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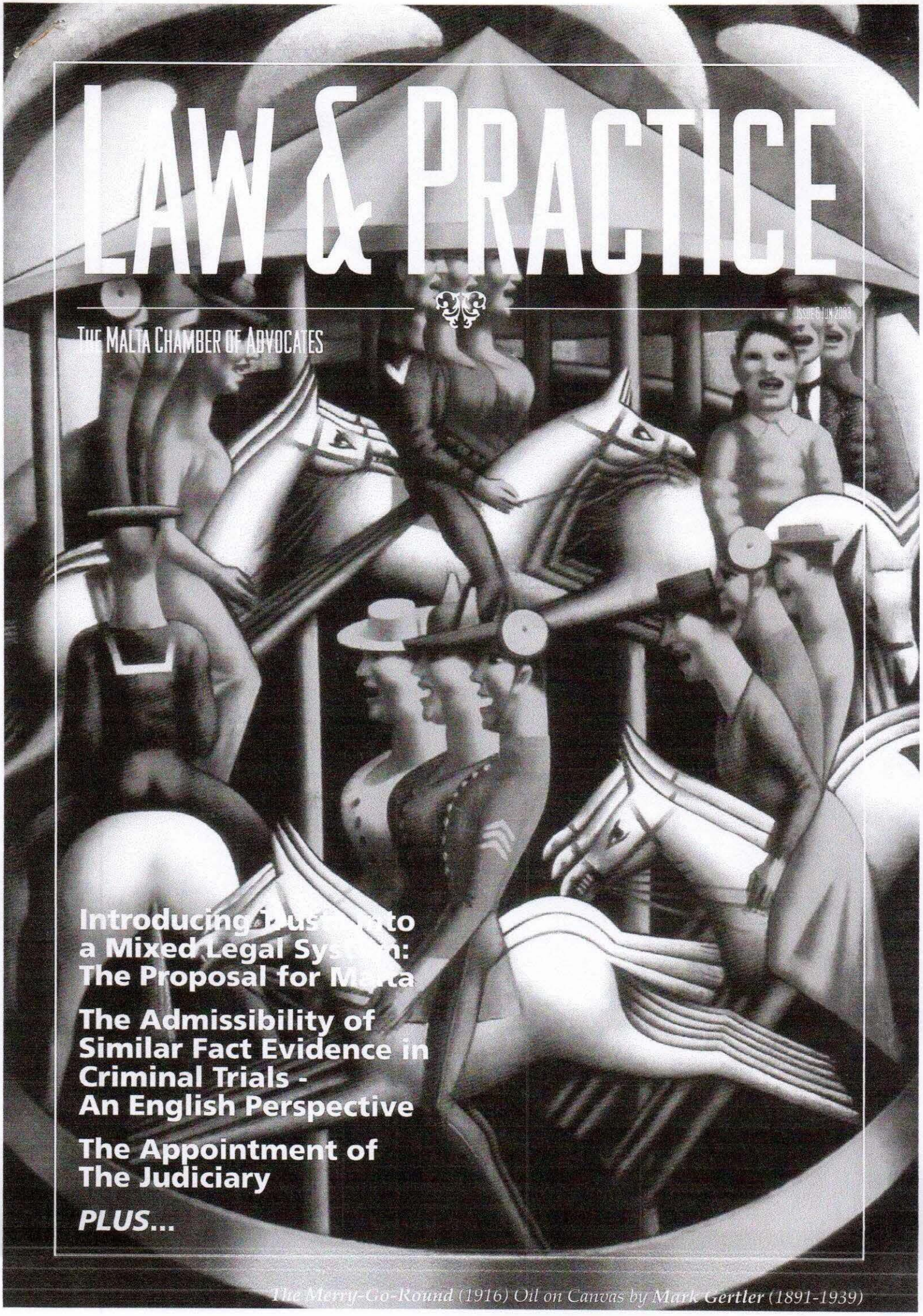

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The Merry-Go-Round (1916) Oil on Canvas by **Mark Gertler** (1891-1939)

THE ADMISSIBILITY OF SIMILAR FACT EVIDENCE IN CRIMINAL TRIALS AN ENGLISH PERSPECTIVE

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The general rule on admissibility is that all relevant evidence is admissible, subject to the exception found in the similar fact rule that the prosecution cannot in general adduce evidence of misconduct by the defendant on occasions other than that relating to the offence charged, or of any disposition or propensity of the defendant to behave in any manner in order to prove the case. There are various reasons justifying such an exclusion:

1) as held in *D.P.P. v Boardman* [1975] AC 421, such evidence is completely irrelevant and the prejudice created by such evidence outweighs any probative value it might have; and as an ancillary, even if the fact finders are not fully convinced that the defendant is guilty of the charge that they are considering, they may feel inclined to punish the defendant for his or her behaviour;
2) evidence of previous misconduct raises many collateral issues which may be distracting, expensive and time consuming to investigate in the light of the main issues of the case;
3) further, if such evidence is freely admissible, investigating authorities may be encouraged to look for persons with records rather than real evidence.

However the courts have been willing to relax controls on admission of this kind where satisfied that its relevance is sufficient to outweigh any prejudice that may be caused to the defendant's case and the Courts have attempted to adopt formulae to keep this balance.

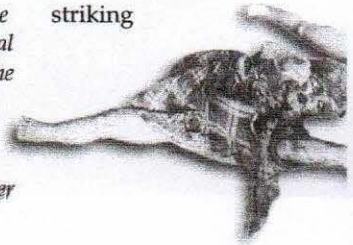
In *Makin v A-G for New South Wales* [1894] AC 57 the accused were charged with murder of a child taken upon informal adoption against payment of a small premium by the mother. There was enough circumstantial evidence to convict but the prosecution wanted to adduce evidence of other mothers who did the same with the accused. Further, 13 bodies of babies were found in premises previously occupied by the couple, thereby rebutting the defence of accidental death. This was admitted to rebut a denial of baby farming. The Supreme Court of New South Wales upheld the admission denying that it was necessary to show even a prima facie connection between the accused and deaths before the evidence became admissible (even though obiter the court did say that there was plenty evidence of connection in the case). Therefore evidence tending to show other discreditable acts was admissible to corroborate circumstantial evidence both of the commission of the actus reus of the crime and of the mens rea required for it. The Privy Council held that:

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

The words in *Makin* are mor naturally read as stressing th importance of the relevance the evidence to the issues in t case.

Great difficulties however we experienced by the courts in applying this dictum. The ma problems with *Makin* were th the words "relevant" and "admissible" were used interchangeably clouding th issue.

A subsequent development w *Boardman*. It was held that relevance was key element, shifting importance from purpose to the degree of relevance of the evidence. Th requirement of "striking similarity" in this case was us to balance prejudice with probative value. In fact the evidence became admissible because of their striking



similarity to other acts being investigated and because of their resulting probative force. Lord Salmon in *Boardman* referred to a similarity which *"would have to be so unique or so striking that common sense makes it inexplicable on the basis of coincidence"*. Hailsham refers to admitting similar fact evidence where it would be *"an affront to common sense"*, while Lord Morris to *"underlying unity"* (which however was criticised as being vacuous). To be admissible the evidence had to be of some relevance and must have had a strong degree of probative force. It allowed the evidence in this case as being mutually corrobative. Also it appeared to draw a distinction between kinds of relevance – if used to show a disposition only it was to be excluded; but if used to show something else it was admissible.

In *R v Scarrot* [1978] 1 All ER 672, this "positive probative value" was upheld in that one was searching an underlying link in the allegation which was not to be inferred from similarity of facts which can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration.

R v Lunt (1989) 85 Cr App Rep 241, attempted to link up *Makin, Boardman and Scarrott* by laying down certain guidelines:

1) the prosecution cannot in general adduce evidence of disposition to commit a crime or of previous misconduct;
2) however admissible as similar fact evidence going beyond showing a tendency to commit crimes of the kind charged and is positively probative in regard to the crime charged;
3) to determine where so positively probative one is to identify the issue to which the evidence is directed;
4) Once identified will it be probative in that will it assist a jury to reach a conclusion on that issue on the some ground other than the accused's bad character or disposition to commit the sort of crime with which he is charged?
5) If the evidence is so positively probative the judge will nevertheless have a discretion to exclude it if it *"would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value"*

The matter was reconsidered in *DPP v P* [1991] 2AC 447. The House of Lords held that the test of admissibility is *"that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime"*. Regarding "striking similarity" as an essential qualification for admission is to restrict the operation of the principle. They accepted that the test for admission was that probative value of bad character evidence must outweigh the prejudicial effect. In this case the daughter's allegation to incest and rape could be used as corroboration. Probative force could be supplied in a number of ways. The Court of Appeal per Lord Lane held that they lended plausibility to direct evidence.

DPP v P makes it clear that it is no longer the law that the question of admissibility turns mainly upon whether or not "striking similarity" can be demonstrated.

Can Evidence of Propensity be Admitted?
Traditionally this was not allowed and Lord Hailsham in *Boardman* referred to the *"forbidden chain of reasoning"* leading directly from propensity to guilt. However it was held that some evidence of disposition may have sufficient probative force to merit admission. Indeed one can categorise certain cases:

a) Commission of Crime:
here questions as to whether a crime was committed is at issue. At one time it was thought that evidence of accused's bad disposition could not be relied upon to establish an actus reus. This was rejected in *Makin* where finding of the bodies was admitted to show that the accused developed a "system" of baby farming. In *R v Smith* (1915) 11 Cr App Rep 229 evidence of other deaths tended to rebut possible defence of accident.

b) Commission by the accused:
here we are dealing with situations where the crime cannot be denied but the accused is denying he was the perpetrator. One ought to distinguish between cases where the identity of the accused is established by circumstantial evidence of peculiarity or disposition and those where there is direct evidence of identity which it is sought to be supported by the dispositional evidence. It is submitted more evidence is required in the former then in the latter. Strength may come from the peculiarity of aim/technique, or from the accumulation of less unusual detail underlying unity) or from the strength of the evidence identifying the accused as the perpetrator of one, or more of the incidents. *R v Straffen* [1952] 2QB 911 (the murdering of victims in an unusual way and keeping them uncovered) meant, the Court said that little other evidence was required as it bore the accused's signature. Also time and place were essential. In *Thompson v R* (1918) AC 221, here was direct evidence, and therefore the tendency to homosexuality although weak was allowed to corroborate identification.

c) Voluntary Act of the Accused:
here similar fact evidence can be brought in to rebut involuntariness or the fact that the accused has no recollection of the happening

d) Intention of the Accused:
In *R v Bond* (1906) 2KB 389, evidence of previous abortion was brought to prove that it was a deliberate unlawful act.

Similar Facts evidence may also be brought in to rebut a statement of good character by the accused, as was held in *R v Butterwasser* [1948] 1 KB 4. One can rebut evidence of accused's

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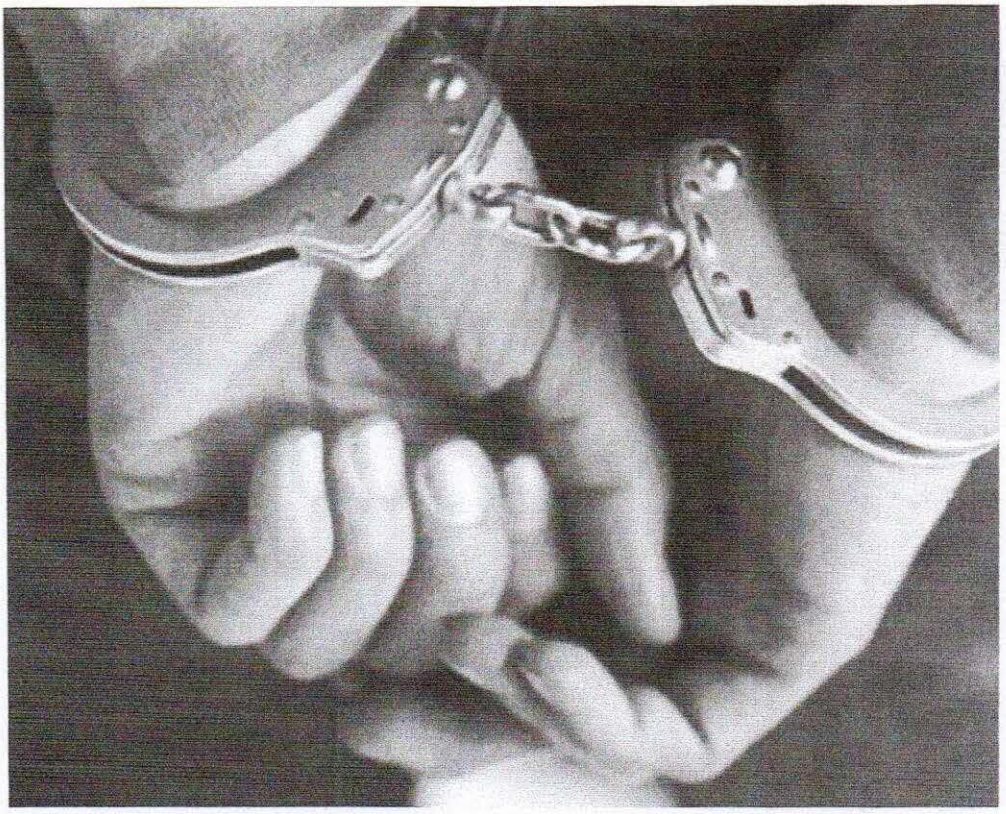

good character either by bringing forward evidence of his bad character in cross-examination or by leading extrinsic evidence of it. In *R v Bracewell* (1978) 68 Cr App. Rep 44 such evidence was allowed where accused put his good character in issue.

Should the Prosecution have to wait and see what defence is to be relied on before adducing similar fact evidence?
Relevance is a key element for the admissibility of such evidence and as will be seen much is determined by the defence set up, in that it will determine the facts in issue. A plea of not guilty in effects puts every element of the crime in issue as Lord Goddard held in *R v Sims (1949)* 1 All ER 697, *"the accused by confining himself to one issue, should not be able to exclude evidence that should be admissible and fatal if he ran two defences as that would make his astuteness prevail over justice"*. This was acknowledged to be harsh and in *Noor Mohammed v R* [1949] AC 182, Lord Goddard expressed the traditional and generous view in *R v Hall* [1952] 1 All ER 66 that in criminal cases the prisoner does not plead in writing; he pleads orally to the general issue and therefore all defences are open to him. However on the other hand it would not be right at once in all cases to assume that a prisoner is going to set up a defence theoretically open to him. It is interesting to note that in the US the prosecution is not bound to accept an admission designed to limit the scope of similar fact evidence, but the matter remains one of balancing relative probative force against the prejudicial effect.

Propensity Established by Expert Testimony
As shown in *Lowery v R* [1974] AC 85 this is generally inadmissible. The co-accused produced psychological evidence to prove that the co-accused was more likely to have committed the crime. Quoting *Makin*, the Privy Council held that the prosecution could not have adduced such evidence. The interesting point is that *Palmer* argues that this could have been admissible because it is distinguishable from past conduct. First of all he says it is doubted whether a jury would over estimate the strength of the inference, especially if psychiatrist's diagnosis can be attacked by the defence; he doubts whether such report amounts to a propensity; and finally it is unlikely that significant amount of m prejudice will be generat expert evidence about th character of the accused.

Conclusion
As Archbold succinctly *"A distinction should be d between evidence of simila usually relating to offences person other than the alle victim of the offence charg evidence of other acs or declarations of the accuse indicating a desire to com reasons for committing, the charged, i.e. motive"*.

In a nutshell, the preval trend seems to be that s fact evidence is increasi being adopted where:
1) evidence is close in ti place/circumstance to t in issue or offence char
2) evidence necessary t complete the account o circumstance of the offe make it more comprehe to the jury;
3) accused may have ha relationship with the vic previous misconduct m relate to the victim rath to those of other offenc
4) evidence may assist i establishing the motive the offence charged.