

Sexual Assault in Canada

LAW, LEGAL PRACTICE,
AND WOMEN'S ACTIVISM

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21.

An Equality-Oriented Approach to the Admissibility of Similar Fact Evidence in Sexual Assault Prosecutions

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The power of rape mythologies to shape criminal law doctrine drives David Tanovich's chapter, wherein he considers the rule of evidence that excludes from consideration by the judge or jury evidence of the accused's "bad character," even when it involves past sexually assaultive conduct that resulted in criminal conviction. This aspect of the criminal law governing sexual assault prosecution has not been the subject of feminist law reform in Canada, although Julia Tolmie's chapter in Part 1, "New Zealand's Jane Doe," describes one of the outcomes of several high profile prosecutorial failures in New Zealand as a renewed public debate on the issue of whether an accused's criminal convictions for other sexual assaults should be withheld from judges and juries. In recognition of the role of gender bias in shaping the current law, and consistent with women's equality rights, David proposes a nuanced new rule that would presumptively admit evidence of an accused's past sexual misconduct in sexual assault prosecutions with some exceptions, including cases where systemic racism may operate against the accused person.

PART I: INTRODUCTION

There has been very little critical and feminist commentary in Canada on the admissibility of prior sexual misconduct evidence as similar fact evidence in sexual assault cases.² Similar fact evidence is a specific type of bad character or conduct evidence.³ It is distinguished from more general bad character evidence because it shares similar features with

1 I wish to thank the tremendous research assistance of Jillian Rogin (Windsor Law 2008) and the generous funding of the Law Foundation of Ontario.

2 It is unclear why the issue has received such little critical attention in Canada. One of the only such pieces is Hanson, "Sexual Assault and the Similar Fact Rule" (1993) 27 UBC L Rev 51. The only other piece to look specifically at the issue is Stuesser, "Similar Fact Evidence in Sexual Offence Cases" (1997) 39 Crim LQ 160.

3 Bad character or discreditable conduct evidence, as it is sometimes referred to, is any evidence that tends to place the accused or a witness in a negative light. See *R v B.(L.)* (1997), 116 CCC (3d) 481 (Ont CA).

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the offence charged. So, for example, evidence that the accused sexually assaulted person(s) other than the complainant could be an example of similar fact evidence in sexual assault prosecutions assuming satisfaction of the threshold legal test. Similar fact evidence is a narrow exception to the general exclusionary rule that the Crown cannot lead bad character evidence in criminal trials. As the Supreme Court of Canada noted in *R v B.(C.R.)*:

Nineteenth century courts started from the premise that a person should not be convicted on the basis that he had committed other offences. They developed a general exclusionary rule with the following exception: evidence of previous misconduct could be admitted if it possessed special probative value ... Viewed thus, the so-called similar fact rule was in reality an exception — narrowly defined — to the general rule excluding evidence of prior misconduct or propensity.⁴

The exclusionary rule, in theory, is grounded on a concern that jurors will convict because the accused is a bad person (i.e., moral prejudice), or they will give it too much weight or it will distract or deflect them from rendering a true verdict based on the evidence (i.e., reasoning prejudice). Because the default position for bad character evidence is exclusion, the onus is on the prosecution to establish, on a balance of probabilities, that the prior sexual misconduct evidence qualifies under the similar fact evidence exception.

The lack of critical attention to this area of evidence law is surprising given that the similar fact evidence rule, like other rules of evidence, serves as a site for gender, race, and sexual orientation bias.⁵ Using the Supreme Court of Canada decision in *R v Handy*,⁶ this article attempts to locate the nature of systemic gender bias in similar fact adjudication. It is argued that such bias is manifested in an expressed “suspi-

4 [1990] 1 SCR 717 at 725. The rule has evolved considerably from the approach in the nineteenth century. A principled approach to admissibility balancing probative value and prejudicial effect has replaced the categorical approach. This is discussed *infra*.

5 An example of sexual orientation bias could be seen in cases involving allegations of sexual assault of young boys where courts equated homosexuality and pedophilia. See *R v Thompson* (1918), 13 Cr App R 61 (HL) [Lord Sumner] (“homosexual offences” exception); and, *R v Sims* (1946), 31 Cr App R 158 (CA) “sodomy is a crime in a special category because ... persons who commit [it] ... seek the habitual gratification of a particular perverted lust...”). In Canada, see *R v Guay*, [1978] 1 SCR 18 where the Supreme Court twice refers to charges of gross indecency on boys as “homosexual acts.”

6 [2002] 2 SCR 908 (hereinafter *Handy*).

cion” of prior sexual misconduct evidence and in a preoccupation with sex rather than violence in deciding similarity. *Handy* is the centerpiece of the discussion because it is the leading similar fact evidence case in Canada. In addition to its precedential value, it is significant because it recognizes that propensity reasoning (i.e., inferring that because the accused has done a similar thing before, he committed the act in question) can be a stand-alone basis of admission.⁷ As discussed in Part III, this opens the door to a presumptive approach to admissibility. The decision is also important because it reveals many of the stereotypes and fallacious reasoning associated with our understanding of sexual assault.

This article is not intended as an attack on the general bad character exclusionary rule. There is no question that bad character evidence can infect and corrupt the trial process. This article’s focus is on developing an approach to admissibility that promotes equality, accuracy, and fairness in the adjudicative process in sexual assault cases. The article’s thesis, set out in Part III, is that in cases that turn on the *commission* of the *actus reus* (which includes the issue of *consent*), admission rather than exclusion should be the rule for prior sexual misconduct evidence. It is an approach grounded in equality principles rather than an assessment of probative value and prejudicial effect. It is also in keeping with the common law’s tradition of moving incrementally and the Supreme Court’s principled approach to the law of evidence.⁸ The approach advocated is not absolute. For example, identification cases are excluded from the presumption. In addition, putative collusion cases and those with Aboriginal and racialized accused require additional layers of analysis because they raise reliability, probative value, and prejudicial concerns that need to be addressed by the trial judge. These special cases are discussed in Part III.

The argument is, therefore, not for an implementation of the categorical approach of Rules 413 and 414 of the *Federal Rules of Evidence* in the United States that makes admission the rule for *all* sexual misconduct cases.⁹ These categorical rules came about, in part, as a result

7 Prior to *Handy*, courts, generally speaking, refused to recognize that similar fact evidence could be used for propensity reasoning. Instead, they tried to find some other basis for admission. For example, as evidence to rebut a defence of innocent association.

8 See Hill, Tanovich, and Strezos, *McWilliams Criminal Evidence* 4th ed. (Toronto: Canada Law Book, 2010) at Chap. 3 for a discussion of the Supreme Court’s approach to the law of evidence.

9 Rule 413 states:

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of high profile acquittals in sexual assault cases where prior misconduct had been excluded, the most notable being the Kennedy-Smith trial.¹⁰ The Federal Rules have been justified on necessity grounds including the difficulty of proving sexual assault cases and a belief that sexual assault perpetrators are more likely to repeat their crimes than other offenders.¹¹ Others have argued that politics more than probative value led to their enactment.¹² These justifications have been thoroughly criticized.¹³ Arguments centred on media attention, politics, or recidivism do not form part of the equality foundations for this article's proposed rule. Nor is the difficulty of prosecution justification relied upon. This is not to suggest that this necessity argument could not be part of an equality argument only that it is, in my view, less persuasive than the other equality arguments advanced here.¹⁴

- (a) In a criminal case in which the defendant is accused of an offence of sexual assault, evidence of the defendant's commission of another offence or offences of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

Rule 414 states:

- (b) In a criminal case in which the defendant is accused of an offence of child molestation or offences of child molestation, evidence of the defendant's commission of another offence or offences of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

These Rules were part of the *Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. No. 103-322, s. 3209535(a), 108 Stat. 2135 (1994). A number of commentators have written in support of these Rules. See Larsen, "Sexual Violence is Unique: Why Evidence of Other Crimes Should Be Admissible in Sexual Assault and Child Molestation Crimes" (2006) 29 Hamline L Rev 177; Lombardi, "Because Sex Crimes are Different: Why Maryland Should (Carefully) Adopt Contested Federal Rules of Evidence 413 and 414 that Permit Propensity Evidence of a Criminal Defendant's Other Sex Offences" (2004) 34 U Balt L Rev 103; and Fingar, "And Justice for All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence" (1996) 5 S Cal Rev L & Women's Stud 501.

- 10 See Bryden and Park, "Other Crimes' Evidence in Sex Offense Cases" (1994) 78 Minn L Rev 530; and Karp, "Evidence of Propensity and Probability in Sex Offense Cases and Other Cases" (1994) 70 Chi-Kent L Rev 15.
- 11 See Bryden and Park, *supra* at note 10, p. 556-57; Karp, *supra* at note 10, p. 20. See also the discussion in Stuesser, *supra* at note 2, p. 161-63.
- 12 See Ellis, "The Politics Behind Federal Rules of Evidence 413, 414 and 415" (1998) 38 Santa Clara L Rev 961.
- 13 See the discussion in Sachs, "Beyond Sex Crimes: A Principled Approach to Admitting Evidence of Prior Bad Acts," online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1402950> (last accessed 16 July 2009).
- 14 A necessity argument is grounded in the low conviction rate for sexual assault offences as compared to other violent offences; the stereotypes and myths that negatively impact on credibility assessments; and the heightened vulnerability of sexual

In support of admissibility in *actus reus* cases, the article examines both formal and substantive equality justifications. Part iv sets out the formal equality argument grounded in the “tit for tat” principle that has emerged in the law of evidence. This general principle recognizes that the defence can sometimes open the door to a Crown response by the tactics it employs (e.g. suggesting that someone else committed the offence). Where the door is open, the Crown is entitled to respond, including with what would otherwise be inadmissible evidence, in order to ensure that the trier of fact is not left with a distorted picture. In sexual assault prosecutions, that door should be deemed opened by the usual “whack the complainant” defence tactics. Part v advances a substantive equality argument grounded in the need to address the inherent suspicion associated with prior sexual misconduct evidence and our courts’ failure to properly give effect to the fact that sexual assault is not a crime of sex and passion but one of violence and domination. These manifestations of gender bias have had a negative impact on cases, as is evident from a survey examining post-*Handy* cases where courts frequently excluded the evidence because of a lack of so-called similarity between the prior sexual misconduct and the complainant’s evidence. The survey is discussed in Part v. Finally, in Part vi, the chapter briefly identifies and responds to feminist criticisms of a presumptive rule of admissibility.

PART II: THE FACTS OF *HANDY*

As *Handy* serves as the backdrop for much of the discussion, it is necessary to provide at the outset a brief summary of the facts and results. Handy was charged with sexual assault causing bodily harm. This was

assault complainants. See the discussion of this relevant social context in *R v Find* (2001), 154 CCC (3d) 97 at 117, 130–31 (SCC); *R v Seaboyer* (1991), 66 CCC (3d) 321 (SCC) (as per L’Heureux-Dube J.); Sheehy and Boyle, “Justice L’Heureux-Dube and the Canadian Sexual Assault Law: Resisting the Privatization of Rape” in Sheehy, ed., *Adding Feminism to Law: The Contributions of Justice Claire L’Heureux-Dube* (Toronto: Irwin Law, 2004); McInnes and Boyle, “Judging Sexual Assault Law Against a Standard of Equality” (1995) 29 UBC L Rev 341; Boyle, “The Judicial Construction of Sexual Assault Cases” in Roberts and Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994); Mack, “Continuing Barriers to Women’s Credibility: A Feminist Perspective on the Proof Process” (1993) 4 Criminal Law Forum 327; Nightingale, “Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases” (1991) 71 Ottawa L Rev 71; Sheehy, “Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?” (1989) 21 Ottawa L Rev 741; and Schafran, “Gender Bias in the Courtroom” (1989) 22 Creighton L Rev 413.

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not the first time he had been charged with sexual assault. He had twice been convicted for sexually assaulting two other women.¹⁵ He had also faced sexual assault charges involving his ex-wife.¹⁶ With respect to the incident at issue on appeal, in early December of 1996, the complainant went to a bar with a friend. At the bar, she met Handy whom she had met six months earlier. He appeared intoxicated. After a night of “drinking and flirting,” they went to a friend’s house to smoke marijuana. They left together in a car and drove to an Econo Lodge motel. The car crashed into a ditch.¹⁷ Once in the hotel room, they commenced what started out as consensual sex. The complainant told Handy to stop when the sex became painful. He refused and anally raped her. He punched and choked her when she tried to stop him. After the incident, he allegedly said, “What the hell am I doing here? Why does this kee[p] happening to me?”¹⁸ A number of witnesses testified to seeing bruises on the complainant’s throat, chest, and arms following the incident. There was also evidence that the complainant suffered from post-traumatic stress following the incident.¹⁹ The trial judge ruled that seven alleged incidents of physical and sexual abuse, including allegations of anal rape, by Handy against his ex-wife were admissible as similar fact evidence.²⁰

Handy’s defence was that the sex was consensual and that the complainant and his ex-wife had colluded for financial gain. The two had met in the summer of 1996 during which time the ex-wife told the complainant about Handy’s past and that she had received \$16,500 in compensation from the Criminal Injuries Compensation Board. The conversation included the following testimony from the ex-wife:

Q. You told her that he had been to jail?

A. Yes, I did.

Q. You told her that he abused you?

A. Yes, I did.

¹⁵ *Supra* at note 6, para 142.

¹⁶ This was referred to as an “incomplete trial” in the Supreme Court judgment. See *Handy, supra* at note 6, para 133.

¹⁷ These additional facts come from the Court of Appeal judgment reported at (2000), 145 CCC (3d) 177 (Ont CA) at paras 10–11.

¹⁸ *Handy, supra* at note 6, para 4.

¹⁹ *Ibid.* at para 5.

²⁰ These seven incidents are described in detail in paras 6–13 of *Handy, supra* at note 6.

Q. And you told her that you collected \$16,500 from the government. All you had to do was say that you were abused.

A. Yes.

Q. So, she knew all that before December of 1996?

A. Yes.²¹

Handy was convicted of sexual assault. On appeal, both the Ontario Court of Appeal and the Supreme Court of Canada held that the trial judge had erred in admitting the prior misconduct evidence involving his ex-wife. A new trial was ordered. As is often the case where sexual assault convictions are overturned on appeal, the new trial was never held.²² The Supreme Court's reasoning on the similar fact issue is discussed throughout the article.

PART III: AN EQUALITY-ORIENTED RULE OF ADMISSIBILITY

The Supreme Court of Canada has repeatedly stated that there is no special similar fact admissibility rule for sexual assault cases. In *Handy*, for example, Justice Binnie, for the court, held:

The "common sense" condemnation of exclusion of what may be seen as highly relevant evidence has prompted much judicial agonizing, particularly in cases of alleged sexual abuse of children and adolescents, whose word was sometimes unfairly discounted when opposed to that of ostensibly up-standing adults. The denial of the adult, misleadingly persuasive on first impression, would melt under the history of so many prior incidents as to defy innocent explanation. That said, *there is no special rule for sexual abuse cases*.²³

²¹ *Handy*, *supra* at note 6, para 15.

²² See Delisle, Stuart, and Tanovich, *Evidence: Principles and Problems*, 9th ed., (Toronto: Carswell, 2010) at 273. Some of the post-*Handy* commentary includes Stewart, "Rationalizing Similar Facts: A Comment on *R v Handy*" (2003) 8 Can Crim L Rev 113; Morris, "The Possibility of Collusion as a Bar to the Admissibility of Similar Fact Evidence" (2003) 11 CR (6th) 181; Delisle, "Annotation" (2002) 1 CR (6th) 209; Stuart, "Annotation" (2002) 1 CR (6th) 209; and Schreck, "*Handy*: Raising the Threshold for the Admission of Similar Fact Evidence" (2002) 1 CR (6th) 245.

²³ *Handy*, *supra* at note 6, para 42 (emphasis added).

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Similarly, in *R v B.(C.R.)*,²⁴ Justice Sopinka (with Chief Justice Lamer concurring) stated that “[t]here is not support in the cases in our Court for the theory that the rule has special application in sexual offences.”²⁵ The problem is that the court has simply stated its position with no justification or meaningful analysis.

While *Handy* rejected the idea of a “special rule” for sexual assault cases, it nevertheless did open the door for arguments in favour of a new approach to admissibility. For the first time, a unanimous Supreme Court recognized that similar fact evidence can be admissible where it shows a *specific* (as opposed to a general) propensity to engage a particular kind of behaviour, including sexual assault. Relying on Chief Justice McLachlin’s decision in *B.(C.R.)*,²⁶ Justice Binnie observed that “evidence classified as ‘disposition’ or ‘propensity’ evidence is, exceptionally, admissible.”²⁷ Again referring to *B.(C.R.)*, Justice Binnie identified the propensity in that case as “a situation specific propensity to abuse sexually children to whom he stood in parental relationship.”²⁸ Finally, he noted that “Canadian case law recognizes that as the ‘similar acts’ become more focussed and specific to circumstances similar to the charge (i.e., more situation specific), the probative value of propensity, thus circumscribed, becomes more cogent.”²⁹

The court’s specific propensity reasoning is not grounded in traditional character analysis but rather in the doctrine of chances, that is, the improbability of coincidence that a complainant would not be telling the truth about someone who has done the same thing before.

As Justice Binnie put it at various points in *Handy*:

The inferences sought to be drawn must accord with common sense, intuitive notions of probability and the unlikelihood of coincidence.³⁰ ...

It was thus held in *Makin* that the accumulation of babies found dead in similar circumstances permitted, in relation to the accused, the double in-

²⁴ [1990] 1 SCR 717 (hereinafter *B.(C.R.)*).

²⁵ *Ibid.* at 740.

²⁶ *Ibid.* at 735.

²⁷ *Handy*, *supra* at note 6, para 51–52.

²⁸ *Ibid.* at para 90.

²⁹ *Ibid.* at para 48.

³⁰ *Ibid.* at para 42.

ference of propensity mentioned above. The improbability of an innocent explanation was manifest.³¹ ...

Probative value exceeds prejudice, because the force of similar circumstances defies coincidence or other innocent explanation.³²

In addition to acknowledging the availability of propensity reasoning, the *Handy* court recognized that its relevance can be proof of the *actus reus* that in many cases turns on the credibility of the complainant.³³ As Justice Laskin observed in *R v B.(R.)*: “the question to be decided was whether the sexual assaults occurred. The similar fact evidence was probative of the *actus reus* of the offences, which in turn depended on the credibility of the complainants’ evidence about the assaults.”³⁴

In light of the recognition in *Handy* that similar fact evidence can be used as specific propensity evidence, the door is now open for the adoption of an approach that presumes admissibility in cases where the issue is commission of the *actus reus* (i.e., did the act occur and, where the complainant is of age, whether there was consent). Although the judge would always have discretion to exclude the evidence under this presumptive approach, such an exercise, outside of the special cases discussed below, would be rare. The onus would rest with the defence. The rule should either be judicially or legislatively created. Contrary to those who see this approach as opening up the bad character floodgates, a presumption of admissibility does not open the door for similar arguments in other cases. In most non-sexual assault cases, where the Crown seeks to lead similar fact evidence, the issue is identity, which is not included in the presumption, or the accused has done something to open the bad character door. In other cases, the Crown will have available other means of impeaching credibility such as a criminal record. Finally, in other cases involving violence, we rarely see the kind of outright and vicious attack on the credibility of the complainant. And so, in other cases, there is rarely the same kind of equality argument that would justify admission of similar fact evidence.

³¹ *Ibid.* at para 46.

³² *Ibid.* at para 47.

³³ *Ibid.* at para 120.

³⁴ (2005), 77 OR (3d) 171 at para 11 (CA). See also, *R v B.(T.)* (2009), 95 OR (3d) 21 at paras 21–24; *R v T.(C.)* (2005), 74 OR (3d) 100 at para 56 (CA); and, *R v Thomas* (2004), 72 OR (3d) 401 at paras 43, 54 (CA).

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Moreover, as noted earlier, the approach advocated is narrower and less categorical than Rules 413 and 414 of the *Federal Rules of Evidence*. For example, the presumption does not apply in cases where the issue is mistaken belief in consent or other cases where the issue is knowledge or wilful blindness. And, even where the issue is *actus reus*, there is an exception for identification cases and additional layers of scrutiny or safeguards in cases involving possible collusion or where the accused is Aboriginal or racialized. These special cases are discussed below.

ID Cases

Equality arguments are not applicable in cases where the issue is one of identification because these cases turn, generally speaking, on the reliability of the identification evidence and not on the credibility of the complainant.³⁵ Rarely is it ever suggested that the complainant is lying in these cases. The issue is whether he or she correctly identified the assailant. In addition to traditional reliability concerns, identification cases also raise additional fairness concerns. A presumptive rule of admissibility runs the danger of encouraging the police to simply round up the usual suspects in hopes of a positive line-up identification. Justice Binnie alluded to this concern in *Handy* when he noted:

If propensity evidence were routinely admitted, it might encourage the police simply to “round up the usual suspects” instead of making a proper unblinkered investigation of each particular case. One of the objectives of the criminal justice system is the rehabilitation of offenders. Achievement of this objective is undermined to the extent the law doubts the “usual suspects” are capable of turning the page and starting a new life.³⁶

The prospect of a wrongful conviction is, therefore, real in this context. This not only serves to undermine confidence in the administration of justice but it also means that the real perpetrator remains at large. The presumption of admissibility should not apply here and instead identification cases should continue to be assessed using the “strikingly similar” standard from *R v Arp*.³⁷

35 A similar argument is made in *Bryden and Park*, see *supra* at note 10.

36 *Supra* at note 6, para 38.

37 [1998] 3 SCR 339. In *Handy*, *supra* at note 6, para 77, the Supreme Court described this *Arp* standard as follows:

Thus in *Arp*, where the issue was identification, Cory J. cited at para 43 *R v Scopelitti* (1981), 63 CCC (2d) 481 (Ont CA), where Martin J.A. observed that evidence of

Putative Collusion Cases

As noted earlier, using a doctrine of chances reasoning process in cases of similar fact evidence addresses the classic “character” concerns associated with this kind of evidence. The reasoning does not require any moral evaluation of the accused but rather a detached analysis of the likelihood of coincidence that two people would independently make similar allegations unless they were true. The doctrine of chances is destroyed, however, where the similar fact evidence is tainted. Coincidence is now replaced by collusion. This concern is addressed by the *Handy* approach requiring the Crown to negate collusion on a balance of probabilities where there is an “air of reality” to the allegation. And so, under this article’s approach, the presumption would not apply where the defence raises an “air of reality” to collusion.

Cases Involving Aboriginal or Racialized Accused

It is now widely accepted in Canadian courts that systemic racism exists in the criminal justice system.³⁸ This racism translates into negative credibility assessments and propensity reasoning for Aboriginal and racialized accused. As Chief Justice McLachlin recognized in *R v Williams*:

In my view, there was ample evidence that this widespread prejudice included elements that could have affected the impartiality of jurors. Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity. As the Canadian Bar Association stated in *Locking up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release* (1988), at p. 5:

Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects

propensity on the issue of identification is not admissible “unless the propensity is so highly distinctive or unique as to constitute a signature” (p. 496). Martin J.A. made the propensity point again in his lecture on “Similar Fact Evidence” published in [1984] *Spec. Lect. L.S.U.C.* 1, at pp. 9–10, in speaking of the Moors Murderer case (*R v Straffen*, [1952] 2 QB 911):

Although evidence is not admissible to show a propensity to commit crimes, or even crimes of a particular class, evidence of a propensity to commit a particular crime in a *peculiar and distinctive way* was admissible and sufficient to identify [*Straffen*] as the killer of the deceased (emphasis in original).

³⁸ See, for example, the discussion in *R v Williams*, [1998] 1 SCR 1128 at paras 58–59; and *R v Parks* (1993), 84 CCC (3d) 353 at paras 42 to 55 (Ont CA). See also Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006).

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a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals.

There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system: see *Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*, at p. 33; *Royal Commission on the Donald Marshall, JR, Prosecution: Findings and Recommendations*, vol. 1 (1989), at p. 162; *Report on the Cariboo-Chilcotin Justice Inquiry* (1993), at p. 11. Finally, as Esson C.J. noted, tensions between aboriginals and non-aboriginals have increased in recent years as a result of developments in such areas as land claims and fishing rights. These tensions increase the potential of racist jurors siding with the Crown as the perceived representative of the majority's interests.³⁹

Justice Doherty acknowledged this in the context of anti-black racism in *R v Parks*:

Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.

In my opinion, there can be no doubt that there existed a realistic possibility that one or more potential jurors drawn from the Metropolitan Toronto community would, consciously or subconsciously, come to court possessed of negative stereotypical attitudes toward black persons.⁴⁰

In *R v C.(D.)*,⁴¹ Justice Doherty specifically recognized the prejudice facing black accused charged with sexual assault in the context of whether to question prospective jurors for partiality based on race and the nature of the crime:

³⁹ *R v Williams supra* at note 38, para 58.

⁴⁰ *Ibid.* at paras 54–55.

⁴¹ (1999), 139 CCC (3d) 248 (Ont CA) at paras 4–5.

If anything, the potential for partiality in a case involving the alleged sexual assault of a 16-year-old white girl by a black man is greater than in the case of alleged violence by one man against another man.

In light of this reality, courts must be cognizant of the very real danger of racial bias impacting the trier of fact in its assessment of the cogency of the similar fact evidence. Courts should be flexible in allowing the defence to rebut the presumption with arguments that the prejudicial effect outweighs its probative value. This might be the case, for example, where the prior acts involved issues relating to identification. In cases where the evidence is admitted, a strong caution to the jury should be required.⁴²

PART IV: A FORMAL EQUALITY JUSTIFICATION

A common defence tactic in sexual assault cases is, as recognized by the Supreme Court in *R v Mills*, to “whack the complainant.”⁴³ The court was referring to a speech by a senior Ottawa defence lawyer to other defence lawyers about sexual assault prosecutions in which he said, “[g]enerally, if you destroy the complainant in a prosecution absent massive corroborating evidence or eye witnesses, you destroy the head.... [T]he defence, really now is slice-and-dice time for the complainant. You have to go in there as a defence counsel and whack the complainant hard....”⁴⁴

This “whack the complainant” tactic is commonly manifested in:

- electing to have a preliminary inquiry where defence counsel can cross-examine the complainant before trial;
- explicit or implicit reliance on myths and stereotypes to impugn the credibility of the complainant;

⁴² See, more generally, the discussion of the issue of race and character evidence in Carodine, “The Mis-Characterization of the Negro’: A Race Critique of the Prior Conviction Impeachment Rule” (2009) 84 Indiana LJ 521; Goodman, “The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence” (2007) 25 Law & Inequality 1; Johnson, “Racial Imagery in Criminal Cases” (1992–93) 67 Tul L Rev 1739; and Johnson, “The Color of Truth: Race and the Assessment of Credibility” (1996) 1 Mich J. Race & L 261.

⁴³ [1999] 3 SCR 668 at para 90.

⁴⁴ Schmitz, “Whack Sex Assault Complainant at Preliminary Inquiry” (2 May 1988) Law Week 22.

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- suggesting to the complainant, in many cases a child complainant, that she has come to court prepared to perjure herself in the absence of any legitimate motive to lie;
- reliance on a specious motive to lie such as revenge or financial profit;
- attempting to cross-examine the complainant on her prior sexual history; or, seeking to introduce the complainant's medical and counselling records.⁴⁵ One of the purposes of doing so is to "depict the sexual assault complainant as the irrational, incredible, and hysterical other of the rational legal subject";⁴⁶
- lengthy, embarrassing, intrusive cross-examination often focusing on clothing, alcohol consumption, lifestyle, employment or lack thereof, marital status, minor inconsistencies, lifestyle, drug or alcohol use;
- aggressive, lengthy, embarrassing and confusing cross-examination of child complainants;⁴⁷ and,
- putting suggestions to the complainant concerning consent that the lawyer knows are likely false;⁴⁸ or, otherwise aggressively cross-examining a witness the lawyer knows is telling the truth.⁴⁹

45 Even the application itself will have a detrimental impact on the dignity, privacy, and psychological well-being of the complainant.

46 See Gotell, "The Ideal Victim, the Hysterical Complainant and the Disclosure of Confidential Records: A Case Study of the Implications of the Charter for Sexual Assault Law" (2002) 40 Osgoode Hall LJ 256. See further, Gotell, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43 Alta L. Rev 743; and Benedet and Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues" (2007) 52 McGill LJ 515.

47 See Schuman, Bala, and Lee, "Developmentally Appropriate Questions for Child Witnesses" (1999) 25 Queen's LJ 297–301 for illustrations of some of the tactics and questions used to intimidate and confuse a child. See also Bala, Ramakrishnan, Lindsay, and Lee, "Judicial Assessment of the Credibility of Child Witnesses" (2005) 42 Alta L. Rev 995; Child Abuse Prevention and Counselling Society of Greater Victoria, *Children as Witnesses* (Victoria, British Columbia, 1999); *R v F.(CC)*, [1997] 3 SCR 1183 at 1205; Eastwood, Kift, and Grace, "Attrition in Child Sexual Assault Cases: Why Lord Chief Justice Hale Got it Wrong" (2006) 16:2 J Judicial Administration 81; Eastwood, Patton, and Stacey, "Child Sexual Abuse and the Criminal Justice System" *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology, 1998).

48 See the discussion of the Kevin Barlow case in Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 Dalhousie LJ 294–96.

49 See Layton, "The Criminal Defence Lawyer's Role" (2004) 27 Dal LJ 379.

It is now trite law that the conduct of the defence can impact on the admissibility of bad character evidence. So, for example, applying traditional principles, prior sexual misconduct evidence is admissible to rebut a defence of accident or innocent association;⁵⁰ or mistaken belief in consent.⁵¹ In other contexts, allowing the Crown to lead bad character evidence to respond to defence tactics is commonly referred to as the “tit for tat” principle. The issue is not strictly one of assessing probative value and prejudicial effect but rather admission grounded in policy and fairness much like the underpinnings of the approach advanced in this article. Under the “tit for tat” principle, the Crown is able to lead bad character evidence where, for example: (i) the accused cross-examines Crown witnesses about their criminal record;⁵² (ii) the accused suggests that another person committed the offence;⁵³ (iii) the accused impugns the character of the victim;⁵⁴ or (iv) the defence impugns the police investigation and failure to focus on other suspects.⁵⁵ The purpose of the “tit for tat” principle is one of fairness including ensuring that the trier of fact has a balanced picture.⁵⁶ As the Ontario Court of Appeal held in *R v Parsons*:

... if the appellant chose to throw sticks at [a third party], the Crown should be able to counter this evidence with any similar evidence relating to the propensity [of the appellant] ... To rule otherwise would leave the jury with a highly misleading impression...⁵⁷

Despite the fact that the “tit for tat” argument does not appear to be argued by Crowns in sexual assault cases, the principle does apply given the nature of the defence tactics in these cases.⁵⁸ Indeed, there are

⁵⁰ See, for example, *R v B.(F.F.)*, [1993] 1 SCR 697.

⁵¹ See, for example, *R v Clermont*, [1986] 2 SCR 131.

⁵² See *R v Corbett*, [1988] 1 SCR 670 at 690.

⁵³ See *R v Parsons* (1993), 84 CCC (3d) 226 at 237–38 (Ont CA) (hereinafter *Parsons*); *R v Vanezis* (2006), 213 CCC (3d) 449 (Ont CA); and, *R v Woodcock* (2003), 177 CCC (3d) 346 at paras 136–137 (Ont CA).

⁵⁴ See *R v Truscott* (2006), 213 CCC (3d) 183 at para 36 (Ont CA); and, *R v Scopelliti* (1981), 63 CCC (2d) 481 at 497–98 (Ont CA).

⁵⁵ See *R v Mallory* (2007), 217 CCC (3d) 266 at paras 85–87 (Ont CA); and, *R v Dhillon* (2002), 166 CCC (3d) 262 at para 51 (Ont CA). See further the discussion in *R v Van*, [2009] SCC 22 at paras 25, 46.

⁵⁶ See *R v Williams* (2008), 233 CCC (3d) 40 at paras 58–60 (Ont CA).

⁵⁷ *Supra* at note 53, para 25.

⁵⁸ A similar argument is made in Childs, “The Character of the Accused” in Childs and

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far more fairness concerns in sexual assault cases than in cases involving self-defence or third-party attribution.⁵⁹ In addition to “whack the complainant” tactics, the defence is impugning the character of sexual assault complainants when they make the suggestion in cross-examination that the complainant is committing perjury and lying about the assault. As noted earlier, it is rare for a complainant in other crimes involving violence to be challenged as a liar. The usual defence is that they are mistaken in their identification of the accused, not that they are lying about being harmed. Interestingly, this “tit for tat” justification was relied upon by Justice L’Heureux-Dube in her dissenting opinion in the similar fact case of *R v D.(L.E.)*⁶⁰ wherein she observed:

In the present case, defence counsel launched an attack on the credibility of the complainant....

When children are sexually assaulted there are generally no witnesses. When such matters become the subject of criminal prosecution it is usually the victim’s word against the accused’s. Under such circumstances, the credibility of the victim is of crucial importance to the determination of guilt or innocence. When, as in this case, the credibility of the victim is attacked by defence counsel, the victim should not be denied recourse to evidence which effectively rebuts the negative aspersions cast upon her testimony, her character or her motives....⁶¹

PART V: THE SUBSTANTIVE EQUALITY JUSTIFICATION

Prosecutors have traditionally faced an uphill battle in trying to introduce pattern evidence in sexual assault cases. Part of the reason is what Justice McLachlin referred to in *R v B.(C.R.)* as the common law having taken a “strict view of similar fact evidence, regarding it with suspicion.”⁶² She does not elaborate on the etiology of the “suspicion” other than to trace the common law’s concern about the prejudicial effect of bad character evidence on the deliberative process. However, since the majority of the modern era similar fact cases heard in the Supreme Court of Canada (and almost all of the leading cases) involve

Ellison, *Feminists Perspectives on Evidence* (London: Cavendish Publishing, 2000) at 231–35.

59 See the discussion *infra* and the necessity discussion at note 11.

60 [1989] 2 SCR 111.

61 *Ibid.* at 133–34.

62 [1990] 1 SCR 717 at 723 (hereinafter *B.(C.R.)*).

sexual assault,⁶³ the “suspicion” would appear to have more to do with the nature of the case than concerns about prejudice.⁶⁴ Indeed, as Professor Winter has observed, “it may be that it is not fear of forbidden reasoning which has prohibited inclusion of evidence of past rapes, but a more elusive judicial belief system in rape cases.”⁶⁵ Moreover, as Professor Hanson stated:

Much of the case law on the rules of similar fact evidence has related to incidents of rape, incest and child sexual assault. The argument put forward in this article is that the predominance of such offences in the case law is not coincidental. Rather, their over-representation can be seen to flow from

63 In Canada, fourteen of the twenty-two Supreme Court of Canada modern-day similar fact evidence (SFE) *admissibility* cases have involved sexual assault. Cases where the issue was the adequacy of the charge to the jury or application of the curative proviso have not been included. Pre-1970 cases have not been included because they largely date back to the early part of the century and contain very little analysis. See, for example, *R v Brunet*, [1918] 57 SCR 83; and, *R v Koufis*, [1941] SCR 481. It was only in the last twenty-five years that the Supreme Court really began to develop its own approach to similar fact admissibility.

Sexual Assault SFE Cases

Post-1970 [14]

R v Guay, [1979] 1 SCR 18
R v Sweitzer, [1982] 1 SCR 949
R v Bell, [1985] 1 SCR 594
R v Clermont, [1986] 2 SCR 131
R v Robertson, [1987] 1 SCR 918
R v Green, [1988] 1 SCR 228
R v D. (L.E.), [1989] 2 SCR 111
R v B. (C.R.), [1990] 1 SCR 717
R v C. (M.H.), [1991] 1 SCR 763
R v B. (F.F.), [1993] 1 SCR 697
R v Handy, [2002] 2 SCR 908
R v Shearing, [2002] 3 SCR 33
R v Harvey, [2002] 4 SCR 311
R v Blake, [2004] 3 SCR 503

In six of the fourteen sexual assault cases, the Supreme Court held that the evidence was not admissible. More troubling is the fact that since 2000 (i.e., the post-*Handy* propensity era), the Supreme Court has held that the evidence was not admissible in three of the four cases it has heard. These include *R v Handy*, [2002] 2 SCR 908; *R v Harvey*, [2002] 4 SCR 311; and *R v Blake*, [2004] 3 SCR 503. The one exception is *R v Shearing*, [2002] 3 SCR 33.

64 The same can be said of the leading similar fact evidence cases in other common law jurisdictions. See, for example, *D.P.P. v Boardman*, [1975] AC 421 (HL); and *R v H.*, [1995] 2 AC 596 (HL).

65 Winter, “The Role of Gender in Judicial Decision-Making: Similar Fact Evidence, the Rose West Trial and Beyond” (2004) Int’l J Evidence & Proof 35.

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a number of factors: the historical tendency of the courts to doubt sexual complainants; the law's tendency to confine analysis to a restricted set of facts and to view incidents as discrete events in isolation from their context; and, finally, a reluctance to acknowledge the situatedness of decision-makers and potential bias in determinations of what might be probative or prejudicial.⁶⁶

In other words, it is reasonable to assume that the myths and stereotypes that manifest themselves in sexual assault cases have and continue to impact on similar fact adjudication. Some of the myths relevant to this context include that “women lie about being raped; that women are not reliable reporters of events; that women are prone to exaggerate; and, that women falsely report having been raped to get attention.”⁶⁷ The depths of this inherent “suspicion” can be seen in *Handy* itself. Notwithstanding that Handy was a sexual predator who had been twice previously convicted of sexual assault of different women,⁶⁸ and was now alleged to have raped both the complainant and the similar fact witness, the Supreme Court of Canada and Ontario Court of Appeal expressed concerns about the reliability of the similar fact evidence including suggesting that it was “dicey”⁶⁹ and possibly tainted by the prospects of financial profit.⁷⁰ For example, in summarizing the Court of Appeal’s decision, the Supreme Court noted:

66 Hanson, “Sexual Assault and the Similar Fact Rule” (1993) 27 UBC L Rev 51.

67 See *Jane Doe v Toronto (Metropolitan) Commissioners of Police*, [1998] OJ No. 2681 (SCJ) (MacFarland J.) at para 13.

68 [2002] 2 SCR 908 at para 142 (hereinafter *Handy*). It is interesting to point out that, in a previous decision, the Supreme Court recognized that delayed disclosure is irrelevant in the assessment of a complainant’s credibility. As Justice Major, for the majority, held in *R v D.(D.)*, [2000] 2 SCR 275 at para 65:

A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.

Moreover, it was entirely reasonable for Handy’s ex-wife to wait until he was no longer able to harm her before filing a complaint.

69 *Ibid.* at para 113.

70 *Ibid.* at paras 23, 111, 133.

The credibility of the ex-wife was problematic. She had considerably delayed reporting any of the incidents. The eventual timing of her complaints raised issues with respect to her motives. The complaint with respect to four incidents had first been made in support of an uncontested application for compensation before the Criminal Injuries Compensation Board when the respondent was in prison. The rest of the complaints had been made after her final separation from the respondent shortly after she had learned of the charges laid in this case.⁷¹

What makes this “suspicion” in *Handy* even more troubling is that there was corroborating evidence to support the complainant’s allegation that arguably bolstered the reliability of the similar fact evidence. This included witnesses who saw bruises on the complainant’s chest, arms, and throat in the days following the attack, and a statement attributed to the accused, “why does this keep happening to me.”⁷²

The fueling of this “inherent suspicion” by myths and stereotypes associated with sexual assault cases can also be seen in a court’s willingness to view similar fact evidence as possibly tainted by collusion. In *B.(C.R.)*, the accused was charged with sexually assaulting his daughter. The Crown wanted to lead evidence of sexual activity between the accused and his step daughter. The defence did not argue collusion and there was no evidence of it. Nevertheless, in his dissenting opinion, Justice Sopinka (with Justice Lamer concurring) raised the possibility of collaboration on his own motion:

In considering the admissibility of the evidence in this case, I observe that no attempt appears to have been made to negative the possibility of collaboration. No questions were directed to Crown witnesses to determine whether this possibility existed.⁷³

In *Handy*, the Crown wanted to lead evidence of the accused’s alleged sexual and physical abuse of his ex-wife. The Crown sought to lead seven incidents between March of 1990 and October of 1996 to establish the accused’s “propensity to inflict painful sex and when aroused will not take no for an answer.”⁷⁴ In assessing the admissibility of the seven incidents, Justice Binnie, for the court, was concerned that the

⁷¹ *Ibid.* at para 23.

⁷² *Ibid.* at paras 4–5.

⁷³ *Supra* at note 62, p. 734.

⁷⁴ *Handy, supra* at note 68, para 6.

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evidence may have been tainted by the “potential collusion” between the ex-wife and the complainant. As noted earlier, prior to the alleged rape, the complainant and Handy’s ex-wife had met and discussed Handy’s conduct including a criminal injuries compensation claim that the ex-wife had earlier made and the settlement she had received. The court thus identified the root of collusion as the “whiff of profit”:

The ex-wife acknowledged that she had told the complainant of the \$16,500 she received from the Criminal Injuries Compensation Board on the basis, she agreed, that “[a]ll you had to do was say that you were abused.” A few days later the complainant, armed with this information, meets the respondent and goes off with him to have sex in a motel room.⁷⁵

The depth of the court’s concern here is clearly manifested in its mistake on the facts. Justice Binnie suggests that “*a few days later*” and “armed with this information,” the complainant potentially set the stage for a false complaint. In fact, the meeting between the complainant and Handy’s ex-wife took place in the summer of 1996 and the alleged rape on the evening of 6 December 1996.⁷⁶ It is also manifested again in its decision in *R v Shearing*⁷⁷ where the court characterized the summer meeting in *Handy* as a “consultation between the complainant and the similar fact witness prior to the alleged offence about the prospect of financial profit.”⁷⁸

The court’s theory of collusion makes little sense. The concern with collusion is the reliability of the similar fact evidence and whether it is the product of collusion, not the reliability of the complainant’s evidence. Whether or not the complainant’s evidence is somehow tainted is an issue for the trial, not the similar fact application. In *Handy*, the ex-wife’s testimony was, in no way, impacted by this meeting as the compensation claim had been previously filed. Although the court did not come to a final conclusion on the issue of collusion, it is clear that they were heavily influenced by this issue and were satisfied that there was “some evidence of actual collusion”⁷⁹ The court’s discussion of

⁷⁵ *Ibid.* at paras 99, 111.

⁷⁶ *Ibid.* at paras 4, 15.

⁷⁷ [2002] 3 SCR 33 (emphasis added). *Shearing* is important on the issue of collusion because it at least recognizes that communication between complainants is not on its own to raise an “air of reality” (*Ibid.* at paras 43–44).

⁷⁸ *Ibid.* at para 44.

⁷⁹ *Handy, supra* at note 68, para 112.

collusion further reveals the heavy burden placed on the Crown and sexual assault complainants. All nine justices appeared to have been satisfied that there was at least the possibility that the complainant lied about the rape because of the “whiff of profit.” The clear implication that the complainant put herself in this position for money is demeaning and offensive. Again, it caters to the stereotype that women are prone to lie and sometimes motivated by money to do so. It is not clear how the court factored her bruises into their theory, although presumably they would have concluded that she allowed Handy to hit her to further her false claim.

Ensuring that Sexual Assault is Treated as a Crime of Violence Not Sex

Similar fact adjudication in sexual assault cases is marked by a troubling failure to understand the nature of sexual assault. Courts appear to be focused on the issue of sex rather than on the domination and violence aspect of the encounter. As Justice McFarland recognized in *Jane Doe v Toronto (Metropolitan) Commissioners of Police*, sexual assault is a crime of violence, not sex:

sexual violence is a form of violence; it is an act of power and control rather than a sexual act. It has to do with the perpetrator’s desire to terrorize, to dominate, to control, to humiliate; it is an act of hostility and aggression. Rape has nothing to do with sex and everything to do with anger and power.⁸⁰

This failure to properly understand the nature of the offence and, therefore, the propensity of those who commit it, has had a dramatic impact on the admissibility of similar fact evidence as exemplified by both the *B.(C.R.)* and *Handy* cases.

In *B.(C.R.)*, a majority of the Supreme Court (5–2) upheld the trial judge’s decision to admit the similar fact evidence of the accused’s step daughter in a case where he was charged with sexually assaulting his other daughter. Justice McLachlin for the majority, held that if she were the trial judge she may have found this to be a “borderline case.”⁸¹ Why? What troubled her were the dissimilarities in relation to the two complainants and the underlying conduct. She pointed out that the ages of

80 [1998] OJ No. 2681 (SCJ) at para 8.

81 *Supra* at note 62, 739.

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the complainants were different (one was 15 years old, the other 11–13 years old); one complainant was sexually mature, the other only a child when the abuse started; one complainant was a blood relation, the other was not; and the sexual abuse of one child involved urination, the other did not.⁸² None of these dissimilarities would appear relevant when the focus is on domination and aggression rather than the sexual aspects of the conduct. Justice Sopinka, in dissent, would have excluded the similar fact evidence, in part, because of the dissimilarities in the evidence.

A similar focus on the sexual nature of the conduct is evident in *Handy*. In assessing the similarity of the ex-wife's allegations to the allegation of the complainant, the court pointed out the following dissimilarities:

Incident five involved choking, did not demonstrate sexual misconduct and was not remotely connected to the factual allegations in the charge.⁸³

...

None of the incidents described by the ex-wife began as consensual, then allegedly became non-consensual ...

...

The dynamic of these situations is not the same as the motel scene ...⁸⁴

...

Perhaps the most important dissimilarity ... lies not in the acts themselves but in the broader context. The 'similar fact' evidence occurred in the course of a long-term dysfunctional marriage where the charge relates to a one-night stand following a chance meeting of casual acquaintances in a bar.⁸⁵

...

The jury would likely be more appalled by the pattern of domestic sexual abuse than by the alleged misconduct of an inebriated lout in a motel room on an isolated occasion.⁸⁶

Again, it is submitted that when the focus is placed on the true nature of sexual offences, these dissimilarities become irrelevant to the issue of propensity. Moreover, such an analysis can only serve to demean and diminish the gravity of the harm caused. For example, in order to make

⁸² *Ibid.*

⁸³ *Handy*, *supra* at note 68, para 124.

⁸⁴ *Ibid.* at para 125.

⁸⁵ *Ibid.* at para 129.

⁸⁶ *Ibid.* at para 140.

their point in *Handy*, the court had to characterize Handy as an “inebriated lout” and the encounter as a “one-night stand” or the “motel scene.” These comments are eerily reminiscent of Justice McClung’s characterization of Ewanchuk’s conduct as “clumsy passes” in *R v Ewanchuk*,⁸⁷ the case where a majority of the Alberta Court of Appeal upheld the acquittal of Ewanchuk of sexual assault despite the factual finding that the complainant had repeatedly said “no.”

The heightened scrutiny by courts of the dissimilarities in the sexual nature of the incidents can be seen in the high number of exclusions post-*Handy*, particularly in cases involving female complainants under the age of nineteen. To identify this trend, a survey of reported post-*Handy* appellate and trial court decisions was conducted. Cases where the issue was identification or where there was an issue of collusion were excluded from the survey so that it could focus on assessing admissibility in cases that turned on credibility. Between 2003–06, similar fact evidence was excluded in 44 percent of the cases involving female complainants under the age of nineteen.⁸⁸ The most common reason

87 See the discussion in the Supreme Court decision where the court set aside the conviction and entered an acquittal and, in particular, Justice L’Heureux-Dubé’s concurring opinion: [1999] 1 SCR 330 at para 91.

88 It is beyond the scope of this paper but worth noting the extent to which courts have little difficulty admitting evidence in cases involving male complainants under the age of nineteen and female complainants over the age of eighteen. There would appear to be far less concern with the degree of similarity in these cases. For example, the evidence was admitted in all nine reported cases involving males under the age of nineteen. See *R v Creswell*, [2009] OJ No. 363 (CA); *R v Brown*, [2006] OJ No. 5276 (CA); *R v C.(T.)* (2005), 27 CR (6th) 94 (Ont CA); *R v B.(R.)*, [2005] OJ No. 3575 (CA); *R v Morin*, [2005] OJ No. 4402 (CA); *R v Titmus* (2004), 191 CCC (3d) 468 (BCCA); *R v C.(V.)*, [2004] NJ No. 311 (CA); *R v Wells* (2003), 174 CCC (3d) 301 (BCCA); *R v Gelesz*, [2002] OJ No. 3883 (CA). Similarly, in cases involving female complainants over the age of eighteen, the similar fact evidence was admitted in nine of the ten reported cases in the survey. See — **Admitted** — *R v Chen*, [2008] BCJ No. 2573 (CA); *R v McNight*, [2006] OJ No. 1849 (CA); *R v Whitehead*, [2004] OJ No. 4030 (CA); *R v D.(T.J.)*, [2004] OJ No. 1444 (CA); *R v Stewart* (2004), 183 CCC (3d) 421 (BCCA); *R v L.(D.)*, [2004] OJ No. 4692 (CA); *R v S.(J.G.E.)*, [2005] BCJ No. 3161 (S.C.); *R v D.(M.)*, [2005] OJ No. 5629 (SCJ); *R v Byer*, [2004] OJ No. 5887 (SCJ) — **Excluded** — *R v W.(W.J.)*, [2003] NSJ No. 328 (PC).

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was the perceived dissimilarities between the proposed evidence and the evidence of the complainant.⁸⁹ Consider the following cases.

In *R v Blake*,⁹⁰ for example, the accused was charged with sexual assault and interference on an eight-year-old complainant. She alleged that after swimming, she was alone with the accused in his bedroom and that he blew on and kissed her vagina. The alleged incident occurred in the summer of 1996. The Crown was permitted at trial to lead two previous convictions as similar fact evidence. One of the convictions from 1986 involved touching the vagina of a ten-year-old girl while she was fully clothed. The other conviction from 1987 involved inviting an eight-year-old boy into his van. While inside the van, he put his hand down the boy's pants and touched his penis.⁹¹

On appeal, the Ontario Court of Appeal held that the trial judge had erred in admitting the evidence and ordered a new trial. On further appeal, the Supreme Court of Canada adopted the reasons of the majority of the Ontario Court of Appeal, which included the following statements:

... In describing the similarities as generic, I mean that the identified similarities describe general, rather than specific, aspects of the conduct and contain limited detail, with the result that the identified similarities are likely to be present in most incidents of sexual touching involving children....

89 Admitted

R v D.(D.), [2006] OJ No. 3934 (CA)
R v Camacho, [2005] OJ No. 4417 (CA)
R v P.(C.J.), [2004] OJ No. 1531 (CA)
R v S.(W.), [2004] OJ No. 4164 (CA)
R v W.(J.), [2004] OJ No. 3591 (CA)
R v Thomas (2004), 190 CCC (3d) 31 (Ont CA)
R v Shearing, [2003] 3 SCR 33
R v S.(E.), [2006] OJ No. 1750 (SCJ)
R v D.(R.W.), [2004] OJ No. 3091 (SCJ)
R v Adams, [2005] BCJ No. 1499 (PC)
R v Sauriol, [2004] OJ No. 5876 (SCJ)
R v L.(D.), [2005] OJ No. 4914 (SCJ)
R v C.(R.), [2003] OJ No. 3919 (SCJ)
R v Collier, [2006] NJ No. 283 (PC)

Excluded

R v H.(J.) (2006), 215 CCC (3d) 233 (Ont CA)
R v Candale (2006), 205 CCC (3d) 167 (Ont CA)
R v T.(L.), [2005] OJ No. 139 (CA)
R v Blake, [2004] 3 SCR 503
R v P.(C.), [2004] OJ No. 4732 (CA)
R v K.(A.), [2006] BCJ No. 823 (PC)
R v B.(T.J.), [2004] NJ No. 71 (PC)
R v H.(J.M.), [2003] OJ No. 5511 (SCJ)
R v M.(C.), [2003] OJ No. 529 (SCJ)
R v W.(J.), [2006] OJ No. 3328 (SCJ)

⁹⁰ [2004] 3 SCR 503.

⁹¹ These facts are summarized in the Court of Appeal judgment reported as *R v B.(R)* (2003), 68 OR (3d) 75 at paras 2–4; 9–10.

In my view, these descriptions relate to non-specific conduct and lack detail. Moreover, the fact that none of the incidents involved more intrusive conduct does not change the generic quality of the identified similarities....

I conclude that apart from generic similarities, there are no distinctive unifying features of the discreditable conduct evidence and the complainant's evidence. Moreover, particularly when considered in conjunction with the distinguishing features of the evidence (including remoteness in time), the identified similarities fail to establish a persuasive degree of connection.⁹²

In the Court of Appeal, Justice Abella dissented. In her opinion, there were sufficient similarities to warrant admission:

Most notable, perhaps, is the extent to which the evidence of the prior acts of sexual abuse is similar to the offence charged. The two prior acts were committed on children who, like the complainant in this case, were ten years old or younger. The incidents involved brief touching of the children's genitalia ... As well, the two prior assaults, as well as the alleged assault, were followed by the appellate either apologizing to the child, or telling them not to disclose what had happened....

Where, as here, the probative value of similar fact evidence lies in its similarity with the charged offence, its admissibility turns on whether the similarities disclose a propensity with the requisite degree of specificity to justify reception of the evidence despite the unfair prejudice to the accused. The similar fact evidence in this case falls at the admissible end of the spectrum as it discloses a type of circumstance in which the appellant is disposed to sexually abuse children in a particular way. The issue in question is not the appellant's general disposition to sexually abuse children but rather whether the evidence is probative of repeated conduct of a similar type in a specific type of situation.⁹³

In *R v T.(L.)*,⁹⁴ the Ontario Court of Appeal overturned a trial judge's admission of similar fact evidence because of the dissimilarities between the acts. Here is how the Court of Appeal described them:

⁹² *Ibid.* at paras 61, 63, 69.

⁹³ *Ibid.* at para 25.

⁹⁴ [2005] OJ No. 139 (CA).

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... the connection between K.R.'s allegations and the other counts and the connection between counts was weak. As between counts, the nature of the allegations made by the complainants varied considerably and the allegations were disparate in time. In regard to K.T., the counts involved incestuous touching with a pre-pubescent child, progressing to masturbation and oral sex as she grew older. The count relating to J.L. alleged that the appellant raped his wife's 15-year-old sister. The counts in relation to the appellant's sister-in-law, A.B., and the similar fact evidence of K.R. involved sexual touching of the girls during and after puberty.⁹⁵

Similarly, in *R v W.(J.)*,⁹⁶ a trial judge excluded the similar fact evidence because of the lack of so-called non-generic similarities:

Moreover, many factors distinguish the proposed evidence from the case before me:

- P.B. was 18 years old at the time of the assault, whereas R.H. was 10
- J.W. had no previous relationship with P.B. and came into contact with her on a single occasion, when she visited the home, whereas he stood in a position of trust toward R.H., who lived in the home, and had a longstanding relationship with her
- The assault against R.H. involved full sexual intercourse, whereas the incident with P.B. involved digital penetration
- P.B. testified she was screaming and struggling to run away during the assault, and that J.W.'s father witnessed the attack, whereas R.H. never suggested she called out or that anyone was aware of the assaults.

In sum, a comparison of the proposed evidence to the case before me reveals significant differences in the ages of the complainants, their relationship to J.W. and the type of assaults committed. Therefore, although generic similarities exist (all the conduct was sexual and took place in the home), the lack of distinctive unifying features combined with the distinguishing features between the former incident and this case fails to establish a persuasive degree of connection. Having so concluded, I need go no further to consider the potential prejudice to J.W.⁹⁷

⁹⁵ *Ibid.* at para 15.

⁹⁶ [2006] OJ No. 3328 (SCJ).

⁹⁷ *Ibid.* at paras 21–22.

And, in *R v K.(A.)*,⁹⁸ a trial judge was compelled to exclude similar fact evidence because of the lack of similarities including the fact that the similar fact witness was not allegedly assaulted while she was lying in her bed as was the case with the two complainants.⁹⁹

PART VI: THE FEMINIST CRITIQUE OF A PRESUMPTIVE RULE

A number of feminist evidence scholars are critical of relaxing the similar fact rule in sexual assault cases. Although their focus is on the categorical rule of admission of Federal Rules 413–414, they have extended their criticisms to cases where the basis of admission is more circumscribed and so it is important to attempt to identify and respond to their arguments.¹⁰⁰ The first concern expressed is that a presumptive rule will reinforce the stereotype that sexual assault complainants require corroboration. This is a valid concern but not a convincing argument in favour of exclusion. The logical extension of the argument would be that no corroborative evidence should be called in sexual assault cases for fear of reinforcing the stereotype. Moreover, no one has ever suggested that pointing out corroborative evidence in a Crown's closing address in a sexual assault case serves to perpetuate the stereotype. Finally, there is always the risk that ameliorative action will reinforce stereotypes but that the good usually outweighs the harm. It is not likely, as Professor Orenstein posits, that cases without similar fact evidence will not be prosecuted with a relaxation of the strict exclusionary rule.¹⁰¹

A second concern is that a presumptive rule will reinforce the stereotype that men who commit sexual assaults are "deviants." Professor Orenstein describes this concern as follows:

Rather than seeing rape as an aberration and rapists as a small group of sick individuals, feminists examine the factors in our society that make us tolerant of rape.... Feminists believe, and there is abundant empirical evidence for this belief, that many otherwise normal seeming, socially acceptable

98 [2006] BCJ No. 823 (PC).

99 *Ibid.* at para 29.

100 Aviva Orenstein, "No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials" (1998) 49 *Hastings LJ* 663; Childs, "The Character of the Accused" in Childs and Ellison, *Feminists Perspectives on Evidence* (London: Cavendish Publishing, 2000) at 220–27; and Baker, "Once a Rapist? Motivational Evidence and Relevancy in Rape Law" (1996) 110 *Harv L. Rev* 563.

101 Orenstein *supra* at note 100, 694.

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men are potential rapists, and that rape may be as much a crime of opportunity as a test of character. Rape, and acquaintance rape in particular, is wide-spread, occurring throughout all strata of society.¹⁰²

Again, while a legitimate concern in sexual assault prosecutions, it is not a convincing argument. It is present with or without reliance on similar fact evidence. In order to be valid, it assumes that the trier of fact will consciously or unconsciously draw a negative inference from the absence of evidence of previous sexual misconduct. One solution, proposed by Orenstein as an alternative to a presumptive rule of admissibility, would be to develop jury instructions to educate jurors about the prevalence of sexual assault in society and how rape is not an aberration or committed only by a “sick” individual. This could be done in conjunction with the approach set out in this article.

Other concerns advanced include general mistrust of character evidence based on the law’s historical reliance on prior sexual history evidence in sexual assault cases, further marginalization of racialized groups, and opening the door to a defence response. I have tried to address these issues in the formulation of the proposed rule. While there is good reason to be suspicious of character evidence, the reasoning here is grounded in probabilities more so than disposition. The evidence is relevant because the law of probabilities makes it unlikely that a person would be falsely accusing an individual who has done the very thing before. To the extent that this might be a motive to lie where the complainant is aware of the prior misconduct, one would expect that the defence would want the evidence as part of the record in order to put forward this theory. In addition, the proposed rule recognizes that there should be additional safeguards put in place in cases involving racialized accused because of the very real danger that systemic racism will lead to additional prejudice in the assessment of the evidence. Finally, the rule is largely grounded in a response to defence tactics (i.e., the “tit for tat” principle), which would then foreclose any attempt by the defence to respond to the Crown’s response.

PART VII: CONCLUSION

The similar fact evidence exception to the bad character exclusionary rule has undergone a considerable transformation in Canada over the last two decades. We have moved from a categorical approach to admissibility to a more principled approach balancing probative value

¹⁰² *Ibid.* at 692. See also the discussion at 691–93.

and prejudicial effect. More recently in *Handy*, the Supreme Court recognized that probative value can include a situation-specific propensity to engage in a particular kind of behaviour. It is now time to recognize that the admissibility of prior sexual misconduct in sexual assault cases requires special attention. This article has advanced both formal and substantive equality arguments to argue that similar fact evidence should be presumptively admissible in cases where the issue is one of commission of the *actus reus*.