

Similar Fact Evidence — Catchwords and Cartwheels

Ronald B. Sklar*

Wigmore once called it a "vast morass of authority".¹ "It is hopeless to attempt to reconcile the precedents" was his judgment in 1940.² In 1972 England's Criminal Law Revision Committee said it "proved far the most difficult of all the [evidence] topics" they had to consider.³ Each was referring to the question of the admissibility of evidence that the accused on one or more other occasions engaged in misconduct similar to that presently charged against him: the admissibility of so-called "similar fact" evidence.

To this vexing subject have been added two further precedents: *D.P.P. v. Boardman*⁴ and *LeBlanc v. The Queen*.⁵ Both are significant, if for very different reasons. *Boardman* may be, as one writer has called it, "an intellectual breakthrough".⁶ *LeBlanc* may be, for those of us who take the exclusionary side of the rule seriously, most ominous.

The admissibility of an item of similar fact evidence is a question of law for the trial judge. Its ultimate weight is a question of fact for the trier of fact. When faced with the prosecution's offer of similar fact evidence⁷ the trial judge has three distinct questions

* Associate Professor of Law, McGill University.

¹ This phrase is attributed to Wigmore by Cowen and Carter in their essay, "The Admissibility of Evidence of Similar Facts: A Re-Examination", *Essays on the Law of Evidence* (1956), 107, though I have not been able to locate the phrase in any of the three editions of Wigmore's treatise.

² Wigmore, *Evidence* 3d ed. (1940), s.302.

³ Criminal Law Revision Committee, *11th Report. Evidence (General)* (1972) (Cmnd 4991), 47. A Canadian commentator prefaced his treatment of the subject with these words: "Frankly, I have found that the subject presents many difficulties, If, therefore, some think that my comments herein show confusion of thought, I can only say, in this respect, that I at least find myself in distinguished company". Savage, *Corroboration and Similar Facts* (1964) 6 Crim.L.Q. 431.

⁴ [1975] A.C. 421 (H.L.).

⁵ (1975) 29 C.C.C. (2d) 97 (S.C.C.) (reported October 19, 1976).

⁶ Hoffmann, *Similar Facts After Boardman*, (1975) 91 L.Q.R. 193.

⁷ Similar fact evidence problems arise — though quite less frequently — in civil cases as well, especially those that involve conduct bordering on the criminal, such as fraudulent misrepresentation. The general policy of exclusion is the same, though "in civil cases the courts . . . have not been so chary of admitting [similar fact evidence]". *Mood Music Publishing Co. Ltd v. De Wolfe Ltd* [1976] 1 All E.R. 763, 766 (C.A.). See generally Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974), 19-26.

to resolve: first, whether a basis exists for admitting the evidence at all; second, whether the evidence, if admissible, is admissible at the point in the trial it was offered; and third, what instructions to give the jury (or himself if he is the trier of fact) concerning the evidence received. The first question, as we shall see, requires the judge to ascertain the probative strength of the evidence and then to balance that strength against the prejudice, confusion and delay which admitting the evidence would produce. The second and third questions each involve him in determining whether the issue on which the evidence has been found to have sufficient probative force actually is in the case at the time the evidence is offered or, if it is not, can fairly be considered available to the defence. The third question further depends on whether the ground upon which the evidence was received is, at the end of the case, still a real one.

The first question is examined in Part I of this article, wherein *D.P.P. v. Boardman* will be considered. Questions two and three are dealt with in Part II, wherein we will consider *LeBlanc v. The Queen*.

I

Properly considered, the admissibility of a piece of similar fact evidence depends upon its *probative strength*, i.e., the degree to which it tends to prove the proposition for which it is being offered. This rather straightforward test of admissibility has lain dormant ever since the landmark decision of *Makin v. The Attorney-General for New South Wales*.⁸ There the Privy Council divided the cases into two groups: those where the similar fact evidence is adduced "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" (in which case, they said, the evidence is inadmissible) and those where the evidence is adduced because it is "relevant to an issue before the jury, [as where] 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" (in which case, they said, it is not inadmissible).⁹ Perhaps predictably, the "relevancy" principle implicit in the second part of the statement was buried by the examples given. The categories listed by the *Makin* court and others intoned in succeeding judgments (early on it was recognized that the statement in *Makin*

⁸ [1894] A.C. 57 (P.C.).

⁹ *Ibid.*, 65.

was not "exhaustive"¹⁰) became the keystones of admissibility. The search in each case was for the acceptable *issue*, e.g., "absence of mistake or accident", "motive", "opportunity", "intent", "preparation", "knowledge" and "identity";¹¹ or for an acceptable rationale of admissibility, e.g., "system", "nexus", "proximity", "underlying unity", "hallmark" and so on. The catchwords were born. Whether the evidence was really *relevant* to the issue by whatever the rationale and whether, if it was, it was *relevant enough* to justify its reception despite its nearly uncontrollable tendency to damn the accused in the minds of the jury, was lost in the shuffle.

The type of judicial thinking spawned by the catchword approach is seen in two cases, one a recent decision from Ontario.¹² In *R. v. Davis*,¹³ a murder prosecution, the deceased and her two-and-a-half year old daughter were lodgers in the accused's house. The accused and deceased had been "on intimate terms". Her body was found in the accused's room. "She had been strangled and had been dead four to twelve days. She had had sexual intercourse before death." Four days before the deceased's body was found, the accused had taken the child to a hospital, leaving her there with a note in his handwriting saying that "her mother is dead". On being examined, the child "was found to have marks on her neck consistent with a strap or band having been pulled tightly round her neck. The marks could not have been caused accidentally". There was other circumstantial evidence of not too substantial a nature implicating the accused.¹⁴

When a doctor sought to testify for the Crown as to the marks on the child's neck the trial judge ruled the evidence inadmissible, presumably on the ground it was highly prejudicial and its only relevancy in the case was *via* an impermissible disposition-to-strangle theory. During the cross-examination of the doctor it was

¹⁰ *Thompson v. The King* [1918] A.C. 221, 237 (H.L.) *per* Lord Parmoor. And see the statement of Viscount Simon in *Harris v. D.P.P.* [1952] A.C. 694, 705 and that of Bull J.A. in *MacDonald v. Canada Kelp Co. Ltd* (1973) 39 D.L.R. (3d) 617, 625 (B.C.C.A.).

¹¹ This listing appears in s.18 of the proposed federal Evidence Code: Law Reform Commission of Canada, *Report on Evidence* (1975), 23-24. This section will be examined more fully in the concluding part of this article.

¹² *R. v. MacDonald* (1974) 27 C.R.N.S. 212, 20 C.C.C. (2d) 144.

¹³ [1963] Crim.L.R. 40.

¹⁴ The deceased was last seen alive in the company of the accused eight days before her body was found. At the time the body was found, a search of the accused's house revealed that "some earth had been moved under the floor-boards". The accused claimed "he had been looking for an electrical fault". He denied having been on intimate terms with the deceased.

suggested to him that the deceased "might have been strangled *by accident* in a moment of sexual passion". At this point, on submission of the prosecution, the trial judge admitted the testimony as to the marks on the child's neck and their cause. The accused did not testify. He was convicted.

The Court of Criminal Appeal dismissed the ensuing appeal. It explained:

If the defence was that [the accused] had strangled [the deceased] accidentally the evidence was highly relevant because the jury could infer from it not only that [the accused] attacked them both¹⁵ but that [the deceased's] death was not accidental.¹⁶

The Court thus agreed with the trial judge that the evidence was relevant and admissible to rebut the suggestion injected into the case on the cross-examination of the doctor that the strangling was accidental.

Davis has since been routinely cited as a "rebutting the defence of accident" case.¹⁷ "Accident" probably heads the list of catchword "exceptions"¹⁸ to the principle excluding similar fact evidence. It is

¹⁵ This remark by the Court as to the relevancy of the evidence to identify the accused as the attacker of both the deceased and the child has to be seen in the context of the immediately preceding sentence where the Court said: "If the defence was that a stranger had murdered [the deceased] and injured the child and [the accused] had panicked on finding [the deceased] dead it was material that he did report the injuries to the child". The Court's reasoning on this point as contained in both this sentence and the remark quoted in the text is not clear. Had a stranger in fact murdered the deceased and injured the child, it does not seem illogical, at least to this writer, for the accused, even if he had panicked over the discovery, to take the injured child to a place where she could be treated. His taking the child to the hospital, in other words, does not seem particularly relevant (certainly not "highly relevant") to the issue of who, the accused or a stranger, attacked the mother and child. If the Court's theory is that it shows a presence of mind inconsistent with panic (a dubious proposition from a psychological point of view), then this rather slight degree of relevance seems hardly enough ground to admit evidence of so prejudicial a nature. *Cf. R. v. Wray* [1971] S.C.R. 272, (1970) 11 D.L.R. (3d) 673.

¹⁶ *Supra*, note 13, 41.

¹⁷ McWilliams, *Canadian Criminal Evidence* (1974), 198; Savage, *supra*, note 3, 457.

¹⁸ The tendency has been to view the instances in which similar fact evidence is held to be admissible as "exceptions" to the "general exclusionary rule" formulated by Lord Herschell in the first sentence of the famous passage in the *Makin* case (*supra*, note 9, and accompanying text). See, e.g., Dickson J. in *LeBlanc v. The Queen*, *supra*, note 5, 102. It is more accurate to view them not as "exception[s] grafted on to" and limiting the scope of the exclusionary rule stated in the first sentence, but as instances of similar fact evidence admissible in their own right whenever sufficiently

no doubt the most dramatic. It was, for example, the ground upon which evidence of the bodies of babies buried in the Makins' several backyards was received in their trial for the murder of one of the infants.¹⁹ Similarly, it was the ground upon which evidence of the deaths of two wives by drowning in their bath while the accused, their husband, was on the premises was admitted on the husband's trial for the death of a third wife by drowning in her bath — not surprisingly called the "brides of the bath" case.²⁰ And it is the ground commonly urged in multiple poisoning cases whenever accidental poisoning could explain the poison death charged.²¹ It is also the use of similar fact evidence most easy to justify. As Wigmore so well put it:

The argument here is purely 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 ... [A]n unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them. Thus, if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (*i.e.* as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small ...²²

The "logical process" in *Davis* seems simple. Once there is satisfactory evidence that Davis attempted to choke the child,²³ the likelihood that the strangulation of the mother was the result of a pure accident or of overexuberant pressure on the deceased's

relevant. *D.P.P. v. Boardman*, *supra*, note 4, 452-453 *per* Lord Hailsham. Whether one adopts one phraseology or the other seems unimportant so long as the *standard* for admissibility, that of the degree of the evidence's probative force on whatever issue it is being offered, is not lost sight of in the process. See Cross, *Evidence* 4th ed. (1974), 318.

¹⁹ *Supra*, note 8.

²⁰ *R. v. Smith* (1915) 84 L.J.K.B. 2153, 11 Cr.App.Rep. 229.

²¹ *R. v. Geering* (1849) 18 L.J.M.C. 215 is the leading case. Referring to it, Cross said, "It would certainly have been a strange thing if a number of people [the accused's husband and two sons] whose food was prepared by the same women had each taken arsenic accidentally over a comparatively short period". Cross, *supra*, note 18, 325.

²² Wigmore, *supra*, note 2.

²³ The evidence that it was Davis who attacked the child was circumstantial and not particularly strong. See on this point *infra*, note 27, and accompanying text.

throat during sexual intercourse is reduced. The evidence, in other words, is relevant. Is this enough to make it admissible?

It is submitted that *on the facts of this case* it is not. The question turns on the degree of the evidence's relevance. We have here only one other act, not a history of strangling people. It is almost as if in *Makin* there had been only one other infant found buried in a Makin backyard, and not ten or eleven.²⁴ Neither the type of victim (again, compare *Makin*), nor the method, a strap in the case of the child, nor, so far as one can tell, the circumstances of the two acts, is similar. We have the additional element that a two-and-a-half year old child was the other victim and there is depressing evidence, that attacks on young children can be an unmotivated response to a "crisis situation".²⁵ The strangulation death of the mother had it preceded the attempt to choke the child — and there was no way of telling from the evidence which came first or exactly how close in time they were²⁶ — could have amounted to such a "crisis situation" irrespective of whether the mother had been strangled intentionally or accidentally. Furthermore, the evidence linking Davis to the attack on the child was thin. No one saw him attack the child. Direct evidence linking an accused to the other criminal act is not needed of course,²⁷ but here the only linking evidence was that Davis brought the child to the hospital. Finally, and most importantly, the effect of this evidence must be balanced against its purported relevance. It brands the accused with

²⁴ "The answers to many questions fall to be taken into account when investigating [a piece of similar fact evidence's] strength or weakness. Such questions include: How well does the evidence establish the similar facts? How well do the similar facts establish the propensity? How similar are the facts? How many times have they occurred? Within how short a space of time have these and the instant facts taken place? How unusual is the propensity which they establish?" Cowen and Carter, *supra*, note 1, 145. And see *D.P.P. v. Boardman*, *supra*, note 4, 453 *per* Lord Hailsham; Neward, *The Judicial Discretion to Exclude Similar Fact Evidence* (1967) 6 West.Ont.L.R. 1, 12-18.

²⁵ Canada Council on Children and Youth, *Child Abuse: A Bibliography* (1976), xiii-xiv.

²⁶ The date of the deceased's death could not be placed more precisely than sometime between April 4th (the last day she was seen alive) and April 8th (four days before her body was found). The deceased's daughter was seen in the accused's company on April 7th and was taken to the hospital with her injuries on April 8th. Even if from the last two facts one can infer that the attack on the child occurred on either the 7th or the 8th, it still leaves it impossible to determine if the mother was already dead, was killed afterward or was killed at about the same time as the attack on the child.

²⁷ McCormick, *Evidence* 2d ed. (1972), 451-452.

a most odious crime and thus pollutes the atmosphere of his trial with hostility. It also creates a separate and distracting issue — was he the one who attacked the child? Its probative force does not seem sufficient, at least to this writer, to overcome these liabilities. Arguably, *Davis* is even a fit case for exercise of the trial judge's discretion to exclude evidence of slight probative value and potentially grave prejudicial impact.²⁸

As shall be seen in our discussion of the next case and of *Boardman*, replacing the mechanical catchword approach with one of balancing the probative force of the evidence against its prejudicial effect does not ease the task of the court; quite the contrary. Balancing tests never are easy.

The second case which illustrates the seductive capacity of the catchwords is the recent case of *R. v. MacDonald*.²⁹ The charge again was murder. The deceased had been beaten to death, the severity of some of the wounds indicating she had been kicked during the beating. The deceased and accused had lived together off and on before and after the accused's second unsuccessful marriage. Her body was found in a bedroom of the small house she shared with the accused. The accused was found lying semi-conscious on a chesterfield in the living room. Empty and full beer bottles were found in the house. An empty 12-ounce whisky bottle was on the kitchen table. Bloodstains were found on a shirt hanging behind the kitchen door and on a pair of men's black shoes also in the kitchen. A note written by the accused on a brown paper bag and which could have been interpreted as a suicide note³⁰ was lying on the kitchen table. The accused had a gunshot wound in the back of the head. A 22-caliber rifle was found in the bedroom. It could not be determined if it had inflicted the accused's wound; fragments of bone and metal had been removed from the accused brain in the course of two operations, but the bullet had been left where it was. A fire-arms expert testified that the weapon which caused the wound would have had to have been in contact with the accused's skull at the time of discharge. The wound, according to the neurosurgeon who had operated on the accused, "was on a level plain".

²⁸ *R. v. Wray*, *supra*, note 15; see generally Weinberg, *The Judicial Discretion to Exclude Relevant Evidence* (1975) 21 McGill L.J. 1, 14-15. An attempt to invoke this discretion failed in *Davis* itself. *Supra*, note 13, 41.

²⁹ *Supra*, note 12.

³⁰ The note read: "Mom is gone. I love her so much. To hell with everything. I know Mom and me love you. Make the best. All our love. Norm and Mom". *Supra*, note 12, 216.

The fire-arms expert demonstrated how the accused could have shot himself in the back of the head with the rifle found in the bedroom. The trial judge "was somewhat skeptical of this demonstration" though he left the matter to the jury.

The accused testified in his own defence that he had no memory of any events occurring within the five-day period beginning with the last day the deceased was seen alive (in the company of the accused) and ending with the day her body was found. The neurosurgeon had testified that the bullet's position in the brain probably would produce a defective memory for that period. Five dollars and twenty-two cents was found in a pocket of the pants the accused was wearing when he was found on the chesterfield. No other money was found in the house, although, according to the accused's testimony at the trial, he and the deceased had at least \$250 in savings hidden in the house in an empty whisky bottle carton. There was some other evidence tending to support an intruder theory.³¹

Given this state of the evidence and the primary issue being the question of who beat the deceased to death ("identity", in the parlance of the similar fact cases), the accused or an intruder, the deceased's twenty year-old son was allowed to testify, after a *voir dire*, that during the period he had lived with the accused and his mother (for "some years" ending about eight months before she was killed), he had seen them fight "over 100 times usually when one or both of them were intoxicated". He testified further that he had "observed the [accused] strike his mother on the body, and kick her in the stomach when she was on the floor", that in June, 1972, after the witness and accused had argued over the latter's beating of the deceased, the accused "had apologized to [the witness] for 'beating Mom all the time' and said that if he ever did it again, he would kill himself".³² The accused in his testimony at the trial denied ever making that statement. He further denied ever kicking the deceased or hitting her "with a blunt instrument or anything else". He denied "beat[ing the deceased] up 100 times", although he admitted "hitting her slaps" and said "he

³¹ When the deceased and the accused were found, the bedroom and living room were "a mess". A chest of drawers in the bedroom "was overturned and broken open". Four bullet holes were found in the kitchen wall. The evidence as to how long they were there "was inconclusive". The accused testified he had never noticed any holes there before and had never fired a gun inside the house.

³² *Supra*, note 12, 217.

might have hit her seven or eight times or so".³³ He was convicted of manslaughter.

Arnup J.A. wrote the judgment for a unanimous Ontario Court of Appeal. After quoting from Phipson and McCormick and referring to the principal English and Canadian cases, including the old case of *Perkins v. Jeffrey*,³⁴ a prosecution for indecent exposure, in which the "illuminating" distinction was drawn between evidence of a previous exposure to the *same* woman (admissible on the "identity" of the accused as the man who had exposed himself on the instant occasion) and evidence of previous exposures to *other* women (not admissible on "identity", but admissible if and when a question of mistake or lack of wilfulness was raised), Arnup J.A. continued:

The primary defence [in the present case] was: "I didn't do it". The evidence of previous severe beatings and kicking of this very woman by the accused man, on more than 100 previous occasions, was intended to be probative of the fact that the accused did the actual beating that caused her death. ... In the circumstances of this particular case it is my view that the evidence was admissible. I base this on the broad basic principle on which the exclusionary rule is based. This evidence went far beyond showing that the appellant was a person of bad character who when he had been drinking beat up other persons, including women. If believed, it showed that on over 100 occasions, when he had been drinking, he had severely beaten the very woman who was killed by being beaten to death.

There was evidence from which the jury could infer that the appellant had been drinking during the time period within which the deceased was killed. There was evidence of blood on a pair of men's shoes; the appellant was the only man living in the house. He had kicked her when she had been knocked down, on many previous occasions.³⁵

Had the court stopped here, there would be little to add. The relevance of the son's evidence, once it is believed by the jury, is plain. It shows that the accused had a pronounced propensity to beat and kick his common-law wife, especially when intoxicated. This is how she met her death. It is of course still possible that the beating was administered by an intruder, but the coincidence would be extraordinary. Common sense dictates admission of the evidence.

But the Court did not stop here. It continued:

In my view, the evidence of the previous beatings was admissible to prove the identity of the person who beat the deceased to death. A single beating is not so unusual as to be a "hallmark", but over 100 beatings

³³ *Ibid.*, 218.

³⁴ [1915] 2 K.B. 702.

³⁵ *Supra*, note 12, 222-223.

of the same woman by the same man comes within the principle of the "hallmark" cases.³⁶

The Court thus invoked — on the issue of "identity" — a time-tested line of authority, cases in which, as McCormick, whom the Court quoted on the point, phrased it, the other occurrences and the occurrence charged are "so nearly identical in method as to earmark them [all] as the handiwork of the accused. . . . The device used must be so unusual and distinctive as to be like a signature".³⁷

The case most frequently mentioned as an example of this rationale for admitting similar fact evidence is *R. v. Straffen*.³⁸ In that case, the accused was charged with strangling a young girl. Earlier on the day of the murder he had escaped from an asylum for the criminally insane. There was evidence of his presence in the neighborhood where the crime was committed. He admitted to having seen the victim, but there was no evidence they were seen together. His defence was a denial of the act. Some eight months before he had been charged with two other strangling deaths, and had been declared unfit to plead to those by reason of insanity. When questioned at the asylum after his capture and return, he admitted to having perpetrated these other two stranglings. The evidence of this admission and the circumstances surrounding the previous two acts were introduced at his trial, and held on appeal to have been rightly received. There were the following similarities amongst the three crimes: all three victims were young girls, all were killed by manual strangulation, in no case was there evidence of sexual molestation or of any other apparent motive, in no case was there evidence of a struggle, and, finally, no attempt was made to conceal any of the bodies although that could easily have been

³⁶ *Ibid.*, 223. The court added, "At the very least, the evidence was admissible through the avenue of motive". *Ibid.* "Motive" as a separate "avenue" for the admissibility of similar fact evidence is found in cases where the other similar act or acts serve as an explanation for the offence charged, a classic example of which is the film "Kind Hearts and Coronets" in which Sir Alec Guinness methodically murders off each of the relatives (all played by Sir Alec) standing between him and an inheritance. And see generally McCormick, *supra*, note 27, 450-451, and cases there cited. Even if we accept the questionable assumption that beatings of the sort seen in *MacDonald* are attributable to some underlying ill will or malice toward the person beaten rather than to a violent temperament exacerbated by drink, resort to "motive" in a case like *MacDonald* only seems a circuitous and artificial way of saying that the history of beatings was, under the circumstances, highly relevant on the issue of who beat the deceased to death.

³⁷ McCormick, *supra*, note 27, 449.

³⁸ [1952] 2 Q.B. 911, [1952] 2 All E.R. 657.

done.³⁹ The evidence of the prior acts was admitted, according to the Court of Criminal Appeal, "for the purpose of identifying the murderer of Linda Bowyer as being the same individual as the person who had murdered the other two little girls in precisely the same way".⁴⁰

The *Straffen* Court took pains to deny it had sanctioned admission of evidence of a propensity for strangling,⁴¹ which is only partly true. The evidence certainly disclosed such a propensity but one of strangling under very distinctive, and hence highly probative, circumstances.

A second example of "hallmark", and a brief respite from stranglings and fatal beatings, is an American case,⁴² a prosecution for robbery. The robbery charged was committed by persons who at the time were wearing bus driver uniforms and carrying guns and flashlights. They drove their car alongside the victim's car, compelled him to stop, then, impersonating police officers, ordered him out of the car and robbed him. Evidence was adduced identifying the accused as the perpetrators of two other robberies committed in exactly the same way in the same general area during the preceding two weeks. That evidence was held both relevant and admissible on the issue of whether the accused were the robbers on the occasion charged. Again, what was proved was a style, a *modus operandi* that made it highly unlikely the accused had been mistakenly apprehended as the perpetrators on the last occasion. (It also proves the advantages of "versatility".⁴³)

It must be clear that *R. v. MacDonald* is not a "hallmark" case. The Court seemed to think that the *number* of beatings made the evidence "unusual" enough to admit it under the "hallmark" rationale. But it is not repetition that brings an act within the principle. It is the presence of some special or unique feature marking the other acts and the act charged as something out of the ordinary. One previous beating could be distinctive enough if it were shown that it as well as the fatal beating were performed, to borrow a remark from the *Boardman* case, "wearing the ceremonial head-dress of a Red Indian chief".⁴⁴ Beating someone with fists and feet,

³⁹ *Ibid.*, 916.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Whiteman v. State*, 119 Ohio St. 285, 164 N.E. 51 (1928). And see the similar case of *R. v. Davis & Murphy* (1971) 56 Cr.App.Rep. 249.

⁴³ Cross, *supra*, note 18, 314.

⁴⁴ *Supra*, note 4, 454 *per* Lord Hailsham.

with all due respect, is nothing out of the ordinary as violent assaults go.

"Hallmark" is misplaced in *MacDonald*. If believed, the son's evidence of the accused's previous violent conduct toward the deceased *when seen with the other evidence in the case* was quite obviously very probative. It needed no crutch, "hallmark" or otherwise, to admit it. "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."⁴⁵

Reverting to catchwords when none are needed is more than just a case of overkill. Courts tend to employ the catchwords indiscriminately; degrees of relevance and shadings in the facts are not appreciated. For example, what if the "other evidence" in *MacDonald* had not dovetailed so nicely with the evidence of the previous beatings? What if the accused had not been found lying semi-conscious on a chesterfield in the living room, but had been located later that day, none the worse for wear, in a tavern or at his job? Or what if there had not been evidence that drinking had gone on, or there had not been any suicide-type note, or there had been more convincing evidence that the house had been ransacked by an intruder? What then?

Calling the previous beatings a "hallmark" or declaring the evidence goes to "identity" solves nothing.⁴⁶ The question is one of relevancy, not labels. As such, "the slightest movement of the kaleidoscope of facts creates a new pattern which must be examined afresh".⁴⁷ Does the evidence retain sufficient probative value to justify the prejudice, delay and confusion it produces? Of the variations in the facts mentioned above, only the absence of the suicide note would seem too insignificant to present a problem for the trial judge who must rule on admissibility. More definite than that one cannot (and should not) be. As Lord Cross declared recently:

The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-

⁴⁵ Stone, *The Rule of Exclusion of Similar Fact Evidence: England* (1936)

46 Harv.L.Rev. 954, 983-984.

⁴⁶ "The great drawback in the use of categories or catchphrases such as 'it shows a system' is that, as happened with the occupier's liability categories and catchphrases, they ossify and lead to hair-splitting distinctions over minutiae." Killeen, *Recent Developments in the Law of Evidence* (1975) 18 Crim.L.Q. 103, 120.

⁴⁷ Hoffman, *supra*, note 6, 204.

cautious jury, if they accepted it as true, would acquit in face of it. In the end ... the question as I see it must be one of degree.⁴⁸

This passage appeared in the most recent of a line of House of Lord decisions, *D.P.P. v. Boardman*.⁴⁹ Viewed narrowly and pessimistically, *Boardman* is just another decision plying the "hallmark" principle albeit with greater clarity than ever before. Viewed broadly and optimistically, it will finally replace unthinking reliance upon the catchwords by basic relevancy principles. Viewed moderately and realistically, it will probably fall somewhere in-between.

The facts of *Boardman* were routine as these types of similar fact evidence cases go. The charge was buggery. The accused was headmaster of a boarding school containing about 30 boys. He was convicted on one count of buggery with one S, aged 16, a pupil at the school and on another count of inciting H, a pupil aged 17, to commit buggery. (A conviction on a third count involving a third boy was quashed by the Court of Appeal and is not important here.) No application was made for separate trials. Each boy testified at the trial only as to the alleged act forming the count in which he was involved and to other specific instances in which he claimed he was approached by the accused. In S's case, there were several such earlier incidents leading up to the act charged. Some of these incidents the accused denied in their entirety. For some, he admitted a part of the incident and offered innocent explanations of the rest. The most material of these earlier incidents occurred at 4:00 or 5:00 in the morning when S was asleep in the dormitory. According to S, the accused awakened him and, professing his love, asked S to come to the sitting room for five minutes. The accused later admitted speaking to S at that time, but said that he did so because he had found S committing homosexual acts in a bunk with another boy. He said that he asked S and the other boy to come with him to the sitting room. When the other boy pretended to remain asleep and S refused to accompany him, the accused left them where they were. The accused, according to S, during these various approaches requested S to play the active part in the act, indicating that he, the accused, would play the passive part. These were their respective roles, S testified, in the act forming the substance of the charge involving him. H testified to the act which was the basis of the second count and to one previous incident. This previous incident was similar to the incident testified to by S in that the accused sometime between midnight

⁴⁸ *D.P.P. v. Boardman*, *supra*, note 4, 457.

and 2:00 a.m. woke H who was asleep in the dormitory. He told him to get dressed and together they then went by taxi to a disco club. After some drinks they returned to the school and, while talking in the sitting room, the accused, according to H, touched H's penis through his trousers and suggested they sleep together, with he, H, taking the active part and the accused taking the passive part. The accused admitted waking up H and taking him to the disco club, but claimed his purpose was to confront H with an older "bad" woman with whom H was associating. The accused denied the rest of the incident as related by H.

The issue reached the House of Lords on the question of whether the evidence of one boy could properly be considered by the jury as corroboration of the testimony of the other boy, and *vice versa*. An earlier case⁵⁰ had decided that similar fact evidence can serve a corroboratory function if it is first found to be sufficiently relevant and admissible. As Lord Hailsham said in *Boardman*, "to ask whether evidence can be corroboration or is relevant is really to ask the same question in two different ways".⁵¹

The House of Lords thus proceeded to the question of whether the evidence of each boy was relevant and admissible on the count involving the other boy. The convictions were upheld. Taking the narrow view of the case first, the House simply reaffirmed the principle that in homosexuality cases evidence of other similar acts may become admissible "because of their striking similarity to other acts being investigated and because of their resulting probative force".⁵² Again, "if the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused ... [such] that common sense makes it inexplicable on the basis of coincidence", it will be admissible.⁵³ However, even when seen only as a homosexuality case, certain important propositions or near propositions emerge from the case:

1. There is no "special rule" in cases of homosexuality or, by extrapolation, instances of other forms of "abnormal behaviour", such that upon a charge alleging such behaviour, evidence of other similar acts automatically becomes admissible. All their Lordships⁵⁴ rejected this pre-Kinseyian approach; cases suggesting the

⁴⁹ *Supra*, note 4.

⁵⁰ *D.P.P. v. Kilbourne* [1973] A.C. 729 (H.L.).

⁵¹ *Supra*, note 4, 449.

⁵² *Ibid.*, 439 *per* Lord Morris.

⁵³ *Ibid.*, 462 *per* Lord Salmon.

⁵⁴ *Ibid.*, 441 *per* Lord Morris, 443 *per* Lord Wilberforce, 450, 455-456 *per* Lord Hailsham, 458 *per* Lord Cross, 461 *per* Lord Salmon.

existence of such a special rule are in that sense no longer good law.⁵⁵ The approach in homosexuality and similar-type cases where the question is whether the acts alleged were performed and, if so, whether they were performed by the accused (as distinguished, for example, from the questions of whether acts admittedly done by the accused were done accidentally or unwilfully), is no different than in other cases. Whether it be called "unity", "system", "striking similarity", "hallmark", a "signature", or the like, there must be

⁵⁵ E.g., *R. v. Sims* [1946] K.B. 531; *R. v. King* [1967] 2 Q.B. 338; *R. v. Thompson* [1954] O.W.N. 156, (1954) 107 C.C.C. 373 (H.C.). An interesting case in this regard is *R. v. Glynn* [1972] 1 O.R. 403, (1972) 5 C.C.C. 2d 364 (C.A.), in which the charge was murder and evidence had been introduced of the presence of "traces of semen" in the deceased's anus. Evidence that the accused "had engaged in homosexual acts on previous occasions" was admitted at the trial and upheld on the appeal "on the question of identity of the person who committed the murder". The brief opinion of the Court of Appeal is unsatisfactory in that it fails to indicate (1) how long the semen had been in the deceased's anus (if deposited there some appreciable time before his death it would not connect, even remotely, the person who performed such act with the killer) and (2) if the other acts proved against the accused were similar to those committed on the deceased (*i.e.*, whether they showed the accused to be the active party in acts of anal intercourse), which would certainly have greatly strengthened the probative force of the other acts. Assuming as we must that there was other evidence connecting the accused with the death of the deceased (motive, opportunity, and the like), the evidence disclosing the homosexual tendencies of the accused seems quite probative on the issue of who killed the deceased. Given the nature of the charge and the clear and specific purpose for which the evidence of other homosexual acts was admitted, the evidence also does not seem likely to confuse and distract the jury from the main issue. However, even if the result in *Glynn* may be correct, its reasoning is unsound. The Court approved the trial judge's explanation to the jury that the evidence was admitted because it tended to show "an abnormal propensity in a certain direction". This is a throwback to the outmoded and now (since *Boardman*) unacceptable view of homosexuality as a special class of crime "which stamps the individual as clearly as if marked by a physical deformity" (*R. v. Sims, supra*, 538). Then the Court, to support further its conclusion the evidence was admissible, analogized to "a case where it is proved death could have been caused only by a left-handed person, evidence that the accused had the characteristic of being left-handed would clearly be admissible on the question of identity". *Ibid.*, 405. This analogy serves correctly to underscore the limited purpose for which the evidence of the other acts of homosexuality was admitted in *Glynn*. However, it overlooks a fairly fundamental point: at least in this day and age, no one on a jury is likely to be hostile to an accused because he is left-handed. The same cannot as yet be said for the accused who is shown to practise homosexuality. (For "a psychologist's point of view" of *Glynn*, see the note by Doob (1972) 15 Crim.L.Q. 119).

something about all the incidents that makes rejection of the evidence "an affront to common sense".⁵⁶ That the act of homosexuality "took a particular form" is not necessarily enough; for instance, all their Lordships were critical of the trial judge for his relying solely upon the active-passive aspect of the alleged relationship between the boys and the accused as imparting sufficient "similarity", Lord Cross stating, for example, "whether it is unusual for such a middle-aged man to wish to play the pathic rather than the active role I have no idea whatever and I am not prepared, in the absence of any evidence on the point, to make any assumption, one way or the other".⁵⁷

2. The trial judge in his summing up to the jury considered the possibility of a conspiracy between the boys. He told the jury that there was no suggestion in the evidence that they had collaborated on their stories. The defence, rather, was that each boy, for his own reasons, independently made up a false story implicating the accused. This summing up was not challenged by the defence. Addressing this point generally, Lord Wilberforce was of the opinion that a trial judge should exclude similar fact evidence whenever there is "the possibility, as it appeared to him, of collaboration between boys

⁵⁶ *Supra*, note 4, 453-454 *per* Lord Hailsham. For example, in the case of *R. v. Cline* [1956] O.R. 539, (1956) 4 D.L.R. (2d) 480 (C.A.), the accused was convicted of indecent assault (on the appeal, the conviction was altered to attempted indecent assault). The complainant, a twelve year-old boy, testified that the accused had stopped him on the street in the evening "and asked him if he would carry his suitcases. The [accused] had no suitcases with him". This episode happened with the same boy on another evening. Seven other boys between the ages of eight and twelve testified to being stopped on the street in the evening and being asked to carry the accused's suitcases. On each occasion the accused did not have any suitcases with him. As there was no disputed issue of "identity" at the trial, the evidence was offered and held properly received on the issue of the "guilty design and criminal intent" needed for the crime of attempt. However, had there been an issue as to whether it was the accused who had approached the complainant on the two occasions in question, it is submitted there would have been enough "striking peculiarities common to [all the] stories" (Boardman, *supra*, note 4, 460 *per* Lord Cross) to admit the evidence of the other boys equally on the issue of identity. What is "striking" and what is "peculiar" of course are subjective questions of degree. Compare to *Cline*, for instance, *R. v. Wilson* (1973) 58 Cr.App.Rep. 169 where in a prosecution for rape and assault occasioning actual bodily harm it was held that evidence of two female complainants, one aged 19 the other aged 20, each of whom was picked up at dances at the same club and given a lift in accused's car wherein they were allegedly sexually assaulted lacked sufficient "special features" (p.175) to be admissible each as to the other on the question of whether the assaults complained of took place.

⁵⁷ *Ibid.*, 460.

who knew each other well".⁵⁸ None of the other Law Lords put the point so strongly. However, both Lord Morris and Lord Cross intimated quite strongly that the presence of a suggestion of collaboration on the facts of this case would have required the quashing of these convictions.⁵⁹ Put another way, though none of the Law Lords, with the possible exception of Lord Salmon,⁶⁰ seemed particularly impressed with the "strikingness" of the similarities (the active-passive aspect and the similarity of the two night-time approaches in the dormitory), it *was* unlikely, as Lord Cross noted, that "two liars concocting false stories independently of one another would have . . . hit upon" these common features.⁶¹ Even with this inherent improbability in the case, two of their Lordships⁶² labelled the case "border-line", which no doubt it was. Lord Wilberforce "confess[ed] to some fear that the case, if regarded as an example, may be setting the standard of 'striking similarity' too low",⁶³ a fear the present writer shares.

3. Prior to *Boardman*, the notion existed that there was a difference affecting the admissibility of similar fact evidence, at least in "abnormal behaviour" cases, between the defence "I was there and did such and such but not what is alleged against me" (styled "innocent association") and the defence "I am not your man at all" (a "complete denial"). In *Boardman*, "innocent association" lost its catchword status. The presence of this defence as an issue in the trial had been advanced as an independent ground for admitting similar evidence in the "much reviewed"⁶⁴ (and abused) *R. v. Sims*.⁶⁵ In *Boardman*, the judiciary had yet another go at *Sims*. In *Sims*, there were a variety of counts charging homosexual acts with four different men. Each man testified he was invited into the accused's house and the accused there committed the acts charged. The accused's response to all this was to say that he had invited these men into his house, but only "to have a game of cards and to sit with him in his cottage".⁶⁶ The Court of Criminal Appeal, God-

⁵⁸ *Ibid.*, 444.

⁵⁹ *Ibid.*, 441-442 *per* Lord Morris, 460-461 *per* Lord Cross.

⁶⁰ *Ibid.*, 463. See generally on this collaboration point Tapper, *Similar Facts: Peculiarity and Credibility* (1975) 38 M.L.R. 206, 208-209.

⁶¹ *Supra*, note 4, 461.

⁶² *Ibid.*, 445 *per* Lord Wilberforce, 461 *per* Lord Cross.

⁶³ *Ibid.*, 445. See generally Tapper, *supra*, note 60.

⁶⁴ *Supra*, note 4, 438.

⁶⁵ *Supra*, note 55.

⁶⁶ This fact appears in *R. v. Hall* [1952] 1 K.B. 302, 306, [1952] 1 All E.R. 66, 68 wherein Lord Goddard C.J. elaborated upon the Court's judgment in *Sims*.

dard C.J. (as he then was), held that the "striking similarity" of the acts described, especially as there was "nothing to suggest a conspiracy", was sufficient to allow reception of the evidence of each act on each of the other counts in the case (a holding for which *Sims* is still good law⁶⁷); that repetition alone is enough to justify admission for "a crime in a special category" (as to which *Sims* now has been all but overruled); and, thirdly, that:

The visits of the men to the prisoner's house were either for a guilty or an innocent purpose: that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose. The same considerations would apply to a case where a man is charged with a series of indecent offences against children, whether boys or girls: that they all complain of the same sort of conduct shows that the interest the prisoner was taking in them was not of a paternal or friendly nature but for the purpose of satisfying lust.⁶⁸

Lord Wilberforce, Lord Hailsham and Lord Cross in *Boardman* doubted the validity of this third proposition. Lord Wilberforce viewed it "suspiciously" as a "specious manner of outflanking the exclusionary rule";⁶⁹ Lord Hailsham could not see "the logical distinction between innocent association cases and cases of complete denial, since the permutations are too various to admit of universally appropriate labels";⁷⁰ Lord Cross expressed "great difficulty" in accepting the proposition since "in each case [the accused is] saying that my accuser is lying".⁷¹ Both Lord Morris and Lord Salmon, however, seemed to consider the accused's admission to the night-time approaches and his attempt to provide an innocent explanation as *factors* the trial judge could rightly weigh in determining the probative value, and hence the admissibility, of the boys' evidence.⁷²

As a *blanket* category of admissibility, a catchword, Lord Goddard's "innocent association" proposition seems doomed. If *Boardman* has not interred it, it will be done when the right case comes along. But as a *factor* in determining admissibility, the distinction between the defence of "innocent association" and that of a complete denial still seems viable. For example, consider how a court should decide a case like *Sims* if we were to add to it the following

⁶⁷ See, e.g., *Mood Music Publishing Co. Ltd v. De Wolfe Ltd*, *supra*, note 7, 766.

⁶⁸ *Supra*, note 55, 540.

⁶⁹ *Supra*, note 4, 443.

⁷⁰ *Ibid.*, 452.

⁷¹ *Ibid.*, 458.

⁷² *Ibid.*, 442 *per* Lord Morris, 463 *per* Lord Salmon.

facts: that each man alleged he had laid down in bed with the accused when and where the homosexual acts were committed (again with no suggestion of a conspiracy between the men) and that the accused admitted that he was in bed with them, but that all he and they did on each occasion was sleep.⁷³ At some point, and it is submitted that this hypothetical addition to the facts in *Sims* is such a point, a defence of "innocent association" becomes *in light of all the facts* so inherently improbable that, again, "only an ultra-cautious jury if they accepted [the other evidence] as true, would acquit in face of it".⁷⁴ Yet, in the same factual situation, a defence of "complete denial" of any association with the men — unless their stories were "strikingly similar" (and, let us hope, this would *not* be supplied solely by the fact all the acts were alleged to have occurred in bed) — would require exclusion of the evidence. The point being made is that there is, as well, no blanket rule of *exclusion* in "innocent association" cases. In fact, if *Boardman* teaches us anything, it is that in similar fact cases categorical rules, whether they be of admissibility or exclusion, are now (and, *Boardman* says, always have been) unacceptable.

This brings us to the broader view of *Boardman*. One author⁷⁵ has called the case "an intellectual breakthrough" and "by far the most important decision on similar fact evidence since *Makin* . . .". Whether that optimistic verdict proves correct will depend upon whether future courts are able to lift the decision out of its dreary context, that is, yet another homosexuality case concerned with the amount or lack of similarity of the various acts testified to. Without question, for courts bound to the artificial approach of *Makin* and its progeny, *Boardman* contains a deeper and revolutionary (if not wholly surprising⁷⁶) message. It tells us: that the admissibility of evidence of other similar acts depends upon their *degree of probative force*; that since similar fact evidence is perforce "logically probative"⁷⁷ (*i.e.*, evidence a man has done a similar

⁷³ Compare *R. v. King*, *supra*, note 55 with *R. v. Harwood* [1970] 1 Q.B. 133, discussed in Hoffman, *supra*, note 6, 203-204.

⁷⁴ *Supra*, note 48, and accompanying text.

⁷⁵ Hoffman, *supra*, note 6, 193. And see also Killeen, *supra*, note 46, 120.

⁷⁶ It is a bit disheartening, at least to this writer, that it has taken some 80 years (*Makin* was decided in 1894) and "a shoal of reported cases" (Hoffman, *supra*, note 6, 196) for this revolutionary "breakthrough" to take place; disheartening perhaps, but again not particularly surprising. "Man is a creature" Robert Louis Stevenson wrote in 1881 (*Virginibus Puerisque*, I, ch.2), "who lives not upon bread alone but principally by catchwords". Mr Stevenson must have been acquainted with some lawyers.

⁷⁷ *Supra*, note 4, 449-450 *per* Lord Hailsham quoting from *D.P.P. v. Kilbourne*, *supra*, note 50, 756-757 *per* Lord Simon. The former notion that

thing on some other occasion makes it more likely "than it would be without [such] evidence"⁷⁸ that he did it on the occasion in question), to be admissible that degree of probative force has to be in the particular circumstances *especially strong*, so much so, to quote once more the remark of Lord Cross, "that only an ultra-cautious jury, if they accepted it as true, would acquit in face of it"; and that in deciding whether the evidence has reached that high plateau, "much depends in the first place upon *the experience and common sense of the judge*".⁷⁹

It is not only "strikingly" similar similar fact evidence that possesses the necessary high degree of probative strength. An item of similar fact evidence may gain admissibility merely because it is "similar". *Everything depends on the particular evidence and issues in the case*. Thus, in *Straffen*,⁸⁰ the leading example of "striking" similarity, had the accused admitted the act of placing his hands on the young girl's throat (or even, perhaps, only that they had been together for some period of time), but claimed her death was somehow caused unintentionally, it is submitted his admission to having several months before strangled two other young girls intentionally would have been admissible, even had there been no other features of similarity among the three acts. Evidence he had twice before strangled young girls intentionally renders his claim of an unintentional strangling on the third occasion most unbelievable. (Any reader wishing to infer from this that the defence of "accident" *automatically* sanctions receipt of other similar acts is referred back to the discussion of *Davis*.)

To use another example, in a breaking and entry case in which the issue is whether or not the accused was the one who broke

similar fact evidence is excluded because it is irrelevant or "deemed irrelevant" has been laid to rest (one would expect) by Lord Simon's speech in *Kilbourne*. And see the comment of Lord Cross in *Boardman*, *supra*, 456.

⁷⁸ McCormick's formulation of the test of relevancy: McCormick, *supra*, note 27, 437.

⁷⁹ *Supra*, note 4, 444 *per* Lord Wilberforce (emphasis supplied). In the civil infringement of copyright case of *Mood Music Publishing Co. Ltd v. De Wolfe Ltd*, *supra*, note 7, 766, the holding in *Boardman* was summed up by Lord Denning M.R. in the following terms: "The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice: and its admission will not operate unfairly to the accused". The term "unfairly" used by Lord Denning contrasts with the term "prejudicially". The evidence "prejudices" the accused, but not "unfairly" if its probative value is sufficiently strong. See a similar play on these terms in *R. v. Wray*, *supra*, note 15, 293 *per* Martland J.

⁸⁰ *Supra*, notes 38-41, and accompanying text.

into the house, evidence of other break-ins committed by the accused generally would not possess sufficient probative strength on that issue unless the other break-ins were "strikingly" similar to the one charged (*e.g.*, a special and unusual method of gaining entry, the accused's always leaving behind a red, white and blue bandana, *etc.*). On the other hand, were the accused to be caught red-handed inside the house and claimed he had entered the house mistakenly thinking it was his own or looking for a place to sleep or while in a state of "automatism",⁸¹ evidence of his burglarious history, as a matter of "experience and common sense" and without regard to any particular features of similarity, would in ordinary circumstances be admissible to refute such stories. Yet, even here, other evidence (he was drunk and lived on the same block, his house and the house broken into looked alike, when arrested he appeared to be in a dazed state, *etc.*) might well lead to a different decision on admissibility, for what in a normal case of circumstantial evidence merely goes to the weight of the evidence in a similar fact case determines its admissibility. The common law's "deeply rooted and jealously guarded"⁸² policy of keeping out prejudicial and distracting evidence of an accused's past, demands of such evidence that it be more, much more, than just "relevant".

Before turning to the case of *LeBlanc v. The Queen*, one further side of the problem deserves attention. Courts and writers (this one included) often intone the qualifying phrase, "if the evidence is accepted by the jury", when discussing the probative force to which a piece of similar fact evidence is entitled. The witness who testifies to the other acts of misconduct, in other words, like any other witness has to be believed by the trier of fact before any weight may be attached to his evidence. The special problem with similar fact evidence, however, is that the accused is rarely ready for it. The accused in *MacDonald*, for example, came to court prepared to meet evidence that he had beaten his common-law wife to death sometime between April 21 and April 25, 1973. He was not prepared

⁸¹ See *R. v. Harrison-Owen* [1951] 2 All E.R. 726, where Lord Goddard held that evidence of previous convictions for burglary was not admissible to rebut a defence that the accused's presence inside a house was the result of an involuntary act. The decision seems unsound, especially in the light of *Boardman*. It was doubted by Lord Denning in *Bratty v. Attorney General for Northern Ireland* [1963] A.C. 386, 410 (H.L.).

⁸² Viscount Sankey L.C. in *Maxwell v. D.P.P.* [1935] A.C.309, 317, quoted by Lord Morris in *Boardman*, *supra*, note 4, 439. It is noteworthy that in the continental European system of evidence, where relevancy is king, similar fact evidence is matter-of-factly admitted. 1 *Wigmore*, *supra*, note 2, ss.193, 194. For a graphic example, see Bedford, *Faces of Justice* (1961), 164, *et seq.*

to defend himself against allegations he had beaten her up on more than 100 other occasions.⁸³ The evidence of the deceased's son on this point might have been fabricated. Or only his assertions that the accused was wont to kick his mother during the beatings or that the accused had said if he ever beat her again "he would kill himself" (both particularly damaging pieces of evidence under the circumstances) might have been fabricated or, what is just as bad for the accused and perhaps harder to unmask, unconsciously exaggerated or wrongly recollected. Against such possibilities, the accused had at his disposal his own testimony denying the son's allegations and the cross-examination of the son to try to demonstrate the existence of bias or other factors impeaching his credibility. In theory, other resources were available: expert testimony disclosing mental or physical infirmities affecting the reliability of the son's testimony (which the modern cases now permit an adversary to adduce⁸⁴), extrinsic evidence confirming the presence of bias,⁸⁵ and of course, independent evidence of other witnesses contradicting the son's allegations. But such evidence, especially the last, cannot be procured easily or overnight. In the absence of some pre-trial notice to the defence that the son would testify to these facts (which the law does not require from the prosecution) or foreknowledge of the nature of his testimony gained at a preliminary inquiry (and it is unlikely the prosecution would present such a witness at this proceeding, given its limited scope and purpose), such collateral attacks on the son's evidence, or on any similar fact witness's evidence, will be rare.

⁸³ Such unfair surprise is commonly noted as one of the reasons for excluding similar fact evidence. *E.g.*, *LeBlanc v. The Queen*, *supra*, note 5, 102 *per* Dickson J. But see 2 Wigmore, *supra*, note 2, s.305 where Professor Wigmore draws a distinction between "evidence . . . capable of involving the entire range of the person's life" as to which the objection of unfair surprise, in his opinion, applies and "evidence [of an accused's] specific knowledge, motive, design, and the other immediate matters leading up to and succeeding the crime", as to which, he argues, the objection ought not to apply. But it may not always be easy to categorize a situation, as witness the *MacDonald* case. Moreover, the argument begs the question as it seems to assume that the accused *knows* of the existence of the evidence when the very point is that the evidence may be untrue.

⁸⁴ *Toohey v. Metropolitan Police Commissioner* [1965] A.C. 595 (H.L.); *R. v. Hawke* (1975) 7 O.R. (2d) 145, 164-171, 22 C.C.C. (2d) 19, 38-44 (C.A.); *cf.* proposed federal Evidence Code, *supra*, note 11, s.70.

⁸⁵ *E.g.*, *General Films Ltd v. McElroy* [1939] 4 D.L.R. 543, [1939] 3 W.W.R. 491 (Sask. C.A.); see generally Sopinka and Lederman, *supra*, note 7, 289-91. *Cf.* proposed federal Evidence Code, *supra*, note 11, s.66.

There is an obvious remedy. Require pre-trial disclosure, along with particulars, of the prosecution's intention to adduce similar fact evidence.⁸⁶ The Law Reform Commission of Canada's proposed federal Evidence Code employs pre-trial notice as a technique for avoiding unfair surprise in the section establishing a new generic hearsay exception for statements of declarants "unavailable as a witness"⁸⁷ and in the section requiring the trial judge on request of a party and in certain circumstances to take judicial notice of specified types of matters.⁸⁸ The technique is not used in the Code's section on similar fact evidence.⁸⁹ There is, of course, always the danger, real or imagined, that witnesses thus revealed will be harassed or intimidated. However, this has not prevented proposed application of this pre-trial procedure to certain hearsay witnesses. More importantly, this danger must be balanced against the hardship caused the accused who must, without notice, defend himself against unfounded or exaggerated allegations of acts of other misconduct. To have to do so, offends the principles of the adversary process.

II

In June, 1975, the Supreme Court of Canada decided *LeBlanc v. The Queen*.⁹⁰ The charge was causing death by criminal negligence.⁹¹ The accused was a licensed "bush pilot". He had flown Giguère, the victim, and another man, Normand, both employees of the Province of Quebec, to a lake in northern Quebec where they had some work to do. It was agreed he would return at about 2:00 p.m. to pick them up. At that time, according to Normand's testimony, the two men were waiting at the appointed place when they saw the plane approaching. It was about 2000 feet away and flying at an altitude of about 500 feet. The aircraft "made a complete

⁸⁶ Strangely enough, it appears that in England such "fair notice" of the opponent's intention to adduce similar fact evidence is required in *civil* cases! *Mood Music Publishing Co. Ltd v. De Wolfe Ltd*, *supra*, note 7. Lord Cross's suggestion in *Boardman* that the question of admissibility "ought, if possible, to be decided in the absence of the jury at the outset of the trial" (*supra*, note 4, 459) — a suggestion in which none of the other Law Lords joined — eliminates unfair prejudice in the event the evidence is excluded, but does not respond to the problem of "unfair surprise" discussed above in the text.

⁸⁷ Proposed federal Evidence Code, *supra*, note 11, s.29(4).

⁸⁸ *Ibid.*, s.85(1).

⁸⁹ *Ibid.*, s.18.

⁹⁰ *Supra*, note 5.

⁹¹ *Criminal Code*, R.S.C. 1970, c.C-34, ss.202, 203.

circle to the left and then came toward them, in a dive". The witness threw himself to the ground, and avoided being struck. Giguère was struck by an underpart of the aircraft, and killed.

There was no question that the accused was flying the aircraft. He had a passenger with him who testified that as they were flying above the two men waiting on the ground, "the accused tapped [him] on the shoulder, pointed to the two men on the ground below, and laughing, said in French, 'I think we ought to make a pass— let us frighten them'; he then put the aircraft into a dive". There was also testimony that on the evening of that same day the accused visited Giguère's widow "to ask her pardon for causing the death of his good friend, her husband. He explained that he had wanted to make a 'pass', being in the habit of doing this". At the trial the accused gave evidence, saying only that he was a licensed pilot and offering no explanation or excuse for his act. It was apparently a prank turned tragedy.

As Mr Justice Dickson wrote in his dissenting opinion in the Supreme Court: "There was just one simple issue to put before the jury — in making the 'pass', did the accused show 'wanton or reckless disregard for the lives or safety of other persons'?"⁹² No statement was made by the accused at the time of his arrest, nor was evidence presented by the defence at the trial suggesting that any aircraft or pilot failure or climatic condition was responsible for the aircraft's sudden dive; furthermore the aircraft was inspected two days after the incident "and found to be in good flying condition".

The prosecution as part of its case was allowed to present evidence that in the several weeks preceding the fatal "pass" the accused had made three other low "passes"; twice over persons standing on the ground and once over persons sitting in a boat. At the trial and on the appeal the Crown contended that this evidence was admissible "in anticipation of a 'defence' of accident caused, for instance, by the mechanical failure of the airplane or other circumstances beyond control of the [accused]".⁹³ For such a purpose the evidence, as a matter of logic and common sense, would have been very strongly probative and undoubtedly admissible — a classic example of what Wigmore termed "multiplying instances of the same result"⁹⁴ to rebut in rather dramatic fashion the claim that the last in the sequence was caused by some factor beyond the

⁹² *Supra*, note 5, 100.

⁹³ *Ibid.*, 103 *per* Dickson J.

⁹⁴ *Supra*, note 2.

doer's control. The problem with this, as we have just seen, was that no claim of accident had been made up to that point in the trial, or was ever made by the defence. The accused was convicted as charged. His conviction was upheld in the Quebec Court of Appeal, one judge dissenting.⁹⁵

There were thus two separate questions for the Supreme Court to decide: (1) Given that no defence of accident had yet been advanced, was the evidence of the three previous "passes" admissible at the point in the trial it was offered? and (2) At the trial's conclusion, did the trial judge adequately explain the evidence's role to the jury? The majority of six (de Grandpré J. writing the opinion) answered both questions "yes". Two members of the minority (Dickson J. writing the opinion, Laskin C.J. concurring) answered both questions "no"; one member (Beetz J.) only dealt with the second question, also answering it "no".

The majority held the evidence of the previous "passes" admissible "to establish guilty intent".⁹⁶ The threshold question, therefore, was the one that has bedeviled the Court since its decision in *O'Grady v. Sparling*:⁹⁷ What state of mind, if any, is required for "criminal negligence"? Beginning with *O'Grady* and ending with the decision in the instant case, a few principles have emerged. First, criminal negligence is an offence requiring "mens rea".⁹⁸ Second, an intent to cause harm certainly is not required.⁹⁹ Had such a frame of mind been present in *LeBlanc*, Mr Justice Dickson observed,¹⁰⁰ the charge would have been murder. Third, at the other end of the scale, conduct which on its face "shows"¹⁰¹ wanton or reckless disregard for the lives or safety of others will make out a *prima facie* case of criminal negligence. There is in such a case, in other words, no burden upon the prosecution initially to prove that the accused when he acted was *aware* of the possibility of causing harm.¹⁰² The accused may, because it is a *mens rea* offence,

⁹⁵ (1972) 19 C.R.N.S. 54.

⁹⁶ *Supra*, note 5, 113. And see the just decided case of *Boulet v. The Queen*, summarized *infra*, note 130a, where *LeBlanc* is cited as a case in which "la preuve d'acte similaire ... établit l'état d'esprit de l'accusé, ses intentions ..." (pp.24-25).

⁹⁷ [1960] S.C.R. 804, (1960) 25 D.L.R. (2d) 145.

⁹⁸ *LeBlanc v. The Queen*, *supra*, note 5, 110-111 *per de Grandpré J.*

⁹⁹ *Arthurs v. The Queen* [1974] S.C.R. 287, 298, (1972) 28 D.L.R. (3d) 565, 572-573.

¹⁰⁰ *Supra*, note 5, 104.

¹⁰¹ R.S.C. 1970, c.C-34, s.202(1)(b).

¹⁰² *Supra*, note 99, 292, approved in *LeBlanc*, *supra*, note 5, 110 *per de Grandpré J.*; *ibid.*, 102 *per Dickson J.* As Mr Justice de Grandpré said, by

rebut the prosecution's *prima facie* case by advancing some credible evidence he caused the harm inadvertently. In such a case, it appears, the burden shifts back to the prosecution to prove beyond a reasonable doubt he had so adverted to the possibility of causing the harm.¹⁰³ "Advertence", therefore, remains the key. It must be affirmatively proved if the conduct leaves its existence in doubt. When the conduct allows the trier of fact to presume its existence, in effect there is an evidentiary burden put on the accused to come forward with some credible evidence contradicting that which appeared on the face of his conduct.

However, even in a case where the conduct itself allows the *mens rea* to be presumed, nothing prevents the prosecution, if it so chooses, from proving as part of its main case the existence of a state of awareness in order to nail down, if you will, the case for criminal negligence. And in so doing the prosecution should be free to make use of similar fact evidence whenever it is sufficiently relevant for that purpose. The majority at one point appears almost to suggest such a role for the similar fact evidence in *LeBlanc*:

However, even if it could be said that that was the situation in this case [*i.e.*, that "the fact itself proves the intent"], this would in no way prevent the Crown from going one step further, and proving by the similar conduct of appellant in other circumstances of the same type that the *mens rea* definitely existed in the case at bar.¹⁰⁴

An analogous situation would be the use of similar facts to establish the requisite awareness of some fact, condition or consequence included in the definition of the offence. For instance, on a charge of possessing stolen property¹⁰⁵ where the defence is raised that the accused did not know the property he purchased had been stolen, evidence that he had previously purchased property from the same person which he knew at the time or discovered later to be stolen generally would be highly relevant and hence admissible.¹⁰⁶ Or to select an illustration closer to the facts of *LeBlanc*, an accused

way of summing up the position of Pigeon J. in *Peda v. The Queen* [1969] S.C.R. 905, 921, (1969) 6 D.L.R. (3d) 177, 191: "In most cases, the fact itself proves the intent". *Supra*, note 5, 111.

¹⁰³ *Peda v. The Queen*, *supra*, note 102, 921-922. Though a decision interpreting *Criminal Code*, s.221(4) (now s.233(4)), the "dangerous driving" provision, it is clear from *Peda's* subsequent treatment (*e.g.*, *supra*, note 102) that it is equally authoritative on the question of the state of mind needed for criminal negligence under *Criminal Code*, s.202(1).

¹⁰⁴ *Supra*, note 5, 111.

¹⁰⁵ R.S.C. 1970, c.C-34, s.312.

¹⁰⁶ Cf. *R. v. MacPherson & Resnick* [1964] 2 O.R. 101, [1964] 3 C.C.C. 170 (C.A.); McCormick, *supra*, note 27, 450.

who contends he did not know the dangerous nature of a certain substance or practice could be shown to have used the same substance or engaged in the same practice on some prior occasion with harmful or near harmful consequences.¹⁰⁷

However, a moment's reflection lays bare the complete irrelevance of the similar fact evidence in *LeBlanc* for the purpose of proving awareness. No inference of awareness of the danger involved can be drawn from repetition of conduct which on previous occasions produced no mishap or near mishap. Had there been evidence that on one or more of the earlier occasions, the accused to his knowledge flew his aircraft closer to the persons on the ground than he had intended, evidence, that is, that he had once before "miscalculated" the distance between aircraft and ground and was aware of that fact, this would have been strong, perhaps almost conclusive, proof of a wanton or reckless frame of mind on the occasion of Giguère's death. If anything, however, evidence that the three previous passes occurred apparently without incident points to a lack of awareness.

When the majority held the evidence admissible "to establish guilty intent",¹⁰⁸ they therefore must have had in mind its capacity to preclude the possible defence that factors beyond the control of the accused caused the aircraft's sudden descent. Mr Justice de Grandpré recounted with approval portions of the charge to the jury in which the trial judge stated that the evidence was admitted for that purpose.¹⁰⁹ In his majority judgment, he also quoted, with emphasis his own, the following passage from the well known case of *Noor Mohamed v. The King*:

An accused person need set up no defence other than a general denial of the crime alleged. The plea of not guilty may be equivalent to saying "Let the prosecution prove its case, if it can," and having said so much the accused may take refuge in silence. *In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent.* The prosecution could not be said, in their Lordships' opinion, to be "crediting the accused with a fancy defence" if they sought to adduce such evidence.¹¹⁰

Were the facts and circumstances in *LeBlanc* sufficiently "consistent with innocent intention" to justify reception of evidence of

¹⁰⁷ See Cross, *supra*, note 18, 327.

¹⁰⁸ *Supra*, note 96.

¹⁰⁹ *Ibid.*, 113.

¹¹⁰ [1949] A.C. 182, 191-192 (P.C.), quoted *ibid.*, 112.

the three previous passes? Mr Justice Dickson (Laskin C.J., concurring) felt they were not, and it is hard to conclude otherwise. Aircraft or human failure or an abrupt climatic change causing the aircraft to descend suddenly indeed would have been "a fancy defence" or, more to the point, an almost impossible one to advance *under the circumstances*. No evidence up to that point in the prosecution's case and none on the horizon supported such a defence. The minute possibility a particular defence will be raised cannot be enough to justify the anticipatory admission of similar fact evidence, if the prohibition against hauling in such evidence to the prejudice of the accused is to be respected.

There is no quarrel, at least on the part of this writer, with the "compromise position" allowing the prosecution to adduce similar fact evidence to rebut a defence not yet advanced by the accused but which on the facts "can fairly be said to be open to him".¹¹¹ As the Privy Council suggested in *Noor Mohamed*, a criminal trial is different from a civil trial in the sense that no "pleading" emanates from the defence. At the trial, the accused is free to set up any defence he wishes. Under these circumstances, it has been said "the prosecution may adduce all proper evidence which tends to prove the charge".¹¹² In a *mens rea* case, therefore, if the known facts and circumstances are consistent with the possibility of accident, it does not seem unfair to permit the prosecution to adduce evidence in its principal case to eliminate that possibility. But it is unfair and destructive of the exclusionary part of the rule to allow the prosecution this prerogative in circumstances like *LeBlanc*. Is it now to be the rule, for example, that in a gunshot case where there is always the *possibility* the defence of accidental discharge will be raised, the prosecution can automatically haul before the trier of fact evidence of other gun shot assaults or homicides committed against other persons, even though all the information the Crown

¹¹¹ Cross, *supra*, note 18, 318-319.

¹¹² *Harris v. D.P.P.*, *supra*, note 10, 706 *per* Lord Simon. This principle can cause difficulty in a case where the accused, to avoid having similar fact evidence introduced against him, seeks to admit that element of the charge as to which the evidence might be relevant and admissible. Such a tactic succeeded in *R. v. Campbell* [1947] 1 D.L.R. 904, (1946) 86 C.C.C. 410 (B.C.C.A.), although on the facts it seems doubtful a binding "admission" was made in that case. On principle, a binding admission of any element "alleged against [the accused]" in the charge (see *Castellani v. The Queen* [1970] S.C.R. 310, 315, (1970) 9 C.R.N.S. 111, 115) should suffice to bar similar fact evidence relating to that element.

has points to a defence of self-defence or "I didn't do it at all".¹¹³ Surely, if there is to be any exclusionary part of the rule left, the test must be

... that the Crown should not adduce evidence of other similar acts unless it appears from what was said at the time of arrest or from the evidence presented by the Crown at trial or from the cross-examination of Crown witnesses or from the evidence of defence witnesses that the defence which the evidence of similar acts is intended to refute is really in issue; otherwise the accused may be gravely prejudiced by evidence introduced ostensibly to meet a possible defence but in truth to bolster the case for the Crown ... [T]he judge [in the instant case] should have awaited some intimation that accident was going to be raised as a ground of defence before admitting similar fact evidence to rebut a possible but improbable defence of accident.¹¹⁴

There is, after all, always the rebuttal case should the accused after completion of the prosecution's principal case switch tactics.

However, the evidence was admitted. At the conclusion of the case when it came time to instruct the jury the situation was clear: the accused had been overreached. Evidence was in the case which, as it had turned out, had no function but to depict the accused "as

¹¹³ In absence of "striking similarity", *etc.*, evidence of assaults (or homicides) against persons other than the victim are generally excluded on issues such as the identity of the person who assaulted or killed the victim, the intent or motive with which the assault or killing was committed, and the like. *E.g.*, *R. v. Drysdale* [1969] 2 C.C.C. 141, (1969) 66 W.W.R. 664 (Man.C.A.). The rule generally is otherwise where the other assaults or threats of assaults are against the *same* victim. *E.g.*, *ibid.*; *R. v. Robertson* (1975) 29 C.R.N.S. 141, 169-170, 21 C.C.C. (2d) 385, 410-411 (Ont.C.A.); *R. v. MacDonald*, *supra*, note 12.

¹¹⁴ *Supra*, note 5, 104, 105 *per* Dickson J. And see *R. v. Hutchison* (1975) 26 C.C.C. (2d) 423, 438-439, 11 N.B.R. (2d) 327, 342-343 (C.A.), *aff'd* (1976) 30 C.C.C. (2d) 97 (S.C.C.) where on a charge of murdering two policemen allegedly investigating a kidnapping committed by the accused evidence was offered of an armed robbery and kidnapping of a policeman purportedly committed by him some years before. The Court, Limerick J.A., held that as the killings charged were the result of "a vicious criminal act and there could be no defence of accident, mistake, innocent or lawful purpose, or that the act was unintentional", it follows that "the evidence of the other criminal acts [could] in no way [relate] to any issue raised ... as a defence and the mere plea of not guilty cannot be used as a basis for the introduction of evidence at the outset of a trial to anticipate a defence *which is not raised or which is at least not an obvious one*" (italics added). If by the concluding reference to the defence not being an "obvious one" the Court meant obvious taking into account *all* the information available to the Crown rather than just the circumstances of the acts themselves, then *Hutchison* accords with the view of this writer and of Dickson J. in *LeBlanc*.

a reckless character with a disposition for dangerous acts and little concern for his own life or the lives of others".¹¹⁵

In all probability the damage was done, and an instruction entreating the jury to devote their attention solely to the issue of the accused's culpability for the act charged would have been little more than a gesture. But loyalty to the policy of the rule excluding insufficiently relevant (in this case, irrelevant) similar fact evidence required at least this. In any event, it was all that was left to the accused.

The majority seemed to acknowledge the trial judge's responsibility in this regard. They quoted two passages from his instructions wherein he indicated to the jury that the evidence of the other "passes" had been led only on the possible issue of aircraft failure and the like and he directed them to keep those incidents separate from the act which caused Giguère's death.¹¹⁶ On the strength of these cautionary instructions, the majority rejected this ground of appeal.¹¹⁷

The dissenting reasons of Dickson J. reveal the majority opinion to be lacking in candor. Immediately after the first of the two passages quoted and relied upon by the majority, the trial judge instructed the jury that the evidence of the similar facts lent "une couleur de vérité extraordinaire" to the testimony of the passenger in the aircraft with the accused.¹¹⁸ Had the accused attacked this witness's account as biased, exaggerated or fabricated, the evidence of the three previous "passes" would have been relevant to corroborate this key testimony and in a sense, therefore, go to the issue of whether the dive was deliberate or accidental. There is no sign, however, that such an attack was mounted.

Immediately after the second passage quoted by the majority, the trial judge instructed the jury that despite the accused's having failed to advance the defence the prosecution allegedly anticipated, their evidence "retained all of its validity" in the case.¹¹⁹ What the trial judge meant soon became evident. "At length, describing the minutiae of each incident",¹²⁰ he reviewed for the jury the testimony concerning each of the three other "passes". He concluded each of the first two of these reviews with the instruction that the accused's

¹¹⁵ *Supra*, note 5, 105 *per* Dickson J.

¹¹⁶ *Supra*, note 109.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, 105 *per* Dickson J.

¹¹⁹ *Ibid.*, 106 *per* Dickson J.

¹²⁰ *Ibid.*, 105 *per* Dickson J.

conduct on these occasions was "direct evidence" of a violation of duty on his part in "fly[ing] his aircraft with wanton and reckless disregard for the lives or safety of other persons".¹²¹ He concluded the third review by suggesting the jury ask themselves if the accused had not endangered the lives of the persons subjected to that third "pass".¹²²

The trial judge thus not only failed in his duty to delimit the use the jury could make of the evidence, he "used the similar fact evidence to condemn the accused in strongest terms".¹²³ The jury was to judge only the "pass" charged in the indictment. They had to decide whether this dangerous and no doubt "negligent" act was also "wanton or reckless". Whatever one thinks of the policy of the criminal law in this regard,¹²⁴ a properly instructed jury could well have decided the accused's conduct on this one occasion met this standard and hence that he deserved the label "criminal" and the punishment the trial judge believed appropriate.¹²⁵ Or, the jury could have decided the conduct was foolish, unreasonable, dangerous and, as it had unfortunately turned out, disastrous, but nonetheless neither "wanton" nor "reckless" within the meaning given these terms in the criminal law.

In this decision, did proof of the three previous incidents play any *legitimate* role? As has been shown, it added nothing relevant concerning the accused's state of mind except to negative a defence of accident which was never raised. Since "identity" was not an issue in the case, there were in fact *no* issues as to which the evidence was relevant, even in a bald disposition sense. Deflected from the question of the culpability of the one act and armed by the trial judge's instructions reviewing in detail and denouncing each previous act, the jury was left free to cumulate the four acts issuing a verdict in effect condemning the accused for the whole of his behaviour.¹²⁶

What could the majority have had in mind when they lent their support to what the trial judge did in this case? They did not

¹²¹ *Ibid.*, 107 *per* Dickson J.

¹²² *Ibid.*, 108 *per* Dickson J.

¹²³ *Ibid.*, 105 *per* Dickson J.

¹²⁴ Compare, e.g., Hall, *General Principles of Criminal Law* 2d ed. (1960), 135-141, who looks with considerable disfavour on imposing criminal penalties for negligent behaviour, with Smith and Hogan, *Criminal Law* 3d ed. (1973), 64-65, who see it as "reasonable to suppose" that, with particular respect to motor vehicles, "the threat of punishment does have an effect on the care used in the handling of such instruments".

¹²⁵ R.S.C. 1970, c.C-34, s.203. The offence of causing death by criminal negligence carries a maximum penalty of imprisonment for life.

invoke the harmless error proviso of section 613(b)(iii).¹²⁷ They did not hold that evidence of other objectively wanton or reckless similar acts henceforth is to be admissible on the question of the *mens rea* required for the act charged against the accused;¹²⁸ the shock wave from such a ruling would envelop the entire field of motor vehicle offences. Instead, they relied upon two passages in the trial judge's general directions accurately explaining to the jury the limited import of the evidence and disregarded his turn-about on the point later in the instructions.

Reliance upon general directions to cure errors contained in the specific portions of a long set of instructions expects too much from the average juror.¹²⁹ In a similar fact evidence case, such reliance is inexcusable. The rule that prohibits reception of this species of evidence when it is insufficiently relevant is intended to bring about one end: the exclusion of distracting and unfairly prejudicial evidence. It is hard to see how a limiting instruction *correctly* employed can protect the accused from such

¹²⁶ "The result [of the trial judge's directions respecting the three previous acts] was that the jury in this case was not deciding only the culpability of the accused for his act of July 3rd [the act charged]; they were assessing the quality of his conduct on that date and on three separate and disconnected occasions. The cumulative effect could not have been other than highly prejudicial. The accused was placed in the position of having to defend four separate acts and not one." *Supra*, note 5, 108 *per* Dickson J.

¹²⁷ That was how the majority in the Quebec Court of Appeal over the dissent of Rivard J.A. disposed of the case, *supra*, note 95, 66. Mr Justice Dickson rejected this way out, *supra*, note 5, 108.

¹²⁸ Mr Justice Beetz's choice of words in his brief paragraph of dissent seems almost to leave open this possibility: "Even if it were conceded that the evidence of similar acts was admissible in the circumstances to support the evidence of wanton or reckless disregard for the lives or safety of other persons ...". *Ibid.*, 109. Nothing in the majority opinion nor the dissent of Mr Justice Dickson, however, suggests such a major departure from previous law. The present writer is not aware of any case in which other similar acts reflecting a wanton or reckless state of mind were admitted on a criminal negligence charge (and see the remark to this effect by Dickson J., *ibid.*, 101), excepting only the case where the other acts are close enough in time and space to be considered "part of the *res gestae*" of the incident charged against the accused. See *Balcerczyk v. The Queen* [1957] S.C.R. 20, (1956) 117 C.C.C. 71.

¹²⁹ The paradoxical posture the law of evidence adopts toward juries is aptly described by Professor Morgan: it "treat[s] them at times as a group of low-grade morons and at other times as men endowed with a super-human ability to control their emotions and intellects". Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* (1956), 105, quoted in Schiff, *Evidence in the Litigation Process: A Coursebook in Law* draft ed. (1974), 333.

prejudicial evidence once it has infected the case.¹³⁰ It is harder yet to see how a court attuned to the purpose of the rule of exclusion could reach the decision the majority reached in *LeBlanc*.^{130a}

Conclusion

Boardman and *LeBlanc* deal with different but connected aspects of the same hard problem: what the courts should do with

¹³⁰ It is child's play for the behavioral scientist to demonstrate the general ineffectiveness of limiting instructions in controlling the effect of prejudicial evidence admitted in the case. See Doob and Kirshenbaum, *Some Empirical Evidence on the Effect of s.12 of the Canada Evidence Act ["Examination as to Previous Conviction"] Upon an Accused* (1972) 15 Crim.L.Q. 88; Hans and Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries* (1976) 18 Crim.L.Q. 233.

^{130a} On November 2, 1976, too late for critical treatment in this article, the Supreme Court of Canada decided *Boulet v. The Queen*, not yet officially reported. Boulet was charged with participating in the murder by shooting of one Bilodeau. Bilodeau's body was found buried in a pit filled in with a caustic alkaline substance. It was identified by the fingerprint from the one finger that remained. At a preliminary inquiry of one Lamothe for the same murder, the accused testified and admitted some degree of guilty involvement in the murder, claiming, however, that for much of the time he was acting under duress. At his trial, the accused modified his story considerably, claiming that his presence at the scene of the murder was almost entirely innocent. Evidence that he had led the police to the grave of another person, one Brie, shot and killed some three months earlier and buried in an alkaline pit approximately 1000 feet from where Bilodeau was found, was admitted in the Crown's rebuttal case (thus not raising the *LeBlanc* problem). This evidence was held admissible both on the issue of "premeditation" and to contradict the various "defences" advanced by the accused. Mr Justice Beetz, writing for a unanimous seven-member Court, called the case "un exemple classique de cas où, *prima facie*, la preuve d'acte similaire doit être admise" (p.25). *Boardman* is nowhere mentioned. The familiar passage from *Makin* is ritually quoted. As noted, the accused was tied to the first murder only by his knowledge of where the body was buried. His knowledge of this fact would not seem to connect him to the *commission* of the first murder sufficiently to allow receipt of the evidence at the trial for Bilodeau's murder. (See *supra*, note 27, and accompanying text.) This, in fact, was the main argument raised on appeal with respect to the admissibility of the similar fact evidence (there were other grounds of appeal in the case). The point as to the sufficiency of the evidence to connect the accused to the first murder was not decided, however, as the Court held that other evidence excluded at the trial by the trial judge which clearly implicated the accused in Brie's murder (the accused's own testimony at the Coroner's Inquest into Brie's death given "sans demander la protection de la loi" (p.29)) should have been admitted, and hence the accused, according to the Court, had no cause to complain.

“logically probative” yet highly prejudicial and distracting evidence of other acts of misconduct. *LeBlanc* dealt with what might be termed the “procedural” aspects of the problem, namely, when in the trial should similar fact evidence be received, assuming its admissibility on an issue not as yet raised, and what should the trial judge instruct the trier of fact, in the event that the issue on which it was admitted, as things turned out, never was raised. Calling these questions “procedural” is not to minimize them. Fundamental rules matter little if they can be outflanked procedurally. Believers in the exclusionary rule shaped by Lord Herschell L.C. in *Makin* and “said [to be] ‘one of the most deeply rooted and jealously guarded principles of our criminal law’ ”¹³¹ can only hope the decision in *LeBlanc* will prove to be an isolated aberration.

Boardman deals with the essential question of the test for admissibility. It replaces artificiality by principle. Instead of basing admissibility on the presence in the case of some catchword issue to which the similar fact evidence relates, an exercise that “has the advantage of calling on the judge for a minimum of personal judgment,”¹³² *Boardman* compels the court to engage in the delicate and often onerous process of deciding the probative strength of the evidence in the context of all the evidence in the case. The “issue” is not jettisoned from the process. The court trying to determine the probative force of the similar fact evidence must have in mind the issue to which it is being directed. Properly used, “identity”, “intent”, “accident” and the rest are just as useful to the process of determining probative value as are “motive”, “consciousness of guilt” and “opportunity” in ordinary circumstantial evidence situations. They are means, not ends. What is crucial to remember is that at no time can a court say that similar fact evidence is admissible (or inadmissible) simply *because* it goes to “rebut accident”, “show intent” or “prove identity”. Reasoning such as one finds in a recent textbook on Canadian criminal evidence¹³³ must be rejected. After discussing cases in which similar fact evidence was admitted “to prove identity”, the author refers to several Canadian cases¹³⁴ “which reject the admission of [such] evidence to prove identity”. Then, without regard to the probative force the

¹³¹ Viscount Sankey L.C. in *Maxwell v. D.P.P.*, *supra*, note 82, quoted by Lord Morris in *Boardman*, *supra*, note 4, 439.

¹³² McCormick, *supra*, note 27, 453.

¹³³ McWilliams, *supra*, note 17.

¹³⁴ *Brunet v. The King* [1928] S.C.R. 375, [1928] 3 D.L.R. 822; *R. v. Campbell*, *supra*, note 112; *R. v. Hrechuk* (1950) 98 C.C.C. 44, [1950] 2 W.W.R. 318 (Man. C.A.).

similar fact evidence had or did not have in each of those cases,¹³⁵ he declares that "these Canadian cases are quite out of line with the English authorities and . . . are wrong".¹³⁶ This is the last stage of catchword thinking.

This leads us to section 18 of the proposed federal Evidence Code. It says:

Nothing in section 17¹³⁷ prohibits the admission of evidence that a person committed a crime, civil wrong or other act when relevant to prove some fact other than his disposition to commit such act, such as evidence to prove absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.¹³⁸

Section 18 in this post-*Boardman* era (the Evidence Report is dated December, 1975, roughly a year after *Boardman* was first reported) is a disaster. It resurrects one fallacy, misrepresents the test for admissibility as mere "relevancy" and perpetuates the catchword approach. The fallacy it resurrects is that similar fact evidence is never admissible "to prove the disposition of the accused to act . . . in a particular manner".¹³⁹ On the contrary, many of

¹³⁵ In one of these cases, *R. v. Campbell, supra*, note 112, the probative force in fact was considerable. It was evidence in a prosecution for abortion "that on numerous occasions the appellant had carried out similar operations upon other women, and had in fact equipped a nursing home for the purpose of carrying on this illegal business in rather a wholesale way". One witness had testified that she had seen the complainant in a bed in this "nursing home". O'Halloran J.A., dissenting, argued convincingly that this evidence, which he styled "system", was admissible on the issue of whether the accused had been the one who performed the abortion on the complainant. In neither of the other two cases cited in the preceding footnote, also prosecutions for abortion, was the evidence so strong.

¹³⁶ McWilliams, *supra*, note 17, 203.

¹³⁷ S.17(1) reads: "In criminal proceedings, evidence tendered by the prosecution of a trait of character of the accused that is relevant solely to the disposition of the accused to act or fail to act in a particular manner is inadmissible, unless the accused has offered evidence relevant to a trait of his character or to a trait of the character of the victim of the offence". S.17(2) which deals with "evidence of a trait of the character of the victim of a sexual offence" has no bearing here.

¹³⁸ *Supra*, note 11.

¹³⁹ In its Study Paper on "Character", the Commission puts its point plainly: "Evidence of previous conduct which is introduced solely to prove disposition, and from which the trier of fact is asked to infer that in the particular case the defendant acted in accordance with such disposition is made inadmissible . . . subject to certain exceptions". It goes on to say that the evidence would be receivable if "relevant to some factor other than disposition, for example as tending to show motive, intention, knowledge, identity or the like...". Law Reform Commission of Canada, *Law of Evidence Project, Study Paper no.4* (undated), 8-9.

the leading cases of admissibility — *Boardman* included — involve precisely this process. Evidence is introduced that the accused committed one or more acts in some particular way exactly for the purpose of proving that he is the one likely to have committed in that way the act charged. This was the relevancy process as well in *MacDonald* and *Straffen*. This rather obvious fact has been noted on a number of occasions.¹⁴⁰ The drafters of section 18 fall into a trap originally set in *Makin*. They fail to distinguish between proof of disposition as a step in the relevancy process toward proving “identity” or any other major issue open in the case, and proof of disposition as an end in itself. This latter no doubt *is* impermissible. But it is almost never seen, for it would serve no logical purpose. The former, on the other hand, may be and often is permissible. As Lord Cross said in *Boardman*, citing *Straffen*, “circumstances . . . may arise in which such [disposition] evidence is so very relevant that to exclude it would be an affront to common sense”.¹⁴¹ However, some fallacies die hard, and this is likely to be one of them. In *Boardman* Lord Hailsham himself fell into it. He castigated the reasoning process whereby the identity of the person who committed an act is inferred from proof of his disposition toward such acts as a “forbidden type of reasoning”.¹⁴² This inference is no more “forbidden”, however, than is the inference that the last in a sequence of similar acts was not caused accidentally or the inference that previous assaults on the same victim indicate malice. In all such instances, all that is “forbidden”, if one must use that term, is drawing the particular inference (from a proven disposition or otherwise) on the basis of similar fact evidence that does not possess a high degree of probative strength. Nonetheless, already one post-*Boardman* decision has picked up Lord Hailsham’s phrase.¹⁴³ It is, regrettably, very quotable.

Probably worse, section 18 suggests that mere *relevancy* to such catchword issues as “absence of mistake or accident”, “intent”, “identity” and the rest will justify the reception of similar fact evidence.¹⁴⁴ This contributes to decisions like *Davis*, and is fatal to

¹⁴⁰ Cowen and Carter, *supra*, note 1, 133-137, 141-144; Cross, *supra*, note 18, 316; Hoffman, *supra*, note 6, 198-199; Lord Cross in *D.P.P. v. Boardman*, *supra*, note 4, 456-457.

¹⁴¹ *Ibid.*, 456.

¹⁴² *Ibid.*, 453-454, 456.

¹⁴³ *R. v. Rance* [1976] Crim.L.R. 311, 312.

¹⁴⁴ And see the comments of the Commission in its Study Paper on “Character”, *supra*, note 139 which are echoed in the comments that accompany the Code itself. *Supra*, note 11, 65-66.

the establishment in Canada of a rational test based on principle. When it is properly directed to an issue actually in the case, similar fact evidence is rarely *irrelevant*.¹⁴⁵ Its admissibility depends instead on how *strongly* relevant it is. A similar fact provision therefore need say no more than this:

Evidence that a person on some other occasion committed an act of misconduct is inadmissible unless its probative value on some issue properly in the case taken together with the other evidence in the case is so strong that its exclusion would be an affront to common sense.

¹⁴⁵ See *supra*, notes 77 and 78, and accompanying text.