Propensity evidence (s 43) and proving convictions 9 (s 49)

Identification of a relevant propensity: s 43

This step in the admissibility inquiry forms part of the decision about whether the evidence at issue is "propensity evidence" (s 40(1)), but is also the important precursor to the identification of the issue at trial (and so determining relevance) as well as probative value. These steps in the process were described in *McMaster v R* [2019] NZCA 187 at [18]:

> The first step is to analyse the propensity alleged to be evidenced by earlier behaviour. The relationship between the proposed propensity evidence and the trial allegations does not become relevant until the second step of the propensity analysis, when the probative value of the propensity evidence is to be considered. It is at that stage the nature of the issue in dispute and the extent of similarity between the propensity and the allegations is taken into account. The third step is to whether the probative value of the evidence outweighs the risk of it having an unfairly prejudicial effect on the defendant.

In *McMaster* the Court upheld the appeal in part, finding that evidence of M filming naked adults was inadmissible as inconsistent with the propensity alleged for the purposes of the particular charges: possessing objectionable material concerning children (indicating a propensity to view and observe images of naked pre-teen females): at [21] – [25].

See also *Rangihuna v R* [2018] NZCA 199 at [21]; *Sullivan v R* [2018] NZCA 362 at [22] – [23] and *R v A (CA294/2017)* [2018] NZCA 401 at [26] – [30].

Nature of the issue in dispute: s 43(2)

Section 43(2) requires that in determining the admissibility of propensity evidence about a defendant, the Judge must take into account the nature of the issue in dispute. The propensity evidence does not need to be relevant to *all* the issues at trial, just *an* issue (*C (CA458/2018) v R* [2018] NZCA 513 at [23]). The subsection provides explicit recognition that the probative value of propensity evidence cannot be assessed in the abstract. For example, on a charge of burglary, evidence that the defendant has committed burglaries in the past is more likely to be admitted if the defendant testifies that he entered a stranger's house by mistake than if the defendant had not been seen near the scene of the crime and the issue is who committed the burglary.

In *Freeman v R* [2010] NZCA 230 at [21], the Court said:

> In deciding whether to admit propensity evidence, the Judge should identify as precisely as possible the issue in dispute in the case to which the propensity evidence is adduced. Sometimes this will be very general, for instance whether the complainant's account is credible or even just whether the defendant is guilty. Where the relevant issue is very broad there is often greater judicial reluctance to admit evidence of similar offending (particularly where there is only one such other incident) than where the issue in dispute can be defined more narrowly. The other side of the coin to this is that propensity evidence which reveals no more than a propensity to commit offences of the kind alleged, despite having some probative value, will often be inadmissible given the inevitable associated prejudice. This is particularly so where the characteristics of the offending in question are unremarkable.

In *Keefe v R* [2014] NZCA 113 the defendant was charged with manslaughter of her former boyfriend. The prosecution alleged that she had intentionally stabbed the victim. In her

statement to the police the defendant said that the stabbing was an accident. The prosecution applied for an order that, at the coming trial, evidence could be offered of previous incidents where the defendant had threatened the victim with an axe and with a broken bottle. At [12] the Court held that the proposed evidence did not show that the defendant had a propensity to act in a particular way or have a particular state of mind that was relevant to whether the stabbing was deliberate or accidental. Neither of the two earlier incidents involved the defendant actually stabbing the victim. The Court held that if, in the course of the trial, the issue of self-defence arose, then the evidence would become admissible. This would be because, first, the evidence would cast doubt on the defendant's version that the reason she was holding the knife was because she feared the defendant. Secondly, the evidence would weaken her claim that she was so afraid of the victim that she had to resort to the use of a knife to protect herself.

In *Ah You v R* [2011] NZCA 82, the defendant had been convicted of murder arising out of an attack on an elderly woman in her home. Before the trial, the defendant admitted under s 9 that he had attacked the victim and that the attack had caused her death. This amounted to an admission of manslaughter and the outstanding issue was whether at the time of the attack the defendant had the requisite mental element to be convicted of murder. The trial Judge admitted propensity evidence offered by the prosecution, which consisted of earlier occasions when the defendant had entered peoples' homes and made threats of violence or used low-level violence. In allowing the defendant's appeal against conviction, the Court emphasised that s 43(1) required that, to be admissible, propensity evidence must have probative value "in relation to an issue in dispute in the proceedings" (at [23]).

The Court held that the propensity evidence admitted at the trial had little or no probative value in relation to the outstanding issue of the defendant's *mens rea*. In any event, whatever probative value it did have was "easily overwhelmed by the unfairly prejudicial effect of the jury learning of the defendant's past offending" (at [22]). *Ah You* was applied in *R v Taunga* [2017] NZHC 972, a prosecution for murder in which the only issue was whether, when the defendant squeezed the victim's neck for a number of minutes, the defendant intended to cause injury to the victim. Muir J would not permit the Crown to lead propensity evidence of previous occasions when the defendant had lashed out in anger and throttled other people. This propensity evidence was not sufficiently probative on the issue of the defendant's *mens rea*.

Consent in sexual cases

In *R v Healy* [2007] NZCA 451, (2007) 23 CRNZ 923, the Court did not adopt the conclusion of the High Court of Australia in *Phillips v R* [2006] HCA 4, (2006) 158 A Crim R 431 that, in a case involving multiple charges of sexual violation, similar fact evidence from one complainant could *never* be admissible to help prove a lack of consent by another complainant. The Court of Appeal referred to s 43(2) of the Act and stressed the importance of using the wording of the Act as the starting point of analysis, rather than the earlier common law.

In *Yang v R* [2018] NZCA 90 the Court of Appeal agreed with the District Court Judge's pre-trial ruling as to joinder, that "the evidence of each complainant is probative of a tendency on Mr Yang's part to engage in sexual conduct toward a victim in the absence of consent or grounds for a reasonable belief in consent" (at [16]). The Court held (at [17]):

> On both narratives, the offending has the same quality of opportunism; Mr Yang seizes the opportunity of the complainant's presence in his house while his partner is away. In both

> cases, there is the same bold, even brazen quality to the offending, with Mr Yang sexually offending against the women in circumstances utterly inconsistent with the existence of consent. On the complainants' account, there was nothing before either attack which might have suggested to Mr Yang that his attentions were wanted. The 2017 complainant verbally and physically resisted. The 2014 complainant was unconscious. Both accounts involve Mr Yang, at some point, approaching the complainant while unconscious — one because she has passed out drunk and the other because she is asleep.

Guilt or innocence

In *Freeman v R* [2010] NZCA 230 the Court recognised that there may be occasions when the issue in dispute is simply whether the defendant is guilty. An example is *R v Coe* [2017] NZHC 2819 at [18] where, in this pre-trial admissibility hearing regarding proposed (prosecution) propensity evidence about the defendant, neither counsel were able to identify any particular issue in dispute, other than the defendant's guilt.

Credibility and accuracy

In *Vuletich v R* [2010] NZCA 102 the defendant faced charges, mostly of a sexual nature, as a consequence of allegations made by two complainants. The issue to be decided was whether the charges relating to each complainant could be tried together in a trial at which the allegations made by each complainant could be admitted as propensity evidence to assist proving the charges relating to the other complainant. The Court held that there must be separate trials. In isolating what the issue was, as required by s 43(2), Glazebrook J said, at [31], that the mere issue of the credibility of the two complainants "is too broadly phrased to be helpful". See, similarly, *M (CA198/10) v R* [2010] NZCA 219 at [29]–[31].

However in *R v O (CA465/17)* [2017] NZCA 472, the defendant faced charges of sexual violation and indecent exposure in respect of two girls under 12 years of age. The Crown sought to lead propensity evidence of a previous incident of the defendant indecently exposing himself in a park to two other girls, aged 12 and 13. The Court of Appeal defined the issues with respect to the sexual violation charges as "whether the offending occurred and the credibility of [the complainant]", and with respect to the indecency charges as "both credibility and intent to expose" (at [7]). The Court considered the park incident strongly probative on the sexual violation charges because "it is demonstrative of a distinctive and debased sexual regard for pubescent girls".

In *W (CA290/17) v R* [2017] NZCA 405 the Court of Appeal found that the issues may be different across two sets of offending. The defendant was charged with sexual offending against three girls aged around 11. The Court considered that the independent complaint of the third girl was relevant to the credibility of the first two complainants, (where the defence would be collusion and fabrication), and that the evidence of those two complainants was relevant to whether the conduct in relation to the independent complainant was accidental (the defence in respect of the third girl) (at [14]).

In *W (CA27/18) v R* [2018] NZCA 105 the appellant appealed the joinder of three charges of rape, all of middle-aged women. The Court of Appeal agreed with counsel that "the issue at trial will be whether … the complainants' accounts of non-consensual sex are accurate": [14], noting the case fell within the "scenario three" category identified by the minority in *Mohamed* (at [16]): "The evidence of each witnesses supports that of the others because of the unlikelihood that independent witnesses would make up similar stories."

See, similarly, regarding the identification of complainant credibility (and reliability) as the issue at trial in sexual cases: *Turner v R* [2018] NZCA 192 at [18], *T (CA165/18) v R* [2018] NZCA 303 at [16] and [22], *Sullivan v R* [2018] NZCA 362 at [30] and [34] and *Bunting v R* [2018] NZCA 602 at [19]

Different issues

In *L (CA20/18) v R* [2018] NZCA 118 the Court of Appeal agreed with Judge Harvey that evidence of L's 2007 convictions for rape and associated offending against a woman with serious intellectual and physical disabilities was admissible at L's trial for two charges of exploitative sexual connection with a person with a significant impairment. The appellant argued that the issue at trial for the 2007 charges was consent, whereas the trial for the current charges would likely focus on L's knowledge about the complainant's (alleged) disabilities (at [3]). The Court rejected the submission that the issue in the previous and current proceedings must be broadly the same in order for the propensity evidence to be admissible. Rather, the Court stated "the focus must be on whether the historical convictions establish a propensity on the part of L that is probative of one or more of the issues in the current proceedings (whether or not those issues are the same as the issues in the previous proceedings)" (at [17]).

> The Judge was correct, in our view, to find that the 2007 convictions establish that L has a propensity to take advantage, sexually, of a person with an intellectual impairment. Here, if the Crown proves that the complainant is impaired, and that L knew of her impairment, then the propensity evidence may assist the jury to determine whether L took advantage of the complainant's impairment to obtain her acquiescence in, submission to, or participation in sexual activity. The Crown case is that both the current complainant and the victim of the 2007 convictions were vulnerable for broadly similar reasons, and both were targeted by L who exploited the vulnerability that he knew existed. It does not matter that consent is not directly in issue here. L's convictions for rape and sexual violation of a severely disabled woman are probative of whether he has exploited the complainant's intellectual disability (if proven) on this occasion, for the purposes of his own sexual gratification (at [18]).

See also *Mitchell v R* [2018] NZCA 554 (concerning cross-admissibility in the context of a severance application in a sexual case), in which the Court of Appeal agreed, that with regard to Ms F, the evidence was probative that Mr Mitchell committed the offences, and in relation to Ms G, the evidence was probative on the issue of consent: at [18].

Propensity evidence involving a different class of drug

In *Tatana v R* [2017] NZCA 64 the Court would not admit evidence of the defendant's previous convictions for drug dealing in party pills as propensity evidence on the current charge of possession of methamphetamine for the purpose of supply. At [13] the Court said that although earlier decisions of the Court had allowed evidence of convictions for drug dealing to be led as propensity evidence at a subsequent trial for drug dealing, the Court had been unable to find any decision where the previous convictions related to a different class of drug than the charge being tried.

Assessment of probative value of the evidence in relation to the issue(s) identified: s 43(3)

Similarity (and differences): s 43(3)(c)

Section 43(3)(c) acknowledges that probative value increases with the degree to which the circumstances of the propensity evidence match those of the offence that is currently being

tried. In *Rei v R* [2012] NZCA 398, (2012) 25 CRNZ 790, the Court held that little probative value arises from the fact that the propensity evidence demonstrates that the defendant has previously committed offences of the same general kind as alleged in the current charge.

In *Banks v R* [2018] NZCA 120 that Court stated (at [37]):

> It is well established that similarities are the focus for the probative value of propensity evidence rather than differences between cases. In this case, whether or not the victims were a neighbour as opposed to a distant relative, whether or not the age difference was numerically different, and whether or not the sexual acts differed, are, as Judge Harvey said, quite outweighed by the similarities of taking advantage of trust and propensity to sexually offend against pre-pubescent boys. The prejudicial effect of admitting the evidence was high. But that is because its probative value was high. The prejudice was not illegitimate.

In *Khan v R* [2010] NZCA 510 the Court of Appeal considered the relevance of a difference in seriousness between the propensity evidence and the index offending, saying, at [25]):

> A difference in the seriousness of offending will not, of itself, outweigh the probative value of the propensity evidence. Such differences might merely reflect the circumstances in which the offending occurred and the opportunities presented to the offender.

See also *Hetherington v R* [2012] NZCA 88 at [20] and *C (CA458/2018) v R* [2018] NZCA 513 at [34] – [36].

In *SR v R* [2011] NZCA 409, [2011] 3 NZLR 638 at [121] the Court said:

> While this Court has said on many occasions that the focus under s 43 of the Evidence Act is upon similarities rather than dissimilarities, we agree with [defence counsel] that dissimilarities are not to be ignored in the overall analysis. Equally, however, drawing distinctions in matters of detail between the offending alleged and the propensity evidence from prior occasions is not usually a profitable exercise.

In *A (CA244/17) v R* [2018] NZCA 225, the defendant (A) was convicted of a range of sexual offences against a young relative (X), which occurred over a nine-year period, beginning in 2003 when X was seven. The Court of Appeal upheld the decision to admit A's 2000 conviction for the indecent assault of a 14-year-old family member (Y), despite the differences in the offending (at [28]):

> The principal difference between Y's allegations and what X alleged to have occurred was that the propensity evidence related to a single incident, whereas A was on trial for repeated offending over a lengthy period. The fact that the alleged offending against X was repetitive does not alter the similarity between the character of what X alleged had occurred and the single incident which led to A's conviction in 2000.

In *Sullivan v R* [2018] NZCA 362 the Court of Appeal did not consider the difference between a choke hold and strangulation was sufficient to render the propensity evidence inadmissible: at [33].

Unusualness (sexual offences): s 43(3)(f)

In *Solicitor-General v Rudd* [2009] NZCA 401, at [38(f)], the Court held that the interest of a mature male in very young girls is, itself, an unusual factor.

In *Robin v R* [2013] NZCA 105 at [25] the Court said "There is a line of authority which

establishes that sexual activity with children is in itself unusual, even where it does not involve unusual acts for offending of that kind."

In *Vuletich v R* [2010] NZCA 102 at [38] Glazebrook J said, in considering s 43(3)(f):

> Sexual offending against adult women cannot in itself be regarded as sufficiently unusual, unlike sexual offending against young children or arson. The Auckland offending involved violence but violence, including sexual violence in the course of a relationship or the break up of a relationship is not unusual.

In *F (CA7/18) v R* [2018] NZCA 100 the Court noted the significance of the offending being all against child family members (at [32]):

> It is generally accepted that sexual activity with children is unusual in and of itself, even if no acts which are unusual for offending of that kind are involved. In *Rowell v R* [2017] NZCA 55, the Court of Appeal observed that the defendant's propensity to be sexually attracted to young children and to act on that attraction was very unusual. The learned authors of *Phipson on Evidence* note that English cases confirm that a similar view is taken in that jurisdiction: "that paedophilic activities and attitudes are both persistent and exceptionally unusual". Further, the alleged offending all occurred against family members, which further heightens the unusual nature of the offending.

See also *R v A (CA294/2017)* [2018] NZCA 401 the Court stated, in upholding the admission of the propensity evidence (at [32]):

> [U]nder s 43(3)(f), the commonality of unusual features between the propensity and index offending adds to the probative weight of the evidence. This Court has, as the Judge recognised, produced a line of decisions in which child sexual offending is regarded as inherently unusual. Although, more detailed similarities will increase the probative force of the evidence by making the sheer coincidence of apprehension less likely. Therefore, although A's offending against all the complainants was relatively generic offending of its sort, his tendency to sexually engage with young boys is unusual. This makes the evidence of his previous convictions probative of whether A committed the index offending.

In *L (CA20/18) v R* [2018] NZCA 118 the Court stated (at [23](e)):

> The behaviour (or alleged behaviour) on the part of L is highly unusual. It is rare for a mature man, who is not himself intellectually disabled, to not only be sexually attracted to intellectually impaired women, but to act on that attraction (including by having full sexual intercourse with the relevant women).

In *Johnson v R* [2018] NZCA 187, the appeal against joinder was dismissed, the Court of Appeal not disagreeing with the grounds in support of admissibility relied on by the Judge, which included, at [41]:

> The Judge recorded but rejected a defence submission that there were no similarities indicating a propensity for sexual misfeasance and that a massage could not be taken as unusual conduct. He considered that sexual offending against vulnerable females who had been groomed, and whose trust had been gained under the guise of either traditional Māori mirimiri massage or therapeutic massage was an unusual and distinctive feature.

A similar observation was made by the Court of Appeal in *Heke-Gray v R* [2018] NZCA 153 at [44]:

> There is violence inherent in any act of sexual violation. However, there are degrees of violence and, in our view, the Judge correctly stated that the level of violence is unusual in both the 2008 offending and the 2016 allegations. There was a significant level of associated violence in relation to both incidents. Mr Heke-Gray's fixation on anal sex, the

> use of music and of the shower or a pillow to drown out the complainants' cries, and Mr Heke-Gray's extreme possessiveness and paranoia can, in combination, be considered unusual and distinctive.

In *The Second Review of the Evidence Act 2006: Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019), the Law Commission considered whether the inquiries relevant to s 43(3)(f) should be clarified. While not recommending any legislative change, the Commission said (at [18.32] – [18.33]):

> We agree with the criticisms about focusing on the *type* of offending when assessing unusualness under section 43(3)(f). When assessing unusualness, we consider the focus should be on whether there is a distinctive pattern of offending. This approach appears to align with the Commission's original intention in its 1999 report. While there may be some overlap between sections 43(3)(c) and 43(3)(f), the two factors are not interchangeable as it is possible for offending to be similar yet not unusual. Given that unusualness is only one factor in the assessment under section 43(3), we do not consider this approach risks re-introducing the concept of striking similarity.
>
> To date, decisions comparing different types of offending appear to be confined to the area of sexual offending. The courts seem to be moving away from assessing unusualness by reference to the type of offending … In light of this trend towards focusing on whether there is a distinctive pattern of offending when considering unusualness in section 43(3)(f), we have concluded that it is unnecessary to amend the provision.

Unfair prejudicial effect: s 43(4)

Evidence of acquittal (or a stay of proceeding)

In *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298, (2011) 25 CRNZ 625 the Supreme Court held that the Act has not substantially changed the pre-Act position. The Court gave the following guidance at [8]–[9]:

> When a judge is considering the extent of any unfair prejudicial effect on the defendant, the judge should examine whether the fact that the propensity evidence is prior acquittal evidence gives rise to any, or any additional, unfair prejudice. To the extent that it does, the judge should consider how that additional dimension affects the overall balance between probative value and unfair prejudice. Of course if the prior acquittal evidence is not admissible in terms of s 43(1), even without the acquittal dimension, it cannot be led. It is important to make this point because it must not be assumed, simply because the acquittal dimension itself does not give rise to unfair prejudice, that the prior acquittal evidence will therefore be admissible. If, however, the propensity evidence would otherwise be admitted, the judge must consider the acquittal dimension and decide whether it alters the balance. Adopting this approach will assist in properly determining what, if any, bearing the acquittal dimension truly has on the assessment required by s 43(1).
>
> In carrying out the evaluation the focus will be on whether it is unfair to expect the defendant to respond again to the evidence in question in light of the fact that it was not regarded as sufficient to result in a conviction on the earlier occasion. An example given in *R v Degnan* [2001] 1 NZLR 280 (CA) of when that might be so is a case where a defence of alibi was successfully raised against the earlier charge. This example was first given by Lord Hobhouse in *R v Z* [2000] 2 AC 483 (HL), a case upon which the Court relied in *Degnan*.

The approaches to the issue of prejudice in these cases are demonstrated by earlier Court of Appeal judgments in which the Court held that propensity evidence of an incident for which the defendant had previously been charged and acquitted, was inadmissible in the current trial. The reasons given by the Court of Appeal in these cases included:

(i) that, when the defendant continues to deny his guilt in respect of the propensity evidence, the need for the jury to enquire into the facts could overwhelm the current trial;
(ii) that the passage of time had added to the difficulties faced by the defendant in defending the allegations made in the propensity evidence; and
(iii) that the witnesses making the allegations in support of the propensity evidence had problems relating to reliability.

In *Saumanaia v R* [2017] NZCA 224 at [16], the Court noted that if the evidence concerning the propensity incidents (for which the defendant had earlier been, in effect, acquitted), were to be admitted at the current trial for sexual offending, the jury might take it upon itself to rectify any perceived injustice from the defendant's acquittal of the earlier charges, if the jury were to be persuaded that he ought to have been convicted of those earlier charges.

In *R v K (SC10/2019)* [2019] NZSC 46, the Supreme Court granted to appeal and held that evidence of a previous acquittal for sufficiently similar sexual offending was admissible, disagreeing with the Court of Appeal's view that admissibility would risk the jury correcting a perceived injustice, and with the dicta to this effect in *Saumanaia*: at [48] – [49]:

> The so-called risk would arise only if the jury considering an allegation of sexual offending against a defendant, having heard acquittal evidence of similar allegations in the past, concluded that there was a reasonable doubt that the defendant was guilty of the current offending but also concluded that he was guilty of the earlier allegations, despite having been acquitted. The risk is said to be that the jury would find the defendant guilty of the current offending despite the reasonable doubt as to his guilt in order to 'correct' the acquittal in the earlier case. That combination of events seems highly unlikely, but in any event a jury acting in that way would be acting contrary to the oath taken by the jurors and contrary to the directions given by the judge to try the case only on the basis of the evidence before the court. We do not consider that a jury acting in a way that is so clearly in breach of the obligations they accept when doing jury service can properly be considered a realistic risk.
>
> In effect, this observation reflects a rejection of the law as stated in the Court of Appeal's decision in *Degnan* and this Court's decision in *Fenemor*. If the risk arises in the present case, it would also arise in every case in which it is proposed that acquittal evidence would be led as propensity evidence and, if this risk were truly considered a realistic risk, it is hard to see how acquittal evidence would ever be permitted to be led as propensity evidence.

Coincidence reasoning: the factor that determines if a specific jury direction is required

In reaching their conclusions in *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145, (2011) 25 CRNZ 223, the minority of the Supreme Court relied on a variety of circumstances which embodied "coincidence". In the view of the minority the concept of "coincidence" is crucial because it determines whether the judge must give a direction to the jury on the proper use of propensity evidence. At [91]–[92] the minority concluded:

> A propensity evidence direction is required where the Crown is:

> (a) relying on propensity reasoning and in doing so is invoking ideas about coincidence or probability; and/or
>
> (b) the evidence involves aspersions on the character of the appellant in respects not directly associated with the alleged offending.
>
> As well, a propensity evidence direction should be given where, without it, there is a danger that the jury will not realise the relevance of the evidence in question or there is some particular risk of unfair prejudice associated with the evidence.
>
> On the other hand, and as the corollary of what we have just said, where the evidence in question, although still falling within the Act's "propensity evidence" definition, is not led primarily in reliance on coincidence or probability reasoning, a specific direction may well not be required.

In *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116, (2016) 28 CRNZ 108 at [65] the Supreme Court unanimously endorsed the approach of the minority in *Mahomed*.

In *Tuhaka v R* [2015] NZCA 540 at [27], the Court referred to *Mahomed* at [89], and said that whether a direction is required in any individual case depends on whether the Crown is relying on propensity reasoning and, in doing so, invoking ideas about coincidence or probability (or rather whether the evidence involves aspersions on the character of the appellant in respects not directly associated with the offending).

In *Perkins v R* [2011] NZCA 665 at [20]–[21] the Court referred to the minority judgment in *Mahomed* and said:

> Although it will fall within the definition of propensity evidence the relevance of evidence of other misconduct by the defendant to the victim will not normally depend on ideas of coincidence. Its relevance as bearing on the background or the nature of the relationships between those involved will usually be sufficiently obvious as to not require particular explanation. The rationale for its admission rests on it establishing hostility on the part of the defendant to the victim and the violence of its expression. It is not always necessary to direct the jury in relation to such evidence. The risk of unfair prejudice associated with such evidence is likely to be less than with orthodox similar fact evidence and is usually addressed simply by the judge warning the jury in general terms against being influenced by prejudice or emotion…
>
> So also where violence erupts in the familial context the underlying family dynamics are relevant to explain why and in what context alleged incidents occurred, and the effect of them. This may be particularly so where the violence is across the board in a family, and/or when there is sexual abuse.

In *P (CA696/17) v R* [2018] NZCA 53 counsel for the appellant agreed that the issue in dispute was whether or not P committed various acts of physical violence against V1, including, on one occasion, choking her and, on another occasion, holding her head under water. The Court noted: "This Court has said on a number of occasions that evidence of a defendant's violent behaviour towards one partner may be admissible as propensity evidence in a case concerning alleged violence against another partner" (at [17]).

Proving a conviction: s 49

In *The Second Review of the Evidence Act 2006: Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) the Law Commission recommended amending s 49 to provide that the effect of offering evidence of a conviction is presumptive (not conclusive) proof that the person committed the offence: see [4.12] – [4.63] and draft legislation in Appendix 1.

Possibility that s 8 may limit the operation of s 49(1)

In *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1, (2016) 28 CRNZ 273 Young and O'Regan JJ left open the relationship between s 8 and s 49: at [14]. Because in this proceeding all parties accepted the *admissibility* of the convictions of the four associates of the defendant, s 8 (being an admissibility provision) had no role to play. Section 49(2) ("exceptional circumstances") was the only escape from s 49(1)'s prohibition on calling evidence inconsistent with the convictions. However, Young J and O'Regan JJ also said that in cases where there is no practical necessity for evidence to be given as to a prior conviction, s 8 might provide a mechanism for exclusion on the basis of the risk that such evidence would have an unfairly prejudicial effect on the proceedings (at [14]). But their Honours concurrently said that there is likewise scope for the view that an effect which is mandated by s 49(1) should not be regarded as unfairly prejudicial if the circumstances are not exceptional.

The issue regarding s 8 that was raised in *Morton* was expressly left open by the Supreme Court in *Va'afuti v R* [2017] NZSC 142 at [16] issue because the cases could be decided on the basis of s 49 alone.

In *Parkes v R* [2018] NZCA 386 the Court, while noting the comments from *Morton* regarding the application of s 8, said (at [12]):

> Section 49(1) provides that the conviction is admissible "if not excluded by any other provisions of this Act." Plainly the relevance requirement of s 7, and the probative value versus prejudicial effect in s 8, must be part of the admission analysis.

In *Perry & Te Tomo v R* [2018] NZCA 595, the Court of Appeal held that a certificate of conviction of a co-accused of T, (Marshall) who had plead guilty to manslaughter, should not have been admitted at the trial of T, and should have been excluded under s 8. The Court held that even if the certificate was legitimately before the jury, the jury needed to be directed not to use it as proof that Marshall was a principal offender *or* as proof of causation: at [82]. In the absence of directions as to its permissible use, the admission of the certificate gave rise to a miscarriage of justice, and the convictions of both appellants were quashed. Although there was no certificate of conviction admitted in P's trial, the Court held there had been a similar risk of illegitimate *use* of the fact of M's conviction: at [92].

In *The Second Review of the Evidence Act 2006: Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) the Law Commission recommended amending s 49 to specifically provide that the admissibility of conviction evidence is subject to its exclusion under any other provision in the Act, including s 8: [4.64] – [4.84] and draft legislation in Appendix 1.