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Identical Twins or Just Kissing Cousins?: The Scope of the "Similar Fact" Exception

R. v. Atlin, 2003 YTCA 0005

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So-called "similar fact" evidence, as we all know, is a species of circumstantial evidence—evidence that does not go directly to the charge. It is also, by its nature as evidence of bad character, prejudicial to the accused, and is therefore presumptively inadmissible. As Binnie J., writing for the Court in *R. v. Handy*, [2002] 2 S.C.R. 908 (*"Handy"*), confirmed:

> The exclusion of evidence of general propensity or disposition has been repeatedly affirmed in this Court and is not controversial. See Morris v. The Queen, [1983] 2 S.C.R. 190; R. v. Morin, [1988] 2 S.C.R. 345; R. v. B. (C.R.), [1990] 1 S.C.R. 717; R. v. Arp, [1998] 3 S.C.R. 339.
> …
> The respondent is clearly correct in saying that evidence of misconduct beyond what is alleged in the indictment which does no more than blacken his character is inadmissible.
> …
> The policy basis for the exclusion is that while in some cases propensity inferred from similar facts may be relevant, it may also capture the attention of the trier of fact to an unwarranted degree. Its potential for prejudice, distraction and time consumption is very great and these disadvantages

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> will almost always outweigh its probative value. It ought, in general, to form no part of the case which the accused is called on to answer. It is excluded notwithstanding the general rule that all relevant evidence is admissible: [citing *Arp* and *Morris, supra*; *R. v. Robertson*, [1987] 1 S.C.R. 918 (*"Robertson"*); *R. v. Seaboyer*, [1991] 2 S.C.R. 577].

We also know that such evidence is inadmissible whether it is evidence of actual criminal acts, or of merely discreditable conduct (*Robertson*; *R. v. B. (L.)* (1997), 35 O.R. (3d) 35 (C.A.)).

"[Similar fact evidence] ought, in general, to form no part of the case which the accused is called on to answer. It is excluded notwithstanding the general rule that all relevant evidence is admissible."

For every rule, of course, there is an exception—if not several. Accordingly, following the seminal case of *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57 (P.C.), a number of exceptional categories were mapped out. More recently, in Canada, and following the approach in *Director of Public Prosecutions vs. Boardman*, [1975] A.C. 421 (H.L.), that categorical approach has fallen into disfavour, and the test applied is now a rather fuzzy "balancing" of probative value versus prejudicial effect*:

> [E]vidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury (per McLachlin J., as she then was, for the majority in *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717 (*"B. (C.R.)"*)).

As mentioned earlier, such "heavy prejudice" will always be present. It can take the form of potential confusion between a multiplicity of allegations (so-called "reasoning prejudice") or increased inclination to convict based solely on a conclusion that the accused is a person of bad character ("moral prejudice"). (*Handy*).

The probative force of the evidence, on the other hand, works via inferences. Wrote Binnie J. in *Handy*:

> as with any circumstantial evidence, its usefulness rests entirely on the validity of the inferences it is said to support with respect to the matters in issue.

In *Robertson,* Wilson J. put it this way:

> In discussing the probative value we must consider the degree of relevance to the facts in issue and the strength of the inference that can be drawn.

The strength of the inference must be such that,

> absent collaboration, it would be an affront to common sense to suggest that the similarities were due to coincidence (per Sopinka J., dissenting in *B. (C.R.)*, cited with approval in *Handy*).

What factors, then, are the courts to take into account in deciding whether the inferences sought by the Crown are sufficiently valid that they displace the exclusionary presumption? What factors might defence or appellate counsel rely on to persuade the court that the inferences urged are not sufficiently reliable that they should tip the scales against exclusion? One can divine, from the cases, a list of such factors, and the recent decision by our Court, sitting as the Yukon Territory Court of Appeal in *R. v. Atlin*, 2003 YTCA 0005 (*"Atlin"*), exemplifies one of them. In *Atlin*, it was the passage of time that sufficiently weakened the inferences urged by the prosecution that the similar fact evidence was ruled inadmissible.

The appellant had been charged with having committed certain offences against one S.J. in approximately 1987, when the appellant had been about 32 years old. The "similar fact" witness, M.J., testified to fairly similar acts of sexual assault that he said had been committed against him between 1972 and 1975, when he had been 10 to 14 years old, and the appellant had been in his late teens (M.J. had not reported these acts until approached by the police in late 2001). The trial judge allowed M.J.'s allegations to go before the jury on the authority of *B. (C.R.)*, to the effect that such evidence can be considered as part of their evaluation of the credibility of the complainant.

Hall J.A., writing for the *Atlin* Court, referred to the recent decisions in *Handy* and in *R. v. Shearing* (2002), 165 C.C.C. (3d) 225 (S.C.C.) (*"Shearing"*), opining that the *Atlin* trial judge might well have ruled differently

*How can one "balance" such considerations, one might ask, when they are not measured in the same "units"? The one is a measure of a degree of persuasiveness in proving an issue; the other is a measure of potential for distraction of the jury, and corruption of the verdict.

with the benefit of those judgments. Indeed, a reading of those decisions, particularly the judgment of Binnie J. in *Handy*, discloses a virtual check-list of rationales for excluding similar fact evidence, as will be seen below.

In particular, Hall J.A. was concerned with the temporal gap between the allegations of S.J. and M.J.:

> One matter that seems to me troubling in the instant case is the temporal aspect. By that I mean that the incidents involving M.J. occurred at a time when the appellant was quite a young person and the incidents involving S.J. occurred when he was an adult. It is entirely possible that as an individual matures there can be a change in their attitude, way of life and such. While it is not always going to be a conclusive fact where there are other very cogent badges or indicia of similarity, it seems to me that in general the greater the temporal space between the alleged similar acts and the acts that are alleged in the counts before the Court in the indictment, the more care or caution that will have to be exercised by the trier of fact in analyzing the question of how that circumstance will impact on admissibility. It is fair to say that this will often be a very salient factor in the analysis concerning admissibility.
> …
>
> I would consider a significant passage of time would probably militate against admissibility.

This rationale for rejecting the offered "similar acts" in *Atlin* is interesting when one considers that in *B. (C.R.)*, rather more than a decade earlier, the majority of the Supreme Court of Canada had found that a ten-year gap between the two sets of allegations merely helped reduce the probative force of the similar facts to the "borderline"—but still admissible—level.

Further, it might be noted that Hall J.A. relies on only one of at least two bases for concern where there is a significant lapse of time since the alleged similar acts. Another is cited by Binnie J. in *Handy*, as noted below: if an accused denies the uncharged allegations, he may be prejudiced in his attempt to lead evidence in his defence, simply by the passage of time, and the "staleness" of the allegations.

Yet another interesting aspect of this reasoning is that it confirms the real basis for whatever probative force similar fact evidence enjoys: it is propensity evidence in its purest form—if a person has done this, in this manner, before, it is more likely that he did it again, as alleged. If, on the other hand, there is a realistic possibility that his disposition has changed, then that logical inference is weakened (see also *Handy* at paras. 59-68).

The case is also of some interest from the point of view of the degree of similarity necessary between acts (in a case where identity is the issue, it has been held that the similarities must be "so highly distinctive or unique as to constitute a signature": per Martin J.A. in *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.)). S.J. had testified to incidents of fondling, masturbation and attempted anal intercourse. M.J. had complained of a similar range of activities, as well as having been dressed up in pantyhose by the appellant. It was a case, wrote Hall J.A., "where there was not what I would characterize as particularly distinctive conduct linking the series of acts sought to be linked":

> I am persuaded here that the relatively long time period intervening between the similar act evidence and the acts charged in the count involving S.J. was a very salient factor that had to be carefully analyzed. As I said, I would think such circumstances would militate against admissibility here having regard not only to that factor but to the factor that the acts under consideration were not acts that had what I might call any unusual or unique features. Neither was there the sort of unity that sometimes exists when you are dealing with children in the same family or children in the same school, and there is a fairly close connection in time. See, for example, *R. v. J.A.H.* (1998), 124 C.C.C. (3d) 221.

The passage of time, then, might be sufficient to exclude this kind of evidence. What other factors might work to the same effect?

Possibility of Collusion

Handy itself provides an example of another factor, being a case where the inferences sought were invalidated primarily by the real possibility of collusion (the case also features a number of other useful factors, noted below).

At the trial, it was the credibility of the complainant regarding non-consent, rather than the identity of the accused, that was at issue. Mr. Handy was convicted of sexual assault after a jury was allowed to hear allegations from his ex-wife about prior similar acts of rough and non-consensual sex. The Ontario Court of Appeal quashed the conviction, and the Crown appealed to the Supreme Court of Canada.

The ex-wife had met the complainant before the alleged

sexual assault, and had told the complainant that she had received $16,500 from the Criminal Injuries Compensation Board after making a complaint. She had told the complainant at that time that all one had to do to get such payments was to say one had been abused.

These facts, wrote Binnie J., having raised at least an "air of reality" to the defence allegation of collusion, left the Crown with the onus of satisfying the trial judge, on a balance of probabilities, that the evidence of similar acts was not so tainted: "That much would gain admission. It would then be for the jury to make the ultimate determination of its worth".

> *"It was not incumbent on the defence to prove collusion. It was a condition precedent to admissibility that the probative value of the proffered evidence outweigh its prejudicial effect and the onus was on the Crown to satisfy that condition."*

By way of contrast, when the appellant in *Shearing* raised the spectre of collusion between complainants in a multi-count indictment, the Supreme Court held that evidence of communication between them, and shared antipathy toward the accused, was "speculative", and not sufficient to bar admission of their evidence under the "similar fact" rubric.

See also *R. v. C. (B.)* (2002), 171 C.C.C. (3d) 159 (Ont. C.A.); *R. v. D. (L.E.)*, [1989] 2 S.C.R. 11

Number of occurrences

The evidence of similar acts gains cogency if it is alleged that the acts were repeated (as, for example, in *Handy*, where there were several alleged acts of forced sexual intercourse with the ex-wife, over several years).

See also *R. v. Batte* (2000), 145 C.C.C. (3d) 449 (Ont. C.A.).

Intervening events:

Just as the passage of time tends to weaken the nexus between similar acts and the offence charged, intervening events can weaken it, making the inferences sought less tenable. See, for example, *R. v. Dupras*, [2000] B.C.J. No. 1513 (QL) (S.C.), a case about evidence of motive and *animus*, but clearly analogous to the similar fact analysis.

Lack of Distinctive features:

See *R. v. Pierre*, [1995] B.C.J. No. 1450 (QL) (C.A.) (*"Pierre"*), where Rowles J.A. writes for the Court:

> To support the trial judge's ruling, respondent's counsel submitted that the similar fact evidence demonstrated a pattern of behaviour and circumstances probative of the complainants' credibility, and that the evidence operated to rebut any suggestion of innocent association. The points of distinctiveness or similarity to which Mr. Fitch referred in his submissions paralleled the arguments made by Crown counsel at trial. Those points included the age and size of D.D. and T.P. and the two complainants, the manner in which the accused came in contact with them, the locations and times at which the conduct occurred, the use of alcohol, supplied by the accused prior to some of the incidents, the suggestion of or actual exchange of money associated with some incidents, the threats associated with some incidents, and the sexual conduct itself.
>
> …
>
> In the present case, the relevance of the similar fact evidence to the proof of the acts constituting the offences charged rests on the Crown's assertion of a plan, scheme, or pattern of conduct on the part of the accused. The obvious difficulty with that assertion is that within the evidence of the two complainants, there is no highly distinctive conduct or remarkable act which the evidence of D.D. or T.P. confirms or supports. As a result, the probative value of the similar fact evidence to the acts sought to be proved in the offences charged rests almost entirely on the propensity of the appellant to commit homosexual acts with adolescents.

The Court contrasted this with the facts in *R. v. A. (S.B.)* (1991), 2 B.C.A.C. 232, in which the similarity between the acts alleged was that the accused was said in each instance to have demanded during oral sex that his victim swallow his seminal fluid. That degree of similarity had been found sufficient for admission.

In *R. v. Huot* (1993), 16 O.R. (3d) 214 (C.A.), the complaints had come from young people in the care of a religious order. In that respect, sufficient nexus might well have been found. Arbour J.A. wrote, however:

> In the present circumstances, I am of the opinion that similar fact evidence was not admissible. The

> similarity of the acts alleged by each of the two complainants, in my opinion, was not sufficient to allow the admissibility of the evidence, taking into account the numerous and important differences between their allegations. The probative value of the evidence had to do essentially with the propensity of the appellant to commit homosexual acts with adolescents; with respect to this alone, the evidence was certainly inadmissible. ...Although each of the two complainants report several different occurrences, it is not possible here to say that there was a plan or a system. I am of the opinion that similar fact evidence confirmed the credibility of the complainants only because it disclosed the propensity of the appellant to perform such acts; it should have been declared inadmissible for this purpose.

"[Evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused..." — B. (C.R.)

R. v. Rulli (1999), 134 C.C.C. (3d) 465 (Ont. C.A.) (*"Rulli"*) was a case in which the Crown had been allowed to lead evidence of alleged prior discreditable conduct with a former girlfriend, during a trial on charges of having abused a current girlfriend. The conviction was overturned on appeal:

> It seems to me … that in cases where the purpose of the similar fact evidence is solely or primarily to enhance the credibility of an adult complainant, we should be hesitant to depart from the common law's traditional rejection of evidence that illustrates that the accused is the sort of person who is likely to have committed these offences.
>
> In the case in appeal, the probative value of the similar fact evidence is slight. There is nothing particularly distinct or unique in Sindy Maslow's account of the manner in which the appellant treated her. Her description of the appellant as possessive, distrustful and assaultive, both verbally and physically, can be replicated in almost any abusive relationship.

See also *R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 (S.C.C.), the rather odd case in which severance was granted on the basis of precisely which body part a doctor was alleged to have improperly touched during medical "examinations", and in which the Supreme Court concluded that such distinctions were not sufficiently significant.

See *Arp*, *supra*, for an example of supposedly "striking" similarities between offences (in a case where identity was at issue, so that the requirement of a virtual "signature" or "fingerprint" existed).

Weakness of Similar Fact Evidence

In *Handy*, fairly significant weaknesses had been demonstrated in the evidence of alleged similar acts. Wrote Binnie J:

> In the usual course, frailties in the evidence would be left to the trier of fact, in this case the jury. However, where admissibility is bound up with, and dependent upon, probative value, the credibility of the similar fact evidence is a factor that the trial judge, exercising his or her gatekeeper function is, in my view, entitled to take into consideration.

Similarly, of course, there must be an evidentiary link between the alleged similar prior acts and the accused as the perpetrator of them, though it is not entirely clear how strong the link needs to be (probably the civil standard: see *Arp*):

> Before evidence may be admitted as evidence of similar facts, there must be a link between the allegedly similar facts and the accused. In other words there must be some evidence upon which the trier of fact can make a proper finding that the similar facts to be relied upon were in fact the acts of the accused for it is clear that if they were not his own but those of another they have no relevance to the matters at issue under the indictment (*Sweitzer v. The Queen* (1982), 68 C.C.C. (2d) 193 (S.C.C.).

Apprehension of Bias

See *Handy, supra*.

Alleged Similar Acts Not Proven

In *Handy*, as mentioned above, there were significant concerns around the credibility of the ex-wife. Further, wrote Binnie J.,

> The strength of the evidence was weakened by the fact that the respondent had denied the incidents and that they formed the subject matter of other proceedings in which they were as yet unproven.
> …
>
> Further, there is a risk, evident in this case, that where the "similar facts" are denied by the accused, the court will be caught in a conflict between

> seeking to admit what appears to be cogent evidence bearing on a material issue and the need to avoid unfairness to the right of the accused to respond. … Logistical problems may be compounded by the lapse of time, surprise, and the collateral issue rule, which will prevent … trials within trials on the similar facts. Nor is the accused allowed to counter evidence of discreditable conduct with similar fact evidence in support of his or her credibility…

See also *Rulli, supra*, in which the alleged similar act evidence involved a conviction that was under appeal at the time of the subsequent trial, and was ultimately quashed.

Similar Acts More Serious and Inflammatory than Acts Charged

In *Handy*, a factor indicated by the Court as still further increasing the prejudicial effect of the wife's evidence was the fact that it was of behaviour even more reprehensible—"to the extent these things can be ranked"—than that alleged in the indictment.

See also *Pierre*, *supra*; *D. (L.E.), supra*.

Fact Sought to be Proved Not at Issue

Finally, it may be that the evidence is being adduced to prove a fact that is not seriously at issue, or is of limited importance to the Crown case. This, of course, will tend to militate against admission: Examples of reasoning supportive of such an argument can be found, for example, in *B. (L.)*, *supra*; *R. v. Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.); *R. v. Clermont*, [1986] 2 S.C.R. 131; *R. v. Bosley* (1992), 18 C.R. (4th) 347 (Ont. C.A.); *R. v. Proctor* (1992), 69 C.C.C. (3d) 436 (Man. C.A.); and *R. v. Hanna* (1990), 57 C.C.C. (3d) 392 (B.C. C.A.).

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