SIMILAR FACT EVIDENCE - RECENT DEVELOPMENTS IN THE LAW

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I. SIMILAR FACT EVIDENCE: RECENT DEVELOPMENTS IN THE LAW

The law has recently evolved with respect to the introduction of similar fact evidence. This has been and continues to be one of the more controversial and indeed frustrating areas of evidence in criminal cases. Any attempt to define its parameters in other than vague or general terms is indeed a challenge. I propose to address during this paper three significant areas relating to similar fact evidence:

1. The scope of the rules relating to adducing similar fact evidence, particularly in light of the recent refinement of the rules respecting the admissibility of such evidence.
2. How to ensure that the jury is appropriately instructed as to the permissible use of similar fact evidence.
3. Tactical and strategic issues facing defence counsel when faced with the prospect of dealing with similar fact evidence.

II. INTRODUCTION - A BRIEF STORY

It must be recalled that evidence of other acts of disreputable conduct by an accused are, for the most part, inadmissible at the instance of the prosecution. An exception to this exclusionary rule dates back to the case of Makin vs. New South Whales (Attorney General) [1894] A.C. 57 (H.C.). In that case the Court upheld the general rule but went on to say that the mere fact that evidence adduced which tends to demonstrate that the accused may have committed other crimes does not render it inadmissible if it is relevant to an issue before the trier of fact. The Court suggested that such evidence may have relevance if it bears upon the question of whether the acts alleged in the Indictment were designed or accidental or to rebut a defence which would otherwise be available to the accused.

In numerous cases which followed Makin the rule allowing the introduction of similar fact evidence tended to be very restricted. The basic principle prohibiting the introduction of similar fact evidence was regarded as fundamental and exceptions were strictly limited.
However, as the law evolved the Courts recognized that the categories stated in *Makin* were not exhaustive. Eventually exceptions were recognized based upon a categorical approach. The process was gradual as the Courts were constantly torn between preserving the general exclusionary rule and recognizing the spirit of the exception as outlined in *Makin*. The number of recognized categories of admissible similar fact evidence grew. Examples of these categories are discussed at pp. 15-20.

According to some critics, the law reached the point where once proposed similar fact evidence could be placed into a category recognized in precedent, its admissibility seemed to follow as a matter of course. This ultimately led to the rejection of a categorical approach in the House of Lords in *Boardman v. D.P.P.* [1974] 3 All E.R. 887.

III. REFINEMENT OF THE RULE BY THE SUPREME COURT OF CANADA

Over the course of two decades the Supreme Court of Canada had numerous occasions to consider the similar fact evidence rule and made significant refinements and indeed outright modifications to the rule during that time:

1. *Rejection of the Category Approach*

   After the pronouncement in *Boardman*, a similar approach was adopted by our Supreme Court in *R v. D.(L.E.)* [1989] 2 S.C.R. 111, 50 C.C.C. (3d) 141, 71 c.R. (3d) 1. Sopinka J. addressed the issue of categories of similar fact evidence and simply indicated that they were nothing more than illustrations of the application of the rule. The categories were not to be viewed as exhaustive but neither were they to be looked upon as an "automatic ticket" of admissibility.

   The "category approach" was again addressed by the Supreme Court of Canada in *R v. B. (C.R.)* [1990] 1 S.C.R. 717, 55 C.C.C. (3d) 1. McLachlin J. (as she then was) spoke for the majority. She also favoured the outright rejection of any "category approach" and suggested that the modern rule should be viewed only as an examination of the probative effect of the proposed
evidence balanced against the prejudice caused to the accused by its admission regardless of the purpose of its admission.

2. The Process for Evaluating Similar Fact Evidence

It is to be recalled that similar fact evidence only becomes admissible where its probative value exceeds its prejudicial effect. In R v. D.(L.E.) Sopinka wrote for the majority and agreed with the following concise statement of the rule from Cross on Evidence, 6th Ed. (London: Butterworth's, 1985):

"Evidence of the character or the misconduct of the accused on other occasions tendered to show his bad disposition, is inadmissible, unless it is so highly probative of the issues in the case as to outweigh the prejudice it may cause."

The issue was examined again in R v. B.(C.R.). McLachlin, in her analysis of Boardman, interpreted that case as setting a requirement that similar fact evidence have a "very high degree of probability" (p.19 C.C.C.). She then stated the preferred approach with respect to examining the admissibility of similar fact evidence as follows:

1. Admissibility must begin with recognition of the general exclusionary rule against evidence going merely to disposition.
2. In order to determine whether the evidence in question constitutes an exception to the general rule depends upon whether the probative value of the proposed evidence outweighs its prejudicial effect.
3. Because of potential prejudice, the probative value of the evidence must be high to permit its reception.
4. In considering whether to admit the evidence a Judge must examine a variety of factors including the degree of the distinctive of the acts alleged against the accused and the connection, if any, of the evidence to issues other than propensity to determine if the probative value of the evidence outweighs its prejudicial effect. (p. 24 C.C.C.)
Ultimately, she endorsed a three-step approach when dealing with similar fact evidence.

1. Assess not only the relevance but the weight of the disputed evidence (the latter task normally being one reserved for a jury).
2. Amalgamate relevance and weight to arrive at a determination of probative value.
3. With due regard to the exclusionary presumption, determine if the probative value outweighs the prejudice. (p. 24 C.c.c.)

The law, however, was again restated in *R v. Arp* (1998) 3 S.c.R. 339, 129 C.C.C. (3d) 321, 20 C.R. (5th) 1. Therein, Cory J. in speaking for the majority suggested that one was to proceed directly to the balancing stage and the test for admissibility was to be restricted solely to balancing the probative value against the prejudicial effect. In his view, "because similar fact evidence is admitted on the basis of an objective improbability of coincidence, the evidence necessarily derives its probative value from the degree of similarity between the acts under consideration" (p. 241 S.c.R.).

Arguably, the earlier test for probative value had two components: there would have to be a finding of significant similarity between the acts under consideration and a determination that the evidence had a high or strong probative value before there was an examination as to whether the evidence could be admissible. It would be only at that point in the inquiry that the balancing of the probative value against prejudicial effect would be undertaken.

3. **The Degree of Similarity**

This is perhaps one of the more frustrating components of the similar fact evidence rule because there has been a constant change of standard. In *R v. Sweitzer* [1982] 1 S.C.R. 949, 68 c.c.c. (2nd) 193, 29 C.R. (3d) 97 and *R v. Robertson*, [1987] 1 S.c.R. 918, 33 C.C.C. (3d) 481, 58 C.R. (3d) 28, the Court seemed to reject the test of "striking similarity" between the similar facts and the conduct alleged to comprise the offence before the Court.
McLachlin J. reiterated in *R v. B.(C.R.)*, *supra*, that the necessity of showing striking similarity between the acts was not always a requirement to the admission of the evidence. Later, however, in *R v. C.(M.H.)* [1991], 1 S.C.R. 763, 63 C.C.C. (3d) 395, 4 C.R. (4th) 1, she seemed to modify her approach and suggested that the probative value usually arose from the fact that the acts compared were so unusually and strikingly similar that such similarities could not be attributed to coincidence (p. 342 C.C.C.).

In *R v. Arp*, *supra* the Court seems to suggest that the level of similarity needed to meet the "test of objective improbability of coincidence" was a variable one and would depend upon the issue to which the evidence was directed, the inference that the Crown was seeking to draw from the similar facts, and the other evidence adduced in the case. The Court did however confirm that where similar fact evidence was being adduced on the issue of identity "a high degree of similarity" would be required.

4. **Admitting Similar Fact Evidence to Prove Propensity Alone**

Arguably, the most controversial aspect of the *R v. B.(C.R.)* case is the suggestion that, at least with respect to some offences, similar fact evidence relating solely to disposition may be admissible to prove guilt. This comes from the following passage from the judgment of McLachlin J.:

"While the language of some of the assertions of the exclusionary rule admittedly might be taken to suggest that mere disposition evidence can never be admissible, the preponderant view prevailing in Canada is the view taken by the majority in *Boardman* - 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 ensue to the accused where evidence of prior immoral or illegal acts is presented to the jury." (p. 22 C.C.C.)

In *R v. B.(C.R.)* the accused was alleged to have molested young girls shortly after establishing a father/daughter relationship with them. The similar fact evidence which the Crown proposed to adduce was evidence of a so-called "stepdaughter" suggesting that she had been molested by the accused. This was lead to bolster the credibility of another stepdaughter who
was the complainant in the case before the Court. McLachlin conceded that the evidence in question fell short of establishing a system or design and hinted that the evidence was admitted solely on the basis of disposition. The complainant's credibility was only bolstered by virtue of a disposition or propensity which fell short of a system that was highly distinctive or so unique as to constitute a signature or trademark.

This principle was further extended by the Ontario Court of Appeal in *R v. Batte* [2000] 145 C.C.C. (3d) 449, 34 C.R. (5th) 97. Mr. Justice Doherty in speaking for the Court stated as follows:

"Propensity reasoning involves two inferences. First, one infers from conduct on occasions other than the occasion in issue that a person has a certain disposition (state of mind). Second, one infers from the existence of that disposition that a person acted in a certain way on the occasion in issue: *R. v. Watson* (1996), 108 C.C.C. (3d) 310 (ant. c.A.), at 325. Assuming the evidence can reasonably support both inferences, there is nothing irrational or illogical in using propensity reasoning to infer that an accused committed the act alleged. Viewed in this way, the evidence of the accused's discreditable conduct is a form of circumstantial evidence and meets the legal relevance criterion: *R. v. Arp*, supra, at pp. 338-9." (p.224)

After discussing the usual rules against the admission of similar fact evidence on the basis of propensity reasoning Mr. Justice Doherty stated as follows:

"The criminal law's resistance to propensity reasoning is not, however, absolute. There will be situations in which the probative force of propensity reasoning is so strong that it overcomes the potential prejudice and cannot be ignored if the truth of the allegation is to be determined. The probative force of propensity reasoning reaches that level where the evidence, if accepted, suggests a strong disposition to do the very act alleged in the indictment. For example, if an accused is charged with assaulting his wife, evidence that the accused beat his wife on a regular basis throughout their long marriage would be admissible. Evidence of the prior beatings does much more than suggest that the accused is a bad person or that the accused has a general disposition to act violently and commit assaults. The evidence suggests a strong disposition to do the very act in issue - assault his wife. In such cases, the jury is permitted to reason, assuming it accepts the evidence of the prior assaults, that the accused was disposed to act violently towards his wife and that he had that disposition on the occasion in issue. The existence of the disposition is a piece of circumstantial evidence that may be considered in deciding whether the accused committed the alleged assault. (pp. 225-226)

5. *Similar Fact Evidence as Establishing a "Context"*
In *R v. Litchfield* [1993] 4 S.C.R. 333, 86 C.C.c. (3d) 97, 25 c.R. (4th) 137, it was held that similar fact evidence maybe admitted if that evidence provided information highly relevant to understanding the context in which the alleged offences occurred. The accused faced 14 counts of sexual assault. He was a doctor and each of the assaults were alleged to have occurred in his office as part of a medical examination. It is important to note that the various acts alleged to constitute the sexual assault in each case were *not* the same.

Another example of this type of approach can be seen in the case of *R v. L.B.; R v. M.A.G.* (1997) 116 c.C.C. (3d) 481 (Ont. c.A.). A number of contextual factors, when taken together, were held by the Court to be evidence capable of giving the proposed similar fact evidence substantial probative value:

1. The nature of the relationship between the Appellant and the complainant and each of the similar fact witnesses;
2. The position of trust and authority involved in each case;
3. The accused's conduct as a sexual predator in his own home.

6. *Risk of Collaboration*

Having opened the door to admitting similar fact evidence to demonstrate propensity, particularly in cases involving sexual offences, the Court had to confront the prospect of complainants collaborating together to concoct allegations against an accused. This issue came squarely before the Court in *R v. Burke* [1996] 1 S.C.R. 474, 105 c.c.c. (3d) 205, 46 C.R. (4th) 195.

Mr. Justice Sopinka wrote for the Court and indicated that there was a considerable body of case law to the effect that where the issue of collaboration or collusion is raised, evidence of similar fact should not be admitted absent a finding by the trial judge that there was no real possibility of collusion or corroboration (p. 39). He then went on to review more recent authorities from the House of Lords and found that the current view was that the possibility of collusion is not a factor to be applied by the trial judge in determining the admissibility of the
evidence. This was to be left as an issue to be examined by the jury who must determine what weight, if any, would be given to the evidence having regard to all of the circumstances, including the possibility of collusion.

The Supreme Court of Canada had not addressed the issue and, for the purposes of the appeal, Mr. Justice Sopinka did not find it was necessary to choose between the two approaches referred to. The prevailing view seems to be that which has been more recently adopted by the House of Lords and the issue is simply to be left to the jury.

IV. ADMISSIBILITY

In spite of the potential erosion of the rules relating to the admissibility of similar fact evidence there are still threshold issues which need to be addressed when the prosecution is attempting to adduce evidence of similar facts. Some of this has been previously discussed but generally there are three criteria which must be met:

1. The potential evidence must be linked to the accused;
2. The evidence must be relevant; and
3. The probative value of the evidence must outweigh its prejudicial effect.

A. Linking the Accused

It is trite that there must be evidence connecting the similar acts with the accused and his participation in the crime. Accordingly, it is insufficient to demonstrate only that the similar fact evidence suggests merely a prior opportunity, raising only a possibility that the similar act was perpetrated by the accused. An illustration of this can be found in *R v. Sweitzer*, *supra*. Therein the Appellant was committed for trial on fifteen counts of rape, indecent assault and breaking and entering with intent to commit an indictable offence. Prior to trial the counts were severed. The Crown chose to proceed on a rape charge where the victim was unable to identify her attacker. The prosecution wanted to rely upon the fourteen other charges as evidence of similar acts to prove identity. The difficulty was however that in four of those incidents there was only
some evidence identifying the Appellant as the perpetrator and no evidence identifying the Appellant in relation to the other ten incidents apart from an alleged similarity of conduct of the assailant and the conduct attributed to the Appellant in relation to the other four charges. The Supreme Court of Canada held that the evidence of the four episodes with which the Appellant was connected might have been admissible on the issue of identification in the rape trial but the other incidents were clearly inadmissible.

B. Relevance

Since evidence of disreputable conduct alone is insufficient to meet the exception to the exclusionary rule it is incumbent upon the Crown to establish that similar fact evidence relates to something other than the issue of predisposition or bad character.

It is up to the Crown to spell out the relevance of the evidence and the issue to which it relates at the time it is admitted. Assuming the evidence is admitted, it would be equally incumbent upon the trial Judge to charge the jury in like fashion. Relevance must be demonstrated before any inquiry can be made as to the possible probative value of the evidence. Assuming that substantial probative value is shown, the Court must then determine if the probative value outweighs the prejudicial effect.

C. Probative Value

It is respectfully submitted that there still needs to be some significant measure of similarity between the alleged similar act and the offence being tried in the case before the Court. A variety of other factors are also relevant to demonstrating probative value which will be discussed below.


It is respectfully submitted that the alleged similar acts must be carefully examined to determine their nature and extent and in this regard the strength of the evidence will have to be
assessed. Similar fact evidence for which a conviction has been recorded will obviously have
greater weight as will a confession or admission of the accused acknowledging having
committing the similar acts. On the other hand however, where a prior act of misconduct is
denied by an accused, this is a factor which should be examined by the Courts when dealing with
probative value. Weak or questionable evidence should significantly diminish its probative
value. By way of example, see the case of *R v. Handy*, *infra* at page 14.

It is respectfully submitted that a prior acquittal should, for the most part, be inadmissible
as a similar act in a subsequent trial of an accused. In *R v. Arp* the Court held that the general
rule is that an accused should not be repeatedly required to defend himself against the same
allegations. By way of exception, however, the Court pointed to the case of *R v. Ollis* [1900] 2
Q.B. 758. In *Ollis* the accused was charged with obtaining money by false pretenses. He had
obtained money in exchange for a cheque that was later dishonoured. At his first trial the accused
gave evidence to the effect that he believed when he provided the cheque he would receive
sufficient funds to cover it. He was acquitted on the basis of this explanation. When the accused
was later charged with the same offence the Crown adduced evidence of the first incident
believing it was relevant to the accused's guilty state of mind. The Court upheld the evidence as
being properly admissible.

However, it seems that evidence of a similar act should not be tendered when the
previous act was a sexual one and the accused has been acquitted, even in spite of the fact that
appeal to S.C.C., refused 96 C.C.C. (3d) v.

2. *The Degree of Similarity*

It was submitted in *R v. Arp* that similar fact evidence is often admitted on the basis of
objective improbability of coincidence. As a consequence the evidence would derive its
probative value from the degree of similarity between the acts under consideration.
With respect to the issue of identity, however, Arp is authority for the proposition that there must be sufficient similarity to constitute a unique trademark or signature or a number of significant similarities.

The effect of dissimilarities however is sometimes confusing. In B.(C.R.), McLachlin J. in reviewing the evidence found that the similarities between the similar fact evidence and the offence on trial resulted mostly from the nature of the relationship between the parties. There were a number of dissimilarities however, including:

1. The age of the girls were different;
2. One was sexually mature, the other was only a child when the acts began;
3. One girl was a blood relation, the other was not;
4. Some of the acts were the same but there was some distinction in the acts performed between the two complainants.
5. Significantly, there was a considerable lapse of time between the two alleged relationships.

In spite of these significant dissimilarities, McLachlin was not prepared to find that the admission of the similar fact evidence was improper.

3. **Connection to Matters in Dispute**

The prosecution must point to an issue at trial to which the proposed similar fact evidence will be directed beyond demonstrating mere propensity of the accused to commit the act. This is yet another consideration in the assessment of probative value. It is suggested that if evidence of disreputable conduct relates to a significant issue in the case this enhances its probative value. If the opposite is the case and the evidence relates to an issue of minor significance this will diminish its probative value and it may indeed be rejected on the basis that the prejudicial effect is too great. It has been specifically held that evidence of disreputable conduct should not be admitted where it is tendered to establish an issue which is not in dispute.
D. Prejudice

An examination of the potential for prejudice does not refer to the possibility of similar fact evidence operating to the detriment of the accused because it increases the chance of his conviction. This consideration requires an examination of whether the evidence will operate unfairly in the sense that it could be misused by the jury or could distort the fact finding process, even with appropriate instructions as to its use by the trial judge. These potential risks are as follows:

1. The jury will conclude from the similar fact evidence that the accused is a bad person and therefore is likely to have committed the offence;
2. The accused is punished for his past conduct without regard to whether there is sufficient evidence to demonstrate guilty of the particular offence with which he is charged;
3. The jury may be confused by the similar fact evidence to the extent that it is distracted from the real issues in the case before them.

In order to counter the effects of the possible misuse of similar fact evidence by the trier of fact a number of considerations must be explored.

1. The nature of the discreditable conduct.

The law has held that evidence of discreditable conduct can take a variety of forms, ranging from non-criminal behaviour to serious crimes. The more repugnant and heinous the proposed evidence is the greater is the likelihood that prejudice will arise, particularly where it involves acts arguably more serious than those comprising the offence being tried before the Court.

The sheer number of similar acts may also have a bearing on the issue of prejudice. By way of example, we can look to the case of R v. Klymson (1994), 91 C.C.C. (3d) 161 (B.C.C.A.). The accused was charged with a vast number of offences against his wife but all of them
essentially arose out of four separate incidents. In that case the Crown was permitted to call similar fact evidence relating to forty additional incidents of assault by the accused on his wife. The most serious of these occurred after the period covered by the Indictment. On appeal it was held that the entire body of extrinsic misconduct was held to be gravely prejudicial and *none of it* should have been introduced at the trial.

On occasion, the prejudice arises when consideration is given to the source of the similar fact evidence. By way of example, in *R v. D. S. F.* (1999), 132 c.C.C. (3d) 97 (Ont. C.A.) the discreditable conduct was offered solely through the testimony of the complainant as opposed to calling third party witnesses. The Ontario Court of Appeal was more comfortable with this approach. It found that the potential for prejudice was significantly lessened because if the jury did not accept the complainant's evidence about the charges, there was less likelihood that they would be swayed by the additional evidence of other alleged misconduct.

2. *Confusion of issues*

The concern here is that the introduction of discreditable conduct, particularly if it is extensive or highly contentious, may sway the jury's attention away from their sole task of determining guilt in relation to the specific offence for which the accused is charged. In *R v. Handy* [2000], O.J. No. 1373 (C.A.) the Defendant was charged with sexually assaulting a female acquaintance. The Crown wanted to support the complainant's credibility and sought leave to introduce evidence from the accused's ex-wife concerning prior incidents of physical or sexual abuse. In examining the evidence the Court found that there were serious issues relating to the credibility of both women. As a result it did not allow the similar fact evidence on the basis that the jury would have spent more time determining the ex-wife's credibility than determining the credibility of the complainant.

3. *The Defence Ability to Respond*

This is another factor examined by the Courts in assessing whether or not to allow the Crown to introduce similar fact evidence. The effect of allowing similar fact evidence frequently
compels an accused to stand trial for a number of incidents in addition to the occurrence for which he has been charged. If the ability of the accused to respond to the similar fact evidence is compromised by the passage of time, the unavailability of witnesses or documentary evidence the Court will be less likely to allow the evidence to be admitted. I was unable to locate a case which examined the issue in the context of the Charter and the accused's right to remain silent. An interesting argument which could be advanced is that the accused may not be required to testify if he only stands trial in relation to the incident defined by the Indictment but could be compelled to testify if the prosecution leads extraneous evidence of similar acts of misconduct.

E. Balancing Probative Value Against Prejudicial Effect

The Judge's role in weighing prejudice as against probative value was outlined in R v. B.(C.R.) (supra):

"The relative weight of proof and prejudice vary infinitely from one case to another and the opinion of a particular judge must depend upon the impression the evidence makes upon him in light of his experience and his sense of what is fair. It is inevitable that some cases are so close to the borderline that different judges will take different views upon them..."

The difficulty with the test is that it does not indicate the extent to which the probative value must outweigh the prejudice. In order to preserve a fair trial it is respectfully submitted that the probative value must significantly outweigh the prejudice and where there is a borderline case the proposed similar fact evidence should be rejected.

VI. PURPOSES FOR WHICH SIMILAR FACT EVIDENCE MAY BE ADMISSIBLE

In spite of the rejection of any "category" approach, an examination of some of the formerly recognized categories of similar fact evidence is a useful exercise as it tends to show when such evidence is properly admissible as relating to a fact in issue and not mere propensity.

1. To Prove Actus Reus
The leading case with respect to similar fact evidence was *Mackin v. New South Whales (Attorney General)*, supra. It was a murder case involving the death of two infants. Evidence was adduced to show that the Mackins had other infants placed with them under similar circumstances and the bodies of other infants were found buried in their garden. The evidence was obviously adduced to prove the act of homicide by the accused.

2. **To Rebut Defence of Death by Natural Causes**

A good example of this occurred in the older case, *R v. Smith* (1915), 11 Cr.App.R. 299, which is often called the "Brides in the Bath Case". In the case strikingly similar drowning deaths of two other brides served to rebut the combined defence of death by epilepsy which was described as a natural cause and death by drowning which was described as death by accident.

3. **To Prove the Identity of the Accused**

In many cases identity is a live issue. This is somewhat of a special category and the case law requires that the Crown is obliged to demonstrate that the offence before the Court was committed in a distinctive way and the similar fact evidence shows an unusual disposition or system on the part of the accused which is so highly probative as to allow for the admission of similar fact evidence.

In *R v. Arp* Cory J. suggested that the following guidelines be considered when the Crown seeks to adduce similar fact evidence to prove identity:

1. There should be a higher degree of similarity between the acts in order to ensure that the similar fact evidence has the requisite probative value which outweighs its prejudicial effect. The similarity between the acts could consist of a unique trademark or signature on a series of significantly similar incidents.

2. When assessing the similarity of the acts, consideration should only be given to the manner in which the acts were committed and not the evidence as to the accused's involvement with respect to each act. As a general rule (with some
exception) if the degree of similarity between the acts is such that it is likely they were committed by the same person then the similar fact evidence will ordinarily have sufficient probative value to outweigh the prejudicial effect.

(3) The jury must then consider all of the evidence relating to the alleged similar acts in determining the accused's guilt for any single act.

4. **To Rebut Defence of Innocent or Lawful Purpose**

Where the similar facts in question indicate the commission of one act under a particular set of circumstances which are virtually identical to the case before the Court, the admission of the evidence here would be to demonstrate the probability of an evil or improper purpose.

By way of illustration, in *R v. Armstrong*, [1922] 2 K.B. 555 (C.C.A.) the accused was charged with murder and it was alleged that the victim had been poisoned with arsenic. Evidence of a subsequent attempt to poison another person with the same substance was admitted to disprove the explanation given by the accused for his possessing that poison: that he had purchased it to destroy weeds.

5. **To Prove Knowledge or to Rebut a Defence of Innocent Intent or Mistake**

The assertion by the Crown underlying this approach is that an accused, having been found guilty or having been shown to have undertaken the same offence on a prior occasion, will, in some circumstances, be found to have knowledge of a particular set of circumstances or the evidence can be used to rebut an assertion of innocent intent or mistake.

In a variation of the fact pattern in *R v. Armstrong*, if an individual is charged for the murder of another person by administering arsenic, and it is shown that the arsenic was administered by the same accused to other persons to whom the accused had access and who had died from the same poison, this would tend to show that the accused knowingly administered that arsenic to the victim in the case before the Court.
Where an assertion of innocent intent or mistake frequently arises in cases of false pretenses, fraud or forgery. Evidence of similar misconduct is adduced to demonstrate that on prior occasions the accused knew that an item was not genuine or that he previously obtained money under the same set of false circumstances. This tends to show that the accused knew of the counterfeiting on the specific occasion for which he was charged or was acting with some measure of deliberation or intent.

Indeed, in Sections 359 and 360 of the Criminal Code there is provision to attribute knowledge to the accused in respect of stolen property where he has either been found in possession of stolen property within twelve months before the current charge before the Court or has been previously convicted within the past five years of an offence of theft or possession of stolen property.

6. To Prove System

In relying upon this exception the Crown is attempting to show that not only did the accused previously commit a crime of an identical sort but also engaged in the commission of the offence on numerous occasions in a certain way to the extent that it points to a unique system. In such case the similar fact evidence is persuasive to prove intent or identity as the case may require. Likely the "strikingly similar" test would apply for the admission of this type of similar fact evidence.

7. To Rebut Defence of Accident

Many of the cases we have already discussed allowed evidence of similar acts to rebut the defence of accident and tended to show a design or scheme. In R v. Mortimer (1936) 25 Cr.App.R. 150, a misogynist knocked down and killed a female cyclist with his car. Evidence was admitted that on the same day he had knocked down two other female cyclists and had assaulted them. The evidence was admitted on the basis that it tended to show an intent to kill and demolished any possibility of asserting the defence of accident.
8. To Rebut a Defence of Innocent Association

This is a somewhat unique circumstance where the defence acknowledges having been in the presence of the alleged victim but denies the improper act. It frequently arises in sexual offence cases. Evidence of other incidents of the accused attending upon similar victims under similar victims under the same set of circumstances where a sexual assault occurred tend to bolster the credibility of the complainant in the case before the Court. It is submitted however that the Crown must demonstrate a peculiar propensity to commit a crime of that sort. The strong probative force arises through a series of witnesses each testifying as to the commission of the offence in a particular way with no suggestion of corroboration.

However, in Boardman, supra, the Court questioned the admissibility of similar fact evidence for this purpose. This was of concern to the Court in the cases of teachers or counselors who are of necessity associating day-in and day-out both with the alleged victim and any other person who will testify as to the similar acts.

The House of Lords was concerned not only with the possibility of concocting a story in concert but also the fact that the similarity in stories may arise due to media or publicity. The Court opined that something much more than mere similarity between the acts alleged by the complainants would be needed if the evidence were to be allowed, even in the absence of a proven conspiracy to concoct false allegations.

9. To Corroborate Evidence

As we have seen, based upon the decisions in B.(C.R.) and Batte, similar fact evidence which essentially demonstrates propensity can be used to corroborate the assertions of one complainant if they are similar in nature to assertions of another complainant. The purpose to introducing evidence of a pattern of similar behaviour as against different complainants is to show that each complainant is telling the truth and therefore the similarities enhance the credibility of each complainant.
The difficulty, however, is whether or not there is some need for proof of a distinctive pattern of behaviour. A suggestion in B. (CR.) seems to hint not. However, surely it can be alleged that evidence of indistinctive sexual intercourse or other sexual activities with another person should not always be admissible as similar fact evidence, even if they bear on the issue of credibility.

By way of example, in R v. Wheelton (1992), 71 C.C.C. (3d) 476 (R.C.C.A.) the instances of sexual touching were found not be sufficiently distinctive so as to classify the various acts as similar fact evidence.

VII. SPECIAL INSTRUCTIONS TO THE JURY

Special instructions are needed when a jury is involved to deal with the unusual situation of similar fact evidence.

In general, a voir dire will be required to deal with the issue of similar fact evidence, particularly where it relates to extrinsic misconduct. Such may not be the case where the similar fact evidence comes from the other counts on the Indictment. In that situation the admissibility ruling simply awaits the completion of the Crown's case at trial.

Where, however, similar fact evidence is in fact extrinsic misconduct, mid-trial instructions may be required. It is respectfully submitted that the jury will not always appreciate the significance of this type of similar fact evidence. Accordingly mid-trial instructions may be necessary to ensure that, when evidence of limited value is received, the jurors understand from the moment of its reception the use that they may make of it during their deliberations and equally they must understand what use they must not make of it. Of necessity, mid-trial instructions likely should explain briefly why the evidence about the accused's conduct at some other time and place is coming into the case. The explanation need not be elaborate but it should not refer to the reasons given for receiving the evidence (to suggest that its probative value exceeded its prejudicial effect for example). Furthermore, nothing should be said about the evidence from which the jury concludes that it has received judicial approval or it is entitled to
any greater or lesser critical analysis than any other evidence which may be adduced by the Crown in the case.

Final instructions, obviously, must focus on the similar fact evidence as well. These instructions will have a positive component and a negative component. The positive component is an instruction about the permitted use that may be made of evidence of similar acts. Before utilizing the evidence in a permissible fashion the jury must be admonished that it is still up to them to weigh the evidence and to conclude that it is appropriate to use that evidence for the reason for which it was advanced. For example, in cases where similar facts are adduced to prove identity the jury needs to be instructed that they have to conclude that there is a sufficient likelihood that the same person committed the alleged similar acts before they can consider all the evidence relating to the similar acts in considering whether the accused is guilty of the offence charged.

The instruction to the jury then must deal with the negative component or, in other words, contain a strong direction about prohibited uses of the evidence. In general this would require an admonition that the jury cannot use the evidence to infer that the accused is a person whose character or disposition is such that he or she is likely to have committed the offences charged.

The negative instruction is crucial. In its absence there are at least two cases which suggest that the conviction will be overturned because the prejudicial effect of the failure to properly instruct the jury would be serious enough to result in an unfair verdict.

* R v. Martin (1993), 84 C.C.C. (3d) 280 (Ont. C.A.)

However, where similar fact evidence has been adduced on the basis to show propensity as allowed by *B.(C.R.*) and *Batte*, the trial judge is apparently not under any obligation to charge the jury against the potential use of "propensity reasoning".
The guidelines with respect to a jury charge where similar fact evidence is offered to prove identity were handed down by the Supreme Court of Canada in *R v. Arp*, *supra*:

"In summary, where similar fact evidence is admitted to prove identity in a multi-count indictment situation, a proper charge to the jury should include the following factors considered by Martin J.A. in *Simpson*, *supra*, and by this Court in *Sweitzer*, *supra*, and *D. (L.E.*), *supra*.

1. The trial judge should instruct the jury that they may find from the evidence, though they are not required to do so, that the manner of the commission of the offences is so similar that it is likely they were committed by the same person.

2. The judge should then review the similarities between the offences.

3. The jury should then be instructed that if they conclude it is likely the same person committed more than one of the offences, then the evidence on each of those counts may assist them in deciding whether the accused committed the other similar count or counts.

4. The trial judge must instruct the jury that if it accepts the evidence of the similar acts, it is relevant for the limited purpose for which it was admitted.

5. The jury must be warned that they are not to use the evidence on one count to infer that the accused is a person whose character or disposition is such that he or she is likely to have committed the offence or offences charged in the other count or counts.

6. If they do not conclude that it is likely the same person committed the similar offences, they must reach their verdict by considering the evidence related to each count separately, and put out of their minds the evidence on any other count or counts.

7. Finally, the trial judge must of course make it clear that the accused must not be convicted on any count unless the jury is satisfied beyond a reasonable doubt that he or she is guilty of that offence." (p. 356 C.C.C.)

Particularly with respect to sexual offences, there has been an increase in the use of similar fact evidence which is adduced solely for the purposes of showing that because the accused committed an offence on one occasion he must have committed it on another.

In spite of the possible shortcomings and difficulties which have arisen from the *B. (C.R.*), case the Ontario Court of Appeal suggested that the following should be kept in mind by a judge charging a jury on the use of similar fact evidence in cases involving sexual offences:

"If the evidence is admissible, as stated above, then, absent collusion among the complainants, the jury should be told that testimony of one complainant may support the
credibility of the other complainants. The trial judge should then review with the jury the various similarities and dissimilarities of the evidence with a view to assisting the jury in deciding whether the evidence demonstrated a pattern of similar behaviour suggesting that the stories of the various complainants are true. The members of the jury should also be instructed that the mere fact that they find that the accused committed the offence in relation to one complainant does not of itself prove that he or she committed the other acts or that he or she is the sort of bad person who is likely commit the offences in question. See R. v. B. (F.F.) (1993), 79 C.C.C. (3d) 112 (S.C.C.) at 139. In addition, the jury should be instructed that, if it is not satisfied that the evidence demonstrates a pattern of similar behaviour, then the evidence with respect to each count is to be considered on its own without regard to the evidence of the other complainants.” (p. 535)

It is interesting to compare and contrast the jury instructions required in the A. (J.) case as compared to those mandated by Arp.

Based on the authority in Burke, special instructions with respect to collaboration may be required in cases involving sexual offences where similar fact evidence is comprised of a number of complainants describing sexual misconduct by the accused. Where there is a real possibility of collaboration or collusion the jury needs to be cautioned that they must take this into account in assessing the weight of the similar fact evidence. If there was a real possibility of collusion, little or no weight is to be attached to the similar fact evidence and it should not be considered on the offence on trial before the Court.

VIII. CHALLENGES CONFRONTING DEFENCE COUNSEL

When dealing with the possibility of being confronted with similar fact evidence defence counsel is going to have a significant battle in which to engage.

Particularly in sexual offences, if the B.(C.R.) decision is correct, the defence may have a very difficult time opposing the admission of the evidence on the voir dire. This will be true regardless of whether the evidence is of extrinsic misconduct or if it is misconduct contained in the remaining counts of the Indictment.

When confronted with the situation of having various sexual offences joined in a single Indictment consideration may be given to an application for severance. Although the Crown may
join any number of counts in the same Indictment one has to keep in mind the potential influence on the jury to infer guilt when confronted with a large number of similar type counts. Even in the absence of a finding that the evidence of each count is similar fact, the jury may improperly draw inferences about the propensity of the accused to commit these types of offences.

Much of the groundwork for this type of motion needs to be set through the disclosure process. One would have to get a clear indication from the Crown of the following:

1. Whether it is the intention of the Crown to invite the Court to find that each incident relating to each count in the Indictment will be adduced as similar fact evidence in relation to the others.
2. If a severance application is successful will the Crown attempt to adduce evidence relating to the severed counts on the basis that they are similar fact evidence?
3. Will there be extraneous misconduct led as similar fact evidence?

The severance application may be useful if one can convince the Court that the appropriate test where there are multiple allegations of sexual offences is the strikingly similar test relating to probative value. If this is indeed the test, the severance has the effect of segregating the charges and will enhance the possibility that the evidence relating to the severed counts will be disallowed by the judge as similar fact evidence.

On the other hand, where there is a realistic possibility of corroboration or collusion between the complainants, it is sometimes helpful to leave the multiple counts as they are. In this case the similarities between the stories of the complainants works to the advantage of the defence. It may be possible to show that the similarities between the stories of the complainants are the result of them having conspired together to fabricate a story against the accused. In this case the similarities between the stories of the complainants are used against the Crown's assertion that the similar stories enhance each complainant's credibility.

It should seem, as a matter of theory, that the defence should equally be able to adduce evidence of similar or other acts of the complainant if they are relevant to an issue in trial.
Unfortunately, Section 276 of the *Criminal Code* restricts the offence from adducing acts of a complainant which tend to show a disposition to engage in consensual activity.

Another disconcerting example of the rejection of similar fact evidence adduced by the defence can be found in *R v. Rattan* (1988), 68 c.R. (3d) 84 (B.C.C.A.). In the trial of an offence of sexual assault the defence attempted to adduce evidence of an alleged false complaint made by the complainant about ten months prior. The evidence was rejected by the Court on the basis that it was not markedly similar. Further, it was hinted that only one incident was insufficient. In numerous other cases where the Crown attempts to adduce similar fact evidence pointing to a system the number of incidents prior relates only to its weight and not to its admissibility.

Perhaps, however, the best example one may give of the utility of similar act evidence raised by the defence is the case of *R v. Milgaard*. Obviously the weight of the evidence indicating that Fisher had allegedly perpetrated similar acts to those for which Milgaard was accused carried significant weight.

If similar fact evidence is adduced by the defence to show the guilt of a co-accused or third party it need only be relevant.


Apparently, there is no necessity to meet the other threshold tests which are imposed upon the prosecution when it is attempting to adduce evidence of similar fact.

If the accused asserts self defence, evidence to show that the victim had committed prior similar acts of aggression are admissible.

IX. CONCLUSION

I have reserved the last word on this subject to Mr. Justice David Watt who was a presenter at the National Criminal Law Program in Calgary, Alberta in July 2000. With respect to adducing similar fact evidence he stated the following:

"We can admit propensity evidence, albeit exceptionally. We can't tell the jury that is what we have done. In fact, we have to tell the jury that they can't use the evidence of similar acts as propensity evidence, even though we have admitted it on that basis. Should we not be just a trifle more consistent?"