)
252. D. T. Zeffe tt, *op cit*. p. 407
253. D. T, Zeffertt *op cit*, p. 403, note 30
254. See the case cited at note 27, *supra*.

probative value.[255] 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."[256]

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."[257] 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.[258] 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 by the constant and invariable practice of judges when presiding at criminal trials. They are rules of practice and discretion."[259]

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.[260] In a case decided after

255. *Harris* v. *Director of Public Prosecutions*, *supra*; cf R. v. *Barron* (1913) 24 Cox C. C. 83; R. v. Christie (1914) A. C. 545,

256. *Harris* v. *Director of Public Prosecutions* (1952) A. C. 694 at p. 707

257. R. v. *Jaufs* (1951) 52 N. L. R. 457 at p. 461, *per* Dias, J,

258. The reception of confessions and the precautionary rule requiring corrobation of an accomplice's testimony are examples.

259. *Director of Public Prosecutions* v. *Christie* (1914) 10 Cr. App. Rep. 141 at pages 164 165

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

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."[261]

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 submitted 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[262] which do not recognize an overriding exclusionary discretion seperable from the substantive rules. Matters such as unreliability or staleness of the evidence[263] or doubt as to the criminal character of the accused's behaviour on previous occasions[264] – 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 the English common law and the codified South Asian systems, of which the Sri Lankan system is typical:

(1) A basic feature of the Sri Lankan system consists of its 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 Sri Lankan system, 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

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

262. *Hales* v. *Kerr* (1908) 2 K. B. 601; *Perkins* v. *Jeffery* (1915) 2 K. B. 702.

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

264. R. v. *Doughty* (1965) 1 All E. R. 560

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 Sri Lankan law 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 courts have not been inclined to exclude absolutely.

(4) The canon of inclusion evolved by the English common law is more extensive in scope than that embodied in the law of Sri Lanka, not only for the reason spelt out in conclusion(3), above, but because the Sri Lankan codified system, differing in this respect from English law, inflexibly debars 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 codified Sri Lankan system than in the English common law, since the former system links 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 law between acts of the accused which are alleged to be accidental and 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 Sri Lankan system.

(6) The stratification and compartmentalization of defences—which represent a tacit feature of the Sri Lankan system—give the law the appearance of a patchwork and render difficult the identi - fication 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 basic 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 catch-words 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 courts gradually to abandon 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 Sri Lanka deprive the courts in that jurisdiction of a comparable degree of flexibility and scope for initiative.

(8) Despite judicial observations to the contrary in both 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.