

Similar Fact Evidence

Commentary

See also chapter 70 of this Bench Book: Evidence of other Sexual (or Violent) Acts or Other Discreditable Conduct.

Suggested directions

A. Where the Crown seeks to establish the defendant's identity as the offender

You must first be satisfied that the defendant was responsible for the earlier acts. The evidence on which you may be so satisfied is ...

If you are not so satisfied, you must completely disregard the evidence of the earlier acts.

If you are so satisfied, do you consider that the similarities between the earlier acts and the acts which are the subject of this indictment are so striking that you are satisfied beyond reasonable doubt that the same person was responsible on each occasion? In deciding that, ask yourselves whether the similarities are so striking that you are able to exclude coincidence beyond reasonable doubt.

It is certainly not enough that you consider that the defendant, having been responsible for the earlier acts, is the sort of person who might, or even would, commit the offence alleged in the indictment. You must go far beyond that and decide whether - to repeat the proper test - the similarities are so striking that you are able to exclude coincidence beyond reasonable doubt. Are the similarities so striking as to show that the defendant has put his stamp, his signature, upon the acts, and to lead you to conclude that he must have been the person responsible for both the earlier acts and the offence alleged?

These are the similarities identified by the prosecution ...

These are the defence submissions to you in relation to the alleged similarities ...

B. Where the Crown seeks to establish the defendant's modus operandi

First of all you would have to accept the evidence of the witnesses as to what happened [on the other occasions]. I will go through that evidence and what the Crown and the defence said about it shortly. If you don't accept that evidence you should disregard it entirely.

If you do accept that evidence, it can still be of no use to you unless you can be satisfied that there is so strong a pattern, that the conduct on each occasion is so strikingly similar, that as a matter of common sense, and standing back, looking objectively at it, the only reasonable inference is that the same sequence of events occurred on this occasion. If you are not satisfied of that, you should put the evidence out of your mind. It would be entirely irrelevant to this case and it would be wrong to use it against the defendant. You certainly must not proceed on the basis that if you thought he'd [committed the other offences] he was generally the sort of person who might, or even would, commit [this offence].

Similar acts may of course be later than the act the subject of a charge, so the directions would require modification if that were the case.

C. Where the Crown have joined charges against a number of complainants

As I have said, you must consider the evidence in relation to each charge separately and you are to return a separate verdict for each charge.¹

Here, there is more than one complainant and the prosecution case is that the evidence of each complainant does not stand alone.

The prosecution argues that each complainant is supported by the evidence of the other complainants.

The prosecution argues that similarities in the defendant's alleged conduct towards *each* of the complainants means that the evidence of each complainant supports the others and makes it *more likely* that what each complainant says about the conduct relating to them is *truthful and reliable*.

In other words, the prosecution argues that the degree of similarity between the versions makes it *highly improbable* that it is just by chance that the complainants have falsely complained about similar events.

However before you can use one complainant's evidence in support of the truthfulness and reliability of another complainant, you need to be satisfied beyond reasonable doubt about the following things:

¹ This direction assumes that charges involving difference complainants have been joined on the basis that the evidence from each is admissible on the trial of the charges in respect of the other or others, and admitted in conformity with the decision in *Phillips v The Queen* (2006) 224 ALR 216. For a recent discussion on 'similar fact' evidence see *R v McNeish* [2019] QCA 191.

No collusion

First you must be satisfied that the evidence of each complainant is *independent* of each other. By ‘satisfied that the evidence of each complainant is independent’, I mean that you must be satisfied that there is no real risk that the complainants have together *concocted* similar complaints.

The value of any combination, and likewise any ‘strength in numbers’, is completely worthless if there is any real risk that what the complainants said was falsely concocted by them.

I direct you that you cannot use the evidence of the complainants in combination unless you are satisfied that there is no real risk the evidence is untrue by reason of concoction.

You must be satisfied that there is no *real* risk of concoction: a real risk is one based on the evidence, not one that is fanciful or theoretical.

[refer to any evidence of concoction]

Evidence reliable

Secondly, if you are satisfied there is no risk of concoction then you must also be satisfied –

- (i) that the evidence of the particular complainant under consideration is truthful and accurate as to the alleged similar conduct; and
- (ii) that the supporting evidence of the other complainant/s is *also* truthful and accurate as to the alleged similar conduct.

Strikingly Similar

Thirdly, you must be satisfied that the facts proved with respect to the other complainant/s are so *similar* to the allegations made by the particular complainant under consideration, that there is *no reasonable view of the evidence* of the other complainants, other than that the defendant committed the acts the particular complainant alleged.

[list striking features and dissimilarities]

The prosecution argues that the facts proved to you are *so similar* that, when judged by common sense and experience, they must be true; and in that way, you can use the evidence of the complainants in combination.

They argue that, in the absence of collusion, it is objectively improbable that complainant 'A' would complain of offending against him/her by the defendant in such similar circumstances as those alleged by complainant 'B', unless the offending against complainant 'A' actually occurred.²

Importantly, the defence argues that the allegations are *not so similar* as to allow you to use the evidence of one complainant in proof of the allegations made by another.

Further, the defence argues that you would *not* be satisfied that a particular complainant is truthful and accurate as to the alleged similar conduct. Thus you could not use the evidence of that complainant [those complainants] to support the others.

[or other arguments made on the defendant's behalf]

Summary

In summary,

the evidence of any one complainant, whom you consider to be truthful and reliable, as to the alleged similarities in the defendant's conduct may be used by you as a *circumstance* which might confirm, support, or strengthen the evidence of another complainant; *but only if* you are satisfied, on all the evidence that you have heard, that –

- there is *no reasonable view of it* other than the defendant committed the acts alleged by the other complainant/s, and
- the possibility that the other complainant/s is [are] *lying* can be rejected; and

² *R v CBM* [2015] 1 Qd R 165 at [45].

- the possibility that it is just by mere coincidence that the other complainant has complained falsely of similar conduct on the defendant's part can be rejected.³

If you do not accept that *sufficient similarities* exist in the allegations of each complainant as to be able to rely on the evidence of one in support of the truthfulness and reliability of the evidence of another then you would reject the prosecution argument and look at the evidence of each complainant *independently* without having regard to the evidence of the others.

I caution you that, if you do not accept that sufficient similarity in the evidence of the complainants exists, then you cannot use the evidence to reason in this way – ‘... that he is the *sort of person* who could commit these sort of offences, or is of *bad character*, and therefore we will convict him of all the charges’.

You cannot say to yourselves that because you are satisfied beyond reasonable doubt that the defendant committed offences against one complainant, he must therefore have committed the offences alleged by the other complainants, and so we will convict him of those.

At the end of the day, before you can convict the defendant on any count you must be satisfied that the prosecution has proved each element of the particular count beyond reasonable doubt; that is, that the particular complainant you are considering is truthful and reliable in his/her allegation upon which the particular charge is based.

³ In *DPP v Boardman* [1975] AC 421 Lord Wilberforce wrote (at 444) that:

“This probative force is derived, if at all, from the circumstances that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witness or from pure co-incidence.”