R. *v.* D. (L.E.), [1989] 2 S.C.R. 111

L. E. D. *Appellant*

v.

Her Majesty The Queen *Respondent*

indexed as: r. *v.* d. (l.e.)

File No.: 20702.

1988: December 14; 1989: August 10.

Present: McIntyre, Lamer, Wilson, L'Heureux-Dubé and Sopinka JJ.

on appeal from the court of appeal for british columbia

Criminal law -- Evidence -- Similar fact evidence -- Sexual assault -- Accused convicted of sexually assaulting his daughter -- Whether evidence of alleged prior acts of sexual misconduct by the accused against his daughter admissible.

Criminal law -- Sexual assault -- Charge to jury -- Similar fact evidence admitted at trial -- Whether trial judge properly instructed the jury as to the limited purpose for which such evidence could be used -- Whether trial judge's charge adequate.

The appellant was charged with two counts of sexual assault arising out of separate incidents in July 1985. The appellant allegedly fondled the breasts of his daughter, the complainant, while

on an excursion and, the same day, molested her in his apartment. Approximately three weeks later, the appellant allegedly fondled the complainant's vagina through her clothing. The appellant and his wife had separated after she discovered him in bed with the complainant on May 30, 1981. No sexual assault occurred on that date. They subsequently divorced and the complainant stayed with her mother but the appellant was allowed ample access. At trial, a *voir dire* was held to determine the admissibility of alleged previous acts of sexual misconduct by the appellant against the complainant. The Crown wished to present the complainant's allegations of numerous incidents of sexual fondling and intercourse from December 1978 to May 1981, and further incidents of sexual touching in December 1983 and in the spring of 1985. The appellant had faced several charges, including incest, arising from the incidents alleged prior to May 1981, but the Crown had entered a stay of proceedings in 1982 on all of the charges. Defence counsel did not object to the admission of the allegations of the incidents on May 30, 1981, in December 1983 and in the spring of 1985. The trial judge excluded the evidence of the alleged incidents prior to May 30, 1981 due to an insufficient logical connection between this evidence and the July 1985 incidents. Even if it was relevant, the probative value of the similar fact evidence was outweighed by its prejudicial effect to the appellant. He added, however, that the evidence could become relevant as a result of questions asked in cross-examination of Crown witnesses.

During the cross-examination of the complainant's mother by defence counsel, the witness made an unsolicited response in which she mentioned the incest charge against the appellant. In order to minimize the damage, defence counsel cross-examined further on the events surrounding that charge. Following an adjournment, the trial judge dismissed defence counsel's motion for a mistrial. The trial judge found that the cross-examination would leave the jury with the erroneous impression that the incest charge arose out of the events of May 30, 1981 and was stayed because the complainant's allegation against the appellant was false. He then ruled that the allegations of sexual misconduct prior to May 30, 1981 were admissible to correct that

erroneous impression. In his charge, the trial judge warned the jury on numerous occasions that the appellant was not on trial for incest, nor was he on trial for events occurring prior to July 1985. The evidence of the alleged incidents prior to July 1985 was simply background. The appellant was subsequently convicted and the Court of Appeal affirmed the conviction.

Held (L'Heureux-Dubé J. dissenting): The appeal should be allowed and a new trial ordered.

Per McIntyre, Lamer, Wilson and Sopinka JJ.: The trial judge was correct to exclude the evidence of the sexual incidents alleged to have occurred between December 1978 and May 1981. The evidence from this period showed that the complainant was the object of the appellant's alleged acts and that his misconduct was considerably more serious than the misconduct alleged in the charge. It was logically connected to the present charge against the appellant but its probative force was insufficient to outweigh its prejudicial effect. No evidence other than the complainant's testimony was adduced to prove the offences in the present charge and the similar fact evidence bore nearly the entire burden of proving the Crown's case against the appellant on the acts charged.

The two incidents of alleged misconduct in December 1983 and in the spring of 1985 were properly admitted as similar fact evidence. These incidents were similar to and more proximate in time to those forming the basis of the present charge. The probative value of this evidence was not outweighed by its prejudicial effect.

The trial judge erred, however, in admitting the evidence of the alleged sexual misconduct between 1978 and May 1981 following the cross-examination of the complainant's mother. The evidence had not changed its character and remained evidence of alleged prior sexual misconduct which could only be admitted if it satisfied the similar fact evidence rule. While the evidence

had acquired some relevance for correcting the false impression being left in the minds of the jury, this added relevance did not diminish the prejudicial effect of that evidence. Thus, the unfortunate situation created by the cross-examination did not alter the balance sufficiently to render the evidence admissible. If the trial judge was of the view that an immediate caution to the jury to disregard the evidence was insufficient to ensure a fair trial, then his course was to direct a mistrial rather than admit the evidence of similar acts which had previously been excluded. Since the trial judge erred in admitting this evidence, the trial judge's charge need not be considered in relation to that evidence.

The trial judge's charge was inadequate in respect of the evidence of alleged incidents of sexual misconduct in December 1983 and in the spring of 1985. While the trial judge warned the jury on numerous occasions that the appellant was not on trial for the alleged prior misconduct, but only for the alleged incidents of July 1985, he did not charge the jury in a manner that would minimize as far as possible the dangers inherent in the admission of similar fact evidence. The jury should be instructed that if it accepts the evidence of the similar acts, that evidence is relevant for the limited purpose for which it was admitted. The jury must be specifically warned that it is not to rely on the evidence as proof that the accused is the sort of person who would commit the offence charged and on that basis infer that the accused is, in fact, guilty of the offence charged. Here, the trial judge gave the jury no such warning. The similar fact evidence was treated simply as part of the whole body of evidence on which the jury was to determine innocence or guilt.

Per L'Heureux-Dubé J. (dissenting): The application of the similar facts rule requires a balancing of factors and involves an exercise of discretion on the part of the trial judge who must assess both the probative value and the possible prejudicial effect of the evidence in the circumstances of the case before him. Here, the trial judge could have validly admitted the

evidence from the outset. The probative force of the evidence outweighed the prejudicial effect upon the appellant. In determining whether a father has sexually assaulted his daughter, it is particularly relevant to know whether such behaviour is part of a long-standing pattern of abuse.

In any event, the trial judge properly admitted the evidence of the sexual incidents prior to May 1981 following the defence counsel's attack on the victim's credibility -- the Crown's chief witness. The evidence was admitted not as evidence of "similar fact", but rather for the purpose of establishing the victim's credibility. When the victim's credibility 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.

Since the evidence was not admitted as similar fact evidence, the charge to the jury did not have to deal directly with the special problems relating to similar fact. However, even if it were to be considered as similar fact evidence, the charge to the jury was not defective. The trial judge cannot be expected to completely eradicate any prejudicial effect created by such evidence but he must, in his charge, carefully direct the jury as to the proper use of the evidence and the circumstances in which it may be taken into consideration. In the case at bar, the trial judge's charge contains numerous and repeated warnings concerning the proper use of the evidence of prior incidents.

Cases Cited

By Sopinka J.

Considered: *R. v. Ball*, [1911] A.C. 47; **referred to**: *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Robertson*, [1987] 1 S.C.R. 918; *R. v. Morin*, [1988] 2 S.C.R. 345; *Director of Public*

Prosecutions v. Boardman, [1975] A.C. 421; *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57; *Sweitzer v. The Queen*, [1982] 1 S.C.R. 949; *R. v. Pegelo*, [1934] 2 D.L.R. 798; *R. v. Thompson* (1954), 110 C.C.C. 95; *R. v. Williams* (1973), 12 C.C.C. (2d) 453; *G. v. R.*, [1977] C.A. 130; *R. v. Ambrose* (1975), 25 C.C.C. (2d) 90 (N.B.S.C., App. Div.), aff'd [1977] 2 S.C.R. 717.

By L'Heureux-Dubé J. (dissenting)

R. v. Robertson, [1987] 1 S.C.R. 918; *R. v. Green*, [1988] 1 S.C.R. 228; *R. v. Stalder*, [1981] 2 N.S.W.L.R. 9.

Authors Cited

Cross, Sir Rupert. *Cross on Evidence*, 6th ed. By Sir Rupert Cross and Colin Tapper. London: Butterworths, 1985.

Hoffmann, L. H. "Similar Facts After *Boardman*" (1975), 91 *L.Q.R.* 193.

APPEAL from a judgment of the British Columbia Court of Appeal (1987), 20 B.C.L.R. (2d) 384, dismissing the accused's appeal from his conviction on two counts of sexual assault. Appeal allowed and a new trial ordered,

L'Heureux-Dubé J. dissenting.

Kenneth G. Young, for the appellant.

William Ehrcke, for the respondent.

//*Sopinka J.*//

The judgment of McIntyre, Lamer, Wilson and Sopinka JJ. was delivered by

SOPINKA J. -- This appeal from a decision of the British Columbia Court of Appeal comes before this Court as of right. The Court of Appeal, McLachlin J.A. (as she then was) dissenting, upheld the conviction of the appellant. The appellant had been tried before a judge and jury and found guilty on two counts of sexual assault. The acts of sexual assault were alleged to have been committed by the appellant against his daughter, G.D. The issue in this appeal concerns the admissibility of evidence of alleged previous acts of sexual misconduct by the appellant against his daughter.

Facts

The two counts of sexual assault against the appellant arose out of separate incidents in July 1985. The complainant, G.D., testified that on July 1, the appellant fondled her breasts while on an excursion to a park and later that same day, molested her in his apartment. Approximately three weeks later, again in his apartment, the appellant is alleged to have fondled her vagina through her clothing. The complainant had her 17th birthday shortly before this incident. She had been living with her mother, E.D., and two younger sisters since the appellant left the matrimonial home on May 30, 1981. On that date, E.D. discovered the appellant in bed with the complainant. At trial, it was common ground that no sexual assault occurred on that date. The appellant denied all allegations of sexual misconduct.

Shortly after the commencement of the trial, a *voir dire* was held to determine the admissibility of evidence of alleged previous acts of sexual misconduct by the appellant against the

complainant. The Crown wished to present the complainant's allegations of numerous incidents of sexual fondling and intercourse from December 1978 to May 1981, and further incidents of sexual touching in December 1983 and spring 1985. The appellant had faced several charges, including incest, arising from the incidents alleged prior to May 1981, however in 1982, the Crown had entered a stay of proceedings on all of these charges. The Crown also wished to adduce evidence of a June 1981 medical examination of the complainant. Counsel for the defence did not object to the admission of the allegations of incidents in December 1983 and spring 1985, nor to the evidence of the events on May 30, 1981. Defence counsel did object, however, to the admission of the evidence of incidents alleged to have occurred prior to May 1981, and the medical evidence.

The trial judge ruled that the evidence of the alleged incidents prior to May 30, 1981 should be excluded. Low Co. Ct. J. was of the opinion that there was an insufficient logical connection between this evidence and the July 1985 incidents which gave rise to the charges before him. Even if the evidence of the alleged incidents prior to May 30, 1981 were relevant to the present charges, its probative value was outweighed by its prejudicial effect. In making this ruling, Low Co. Ct. J. warned that the excluded evidence might become admissible as a result of questions asked in cross-examination of Crown witnesses, or as a result of defence evidence. The medical evidence was excluded as not relevant.

The trial resumed with E.D. testifying as a witness for the Crown. In cross-examination, defence counsel posed numerous probing questions about the state of family relations both prior to and after May 30, 1981. When defence counsel suggested that E.D. attempted to extract money from the appellant's mother in the summer of 1981, the following exchange took place:

Witness	I don't believe so. I remember getting into an argument with her about money, but I don't believe I specifically asked her for money.
Counsel	And did you not, in the course of that argument over money, in the summer of 1981 --
Witness	And it must have been later than the summer, because I had to be subpoenaed to go to Court on charges of incest against [L.E.D.]

Following this unexpected response, defence counsel did not move that the proceedings be declared a mistrial; instead, counsel cross-examined further on the events surrounding the incest charge in order to minimize the damage caused. Before this Court, counsel for the appellant agreed that this questioning simply exacerbated an unfortunate situation.

Following an adjournment, defence counsel did move for a mistrial. The trial judge refused this motion since, in his opinion, the situation was created by the defence. He found that defence counsel's cross-examination would leave the jury with the erroneous impression that the incest charge arose out of the events of May 30, 1981 and was stayed because the complainant's allegation against her father was false. Low Co. Ct. J. then ruled that the complainant's allegations of acts of sexual misconduct by the appellant prior to May 30, 1981 were admissible in order to correct that erroneous impression, and to allow the complainant "to tell her entire story". He did not, however, change his ruling as to the medical evidence.

Although the trial judge told the jury that he would advise them as to what use they could make of the evidence, the appellant submits that he failed to do so. In his charge to the jury, Low Co. Ct. J. reviewed in considerable detail each of the previous acts of sexual misconduct alleged. His direction to the jury as to these allegations consisted of a number of warnings that the appellant was only charged with the acts alleged to have occurred in July 1985 and that previous acts alleged were simply "background".

Court of Appeal

Speaking for a majority of the British Columbia Court of Appeal (1987), 20 B.C.L.R. (2d) 384, Hinkson J.A. was not persuaded that the trial judge proceeded on a wrong principle or made the wrong decision in failing to declare a mistrial. Furthermore, Hinkson J.A. found no error in the trial judge's charge to the jury. In his opinion, the warnings about the use of the evidence were adequate. The trial judge had admitted the excluded evidence after it was raised in cross-examination because it had become relevant and necessary to the unfolding of the narrative. There was thus no need for the trial judge to charge the jury that the evidence was admissible to show a guilty sexual passion by the appellant for the complainant. In Hinkson J.A.'s view, the allegations of acts of sexual misconduct prior to May 30, 1981 were relevant and admissible as similar fact evidence from the outset.

McLachlin J.A. dissented. In her view, the trial judge was correct in his initial decision not to admit the alleged prior misconduct as similar fact evidence. The probative value of the evidence was tenuous, while its potential for prejudice was great. His subsequent decision to admit the evidence to rebut the inference which arose on cross-examination violated the rule prohibiting rebuttal evidence on a collateral point.

In the event that the evidence was admissible under the similar facts rule, McLachlin J.A. maintained that the charge to the jury was inadequate. Telling the jury that allegations of prior sexual misconduct were "background" was insufficient in view of the special dangers attending similar fact evidence. The jury was not instructed as to the limited purpose for which such evidence could be used, nor that the evidence should be disregarded if it did not meet that purpose.

Issues

The submissions of the parties pose three questions to be answered by this Court:

(1) was the evidence of alleged prior acts of sexual misconduct by the appellant against the complainant admissible in these proceedings;

(2) if the evidence was not admissible, what was the effect of it being raised in the cross-examination of E.D.; and

(3) if the evidence was admissible, was the charge to the jury adequate.

Admissibility of Evidence

The evidence which the Crown wished to have admitted at the *voir dire* was evidence of alleged discreditable, even criminal, acts by the appellant against the complainant prior to July 1985. As such, it could only be admitted if it met the criteria of "similar fact" evidence.

What is generally labelled the "similar facts rule" is, in fact a rule and an exception to a rule. The admission of similar facts is an exception to the rule excluding evidence which, though relevant, is adduced solely to show that the accused is the sort of person who would be likely to have committed the offence (*Morris v. The Queen*, [1983] 2 S.C.R. 190, at pp. 201-2). This exclusionary rule is itself an exception to the general principle that all relevant evidence is admissible (*R. v. Robertson*, [1987] 1 S.C.R. 918, at p. 941). In *R. v. Morin*, [1988] 2 S.C.R. 345, at p. 368, this Court recognized the link between the basis for the exclusionary rule and the "similar facts" exception to that rule:

> As pointed out by Lamer J. in *Morris v. The Queen*, [1983] 2 S.C.R. 190, this rule of exclusion evolved as a result of the repeated exercise of a judicial discretion excluding such evidence because its probative value was outweighed by its prejudicial effect (p. 201). In considering

> whether an exception should be made, regard must be had for the underlying rationale of the exclusionary rule: does the prejudicial effect of the evidence outweigh its probative value? An exception should be made if the scales tip in favour of probative value.

Cross on Evidence (6th ed. 1985) contains a concise statement of the "similar facts rule" at p. 311 with which I agree:

> ... evidence of the character or of 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 rule was subjected to a careful analysis by the House of Lords in *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421. Lord Hailsham explained the rule as follows, at p. 453:

> It is perhaps helpful to remind oneself that what is *not* to be admitted is a chain of reasoning and not necessarily a state of facts. If the inadmissible chain of reasoning is the *only* purpose for which the evidence is adduced as a matter of law, the evidence itself is not admissible. If there is some other relevant, probative purpose than for the forbidden type of reasoning, the evidence is admitted, but should be made subject to a warning from the judge that the jury must eschew the forbidden reasoning. [Emphasis in original.]

Following the decision in *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57 (P.C.), the seminal case on the point, the courts tended to create categories of cases under which types of similar act evidence ought to be admitted. These categories are generally based on the purpose for which the evidence was adduced, such as "to prove a system" or "to rebut the defence of innocent association". These categories, however, are not to be taken as exhaustive. Nor do they provide an "automatic ticket" of admissibility. They are no more than illustrations of the application of the rule (*Sweitzer v. The Queen*, [1982] 1 S.C.R. 949, at pp. 952-53, and *Boardman*, *supra*).

The process of reasoning therefore is to determine whether the evidence of similar acts has probative value in relation to a fact in issue, other than its tendency to lead to the conclusion that the accused is guilty because of the disposition to commit certain types of wrongful acts. If the evidence has such probative value, the court must then determine whether its probative value is sufficient to justify its admissibility, notwithstanding the prejudicial tendency of such evidence.

Before this Court, the respondent relied on the decision of the House of Lords in *R. v. Ball*, [1911] A.C. 47, for the proposition that evidence adduced to show a "guilty passion" is admissible as similar facts. This decision has been followed for this proposition on numerous occasions in Canada (see, for example, *R. v. Pegelo*, [1934] 2 D.L.R. 798 (B.C.C.A.); *R. v. Thompson* (1954), 110 C.C.C. 95 (B.C.C.A.); *R. v. Williams* (1973), 12 C.C.C. (2d) 453 (Ont. C.A.); and *G. v. R.*, [1977] C.A. 130). In light of *Boardman* and *Sweitzer*, *Ball* can no longer stand for the general proposition that evidence of this kind will automatically be admitted. I turn now to consider whether the decision in *Ball* can offer any support to the respondent's position.

In *Ball*, a brother and sister were charged under the newly enacted *Punishment of Incest Act, 1908* with having had carnal knowledge of each other during two periods in 1910. The evidence of the police who had observed the Balls' house over a two-week period was that the two accused were seen entering and leaving the house; figures were observed in the front bedroom; and a conversation between a man and a woman was overhead coming from that bedroom. When the police called on the house late one evening, they found the sister in her nightdress and the brother coming out of the front bedroom fastening his trousers. The police observed that the front bedroom had a double bed which bore signs of having been occupied by two people, and that the only other bedroom in the house was clearly not in use. In addition to this circumstantial evidence, the prosecution was permitted to adduce evidence that before incest had become unlawful, the two accused had rented and lived in a house as man and wife, and that the sister

had given birth to a child which was registered as the daughter of the two accused. The accused denied that any sexual relations had taken place.

In upholding the admissibility of the evidence of prior relations between the accused, Lord Loreburn L.C. noted that the circumstantial evidence adduced to establish the opportunity for the offence, was "very suggestive of incest" (p. 71). The object of the "similar fact" evidence was to establish that the proper inference to be drawn from the accused occupying the same bedroom and bed was an inference of guilt. Lord Loreburn L.C. concluded (at p. 71):

> ...I consider that this evidence was clearly admissible on the issue that this crime was committed -- not to prove the mens rea, as Darling J. considered, but to establish the guilty relations between the parties and the existence of a sexual passion between them as elements in proving that they had illicit connection in fact on or between the dates charged.

In *Ball*, the "similar fact" evidence showed the propensity of the accused to commit incest. In fact, I think it may be said that in all cases in which evidence of prior misconduct is adduced, that evidence to some degree goes to a propensity or disposition of the accused. That, however, cannot be its sole characteristic if it is to be admitted under the similar facts rule.

The probative value of similar fact evidence must also be measured in relation to the other evidence adduced in the case. In *Ball*, there existed a significant body of circumstantial evidence pointing to the guilt of the accused. That this evidence alone was not considered sufficient seems in part to have been a function of the era; as Lord Alverstone C.J. commented at p. 66:

> In the administration of this Act there is an additional reason which enforces what you have said, namely in the case of poor people in crowded dwellings. It is sometimes impossible for them to avoid sleeping together, and it would be wrong to assume in some cases that there must have been incestuous intercourse because persons of different sexes were in the same bed.

The value of the similar fact evidence was that it dispelled any doubt that the accused were sharing a bed for the purpose of having sexual relations. It has been rightly suggested that if the facts in *Ball*, *supra*, had been that there were two bedrooms in use, the evidence of previous acts of incest would not have been admitted. (See Hoffmann, "Similar Facts After *Boardman*" (1975), 91 *L.Q.R.* 193, at p. 202).

Given the strength of the probative value of the "similar fact" evidence in *Ball*, the prejudicial effect inherent in evidence of prior misconduct was outweighed. The prosecution was not attempting to adduce evidence of past misconduct which was more serious than that alleged in the charge facing the accused, nor was it reaching far into the past to find these "bad acts". In all the circumstances in *Ball*, the evidence was admissible as similar fact evidence.

I turn now to the application of the foregoing to the present appeal. In the *voir dire*, the trial judge excluded the evidence of the incidents of sexual fondling and sexual intercourse which the complainant alleged occurred from December 1978 to May 1981. As in *Ball*, the evidence from this period showed that this particular complainant was the object of the appellant's alleged acts. It was, therefore, logically connected to the present charge against the appellant. The trial judge concluded that its probative force was insufficient to outweigh its prejudicial effect. As McLachlin J.A. noted (at p. 399):

> The evidence, if accepted, showed that the accused had engaged in repeated and persistent sexual conduct with the complainant, including sexual intercourse, when she was a child -- conduct considerably more serious and revolting than the fondling alleged in the counts charged.

No misconduct as serious as this was alleged to have occurred after May 1981. No evidence other than the complainant's testimony was adduced to prove the offences in the present charge.

Evidence other than that of the complainant is not essential in every case before similar acts are admissible. In the present case, however, the similar fact evidence bore nearly the entire burden of proving the Crown's case against the appellant on the acts charged. The trial judge was thus correct in not admitting this evidence. Its probative value was not sufficient to overcome its prejudicial effect. Low Co. Ct. J. was also correct in not admitting the medical evidence since it was not relevant to the offences in the charge.

The trial judge did admit other "similar fact" evidence: the alleged incidents of sexual touching in December 1983 and spring 1985. Defence counsel did not object to the admission of this evidence. This evidence related to alleged sexual fondling of the complainant by the appellant similar to that alleged to have occurred in July 1985; this previous misconduct was not more serious than that with which the appellant was charged. As well, these incidents were more proximate in time to those forming the basis of the present charge. The probative value of this evidence was not outweighed by its prejudicial effect and thus these two incidents of alleged misconduct were admissible as similar fact evidence.

Effect of Cross-Examination

Following the cross-examination of E.D., the trial judge admitted the evidence of alleged sexual misconduct by the appellant against the complainant from December 1978 to May 1981: evidence which he had previously ruled inadmissible as similar fact evidence due in part to its prejudicial effect. Low Co. Ct. J. admitted the evidence to clarify the narrative; in the charge to the jury, he called the evidence "background". The evidence, however, had not changed its character; it remained evidence of alleged prior sexual misconduct which could only be admitted if it satisfied the similar fact evidence rule. To satisfy this rule, the cross-examination must be found to have altered the balance to such an extent that the prejudicial effect of the evidence no

longer outweighed its probative value. I do not think that the unfortunate situation created by the cross-examination had this effect.

In *Robertson*, a case of sexual assault, the evidence to which the accused objected was that given by the complainant's roommate to the effect that the accused had also made a physical approach towards her. In striking the balance required by the similar facts rule, Wilson J. found that the roommate's testimony was highly relevant since "...[i]t provides the background for the circumstances in which the assault occurred" (p. 943). Wilson J. also considered the other purposes of the evidence in assessing its probative value, and then balanced this probative value against the prejudicial effect. *Robertson* makes clear that evidence which clarifies the narrative or provides a background for understanding events may have probative value as similar fact evidence. The use of the term "background" was merely a succinct method of describing the relevance of the evidence in that case. Similar fact evidence may very well achieve sufficient relevance if its admission is vital to the understanding of other evidence in the case. Whether that evidence is admitted as similar fact evidence, however, depends on whether its probative value outweighs its prejudicial effect. It is in this sense that I understand the use of the term "background" in *Robertson*.

Following the cross-examination of E.D. in the case at bar, the evidence of alleged sexual misconduct from December 1978 to May 1981 had added probative value. It had acquired some relevance for correcting the false impression being left in the minds of the jury. This added relevance did not, however, diminish the prejudicial effect of that evidence. As I have discussed, it is the prejudice which this evidence could cause to the appellant which is the reason it must be excluded. While the nature or significance of evidence may change in the course of proceedings and the similar facts rule can take into account such changes, in the case at bar, the balance was not altered sufficiently to render the evidence admissible.

Alternatively, if the trial judge was of the view that the answer given by the complainant's mother and the cross-examination would create a false impression in the minds of the jury that would distort the proceedings, he ought to have declared a mistrial rather than admit the similar fact evidence. The initial answer of the witness was unresponsive to the question although undoubtedly it was an innocent and instinctive act. While the cross-examination by counsel for the accused compounded the error, and counsel for the accused is by no means blameless, this does not relieve the trial judge of his duty to exclude inadmissible evidence. In *R. v. Ambrose* (1975), 25 C.C.C. (2d) 90 (N.B.S.C., App. Div.), aff'd [1977] 2 S.C.R. 717, a Crown witness made an unresponsive statement on cross-examination by defence counsel who then invited the witness to repeat the statement rather than objecting immediately to the answer. I agree with the following statement of the Appeal Division, at pp. 91-92, with respect to the duty of a trial judge:

> In a criminal trial there is a duty on the trial Judge to exclude inadmissible evidence even though adduced by counsel for the accused or not objected to, and should inadmissible evidence be adduced, the trial Judge should either instruct the jury immediately to disregard it or, if it is of so prejudicial a nature that the jury would not have the capability of disregarding it, he should discharge the jury and order a new trial: see *R. v. Farrell* (1909), 15 C.C.C. 283, 20 O.L.R. 182 (C.A.); *R. v. Doyle* (1916), 26 C.C.C. 197, 28 D.L.R. 649, 50 N.S.R. 123 (C.A.).

If the trial judge was of the view that an immediate caution to the jury to disregard the evidence was insufficient to ensure a fair trial, then his course was to direct a mistrial rather than admit the evidence of similar acts which had previously been excluded.

Charge to the Jury

As I have found that the trial judge, after the cross-examination, erred in admitting the originally excluded evidence of alleged sexual misconduct by the appellant against the complainant from December 1978 to May 1981, the jury charge need not be considered in

relation to that evidence. At the initial *voir dire*, however, the trial judge did admit evidence of alleged sexual touching in December 1983 and spring 1985 and I have found that this evidence was admissible as similar fact evidence. I turn therefore, to consider the adequacy of the charge to the jury.

The inherent prejudicial effect of similar fact evidence may be felt by a jury in three main ways (see *Cross*, op. cit., at pp. 326-28). The first is that the jury, if it accepts that the accused committed the prior "bad acts", may therefore assume that the accused is a "bad person" who is likely to be guilty of the offence charged. As McLachlin J.A. noted at p. 399 in the case at bar, this assumption might raise

> ...in the minds of the jury sentiments of revulsion and condemnation which might well deflect them from the rational, dispassionate analysis upon which the criminal process should rest.

The second effect on the jury might be a tendency for the jury to punish the accused for past misconduct by finding that accused guilty of the offence charged. The third danger is that the jury might become confused as it concentrates on resolving whether the accused actually committed the similar acts. The jury members' attention is deflected from the main purpose of their deliberations which is the transaction charged. Having resolved the first matter, there is a danger that they will substitute their verdict on that matter for their verdict on the issue which they are in fact trying.

In this case, the trial judge warned the jury on a number of occasions that the appellant was not on trial for the prior misconduct alleged, but only for the alleged incidents of July 1985. This warning was, however, accompanied by a detailed recitation of the prior misconduct alleged against the appellant. The warning may still have gone some way to minimize the second

prejudicial effect discussed above, but it did nothing to minimize the first and third dangers noted.

In a case in which similar fact evidence is admitted, the trial judge should charge the jury in a manner that will minimize as far as possible the dangers referred to above. The jury should be instructed that if it accepts the evidence of the similar acts, that evidence is relevant for the limited purpose for which it was admitted. The jury must be specifically warned that it is not to rely on the evidence as proof that the accused is the sort of person who would commit the offence charged and on that basis infer that the accused is, in fact, guilty of the offence charged.

In the instant case, the trial judge gave the jury no such warning. The similar fact evidence was treated simply as part of the whole body of evidence on which the jury was to determine innocence or guilt. The purpose of the admission of the evidence was not identified and its use was not limited, although the trial judge advised the jury at the time the evidence was admitted that he would give instructions as to the use that could be made of it. Furthermore, the jury members were not warned that they were not to engage in the prohibited line of reasoning to which I have referred. I conclude, therefore, that the charge to the jury was not adequate.

Accordingly, the appeal is allowed and a new trial directed.

//*L'Heureux-Dubé J.*//

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting) -- I must respectfully disagree with my colleague Justice Sopinka's disposition of this appeal.

The appellant was convicted of sexually assaulting his daughter, G.D., on several occasions in July of 1985. The assaults which were the subject of the charges consisted of the fondling of the seventeen-year-old girl's breasts and vagina by her father.

The incidents which formed the basis of the charges were not isolated assaults. The evidence presented at trial indicated that the appellant had been repeatedly assaulting his daughter from the time she was eleven or twelve years old. The girl's testimony consisted of a chilling recital of sexual assaults throughout her childhood and adolescence.

On May 30, 1981, when G.D. was eleven years old, her mother Mrs. D., caught the appellant in bed with the child and demanded he leave the home. G.D.'s parents were subsequently divorced. Incest charges were laid, but were dropped when G.D. refused to discuss the assault with the police. In her testimony in the present case, she explained her refusal as being the result of fear, unwillingness to hurt her father and guilt at being the cause of her parents' separation.

Following that incident, G.D. lived with her mother. Her father, however, was allowed ample access to the children. The evidence indicates that the incidents of sexual assault continued throughout the child's adolescence. In 1985, G.D. went on a trip to Disneyland with her father, brother and uncle. She expressed her decision to go in the following way:

> I wanted . . . to go to Disneyland and another reason was `cause I thought that maybe my father might have changed and this trip could be different and my dad could be my dad and nothing would happen that had happened before.

She then testified that in spite of her hopes, her father repeatedly sexually assaulted her during the course of the trip. The assaults which are the subject of this appeal occurred shortly following this trip.

The evidence of the alleged assaults occurring prior to May 30, 1981 was initially excluded by the trial judge on a *voir dire*. He determined that it was similar fact evidence where the prejudice to the accused outweighed the probative value. However, the trial judge warned counsel that he would reconsider the admission of the evidence if the cross-examination of the witnesses was such that the evidence became directly relevant. He stated that:

> I want to make it clear that this does not rule out the possibility that the evidence may become relevant as a result of questions asked in cross-examination of Crown witnesses, or as a result of defence evidence.

In spite of this warning, counsel for the defence, in cross-examining the mother of the complainant, engaged in a line of questioning which attempted to damage the credibility of the complainant. This was done by suggesting that the charges were the result of family strife which began with the divorce of the parties, and that similar charges against the accused had already been laid and dropped. The impression created was that there had been no substance to the previous claims and that the current charges were simply part of a pattern of family dispute. The trial judge ruled that the evidence of the prior incestuous behaviour of the accused had become relevant to the credibility of the victim, and it was admitted into trial. The trial judge took care to explain to the jury that the accused was not on trial for incest, nor was he on trial for events occurring prior to the laying of charges.

The majority of the Court of Appeal (1987), 20 B.C.L.R. (2d) 384 held that the evidence had been relevant from the outset, and that, if anything, the trial judge had erred in excluding it initially on the *voir dire*. They further found that it was the cross-examination by defence counsel which caused the material to subsequently be admitted as relevant. The Court decided that they could not overturn the exercise of the trial judge's discretion to continue the trial "unless the court is clearly satisfied that the judge proceeded on some wrong principle or his decision was wrong"

(p. 389). The majority did not find that the judge had proceeded on a wrong principle, nor did they find that he had made a decision which was wrong in the circumstances.

1. Similar Fact Evidence

The admissibility of the evidence of past sexual incidents between the accused and his daughter was dealt with at trial on a *voir dire*. The trial judge decided to exclude evidence relating to events occurring prior to May 1981.

It is a well established principle of criminal law that all relevant evidence is admissible (*R. v. Robertson,* [1987] 1 S.C.R. 918). The so-called similar facts rule is an exclusionary rule which forms an exception to the general principle of admissibility.

In *Robertson,* Wilson J. gave the following explanation of the similar facts rule at p. 941:

> The rule is an exclusionary rule and an exception to the general and fundamental principle that all relevant evidence is admissible. A general statement of the exclusionary rule is that evidence of the accused's discreditable conduct on past occasions tended to show his bad disposition is inadmissible unless it is so probative of an issue or issues in the case as to outweigh the prejudice caused. . . . [Emphasis added.]

Wilson J. went on to say that "In discussing the probative value we must consider the degree of relevance to the facts in issue and the strength of the inference that can be drawn" (p. 943). Clearly, the application of the similar facts rule requires a balancing of factors. It involves an exercise of discretion on the part of the trial judge who must assess both the probative value and the possible prejudicial effect of the evidence in the circumstances of the case before him.

The recent decision of this Court in *R. v. Green*, [1988] 1 S.C.R. 228, dealt with similar fact evidence where an accused charged with the sexual assault of a child had also committed similar acts against other children. In that case I concurred with McIntyre J., who wrote (at p. 229):

> The only issue argued before us concerned the admission at trial of similar fact evidence, which came from children other than the complainant concerning the respondent's behaviour with them. This evidence was admissible to show a system adopted by the respondent, and its probative force was sufficient to outweigh any prejudicial effect upon the respondent. In my opinion, no error was made by the trial judge in its admission and I would allow the appeal and restore the conviction. [Emphasis added.]

Similarly, in this case, it is my view that the probative force of the evidence outweighed the prejudicial effect upon the appellant. In determining whether a father has sexually assaulted his seventeen-year-old daughter, it is particularly relevant to know whether such behaviour is part of a long standing pattern of abuse.

The majority of the Court of Appeal found that this evidence should have been admitted directly. I am inclined to agree. It is my opinion that the trial judge could have validly admitted the evidence from the outset.

2. Relevance of the Evidence for Other Purposes

The evidence which was excluded on *voir dire* was subsequently admitted by the trial judge when, in his view, it became directly relevant to other issues in the case.

Following his decision on the *voir dire*, the trial judge warned counsel that:

> . . . this does not rule out the possibility that the evidence may become relevant as a result of questions asked in cross-examination of Crown witnesses, or as a result of defence evidence.

Given the line of questioning engaged in by counsel for the defense, it is not in the least surprising to me that the trial judge subsequently determined that the evidence became admissible, not as evidence of "similar fact", but as what the trial judge labelled "background". While it must be admitted that "background" is a rather imprecise term, in my view the meaning of the trial judge was clear. He was admitting the evidence not to show the "bad character" or "predisposition" of the accused, nor even to prove a "system" adopted by the accused. Rather, the evidence was relevant to establishing the credibility of the victim, and provided a very important context for the incidents for which the accused was charged.

In the present case, defence counsel launched an attack on the credibility of the complainant. In particular, he implied that the previous charges were not pursued because they were bogus. This approach was an invitation to the jury to draw the same conclusions about the charges which the accused was then facing. He implied that the family break-up was the cause of hostility which resulted in false charges being laid. His tactics obscured the fact that the break-up occurred subsequent to the father being caught in bed with G.D.

When children are sexually assaulted there are generally no witnesses. When such matters become the subject of criminal prosecution it is usually a case of 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.

It must be remembered that the sexual abuse of children is a tragedy which presents the legal system with a difficult situation highly atypical of most crimes. The criminal law is right to demand that the accused only be tried for the crimes with which he is actually charged.

However, in a case such as the present, it would be unrealistic to completely divorce the specific sexual assaults with which the accused was charged from the long standing pattern of abuse which culminated in the charges being laid.

It cannot be over-emphasized that cases of sexual assault by family members against children provide the courts with a difficult and unique set of problems. The fact that most child sexual assaults occur under circumstances where the problem is hard to detect and even harder to prosecute places an obligation upon the judiciary to ensure that the abuses suffered by the victims are not perpetuated by an inability of the legal system to respond to the particular nature of the crime.

I find that, following the line of questioning undertaken by counsel for the defence, the evidence of prior sexual assaults by the accused on his daughter became directly relevant to the credibility of the daughter as chief witness in the case.

3. The Charge to the Jury

The appellant claims that the charge to the jury on similar facts was deficient because the trial judge failed to direct the jury, properly or at all, as to the similar fact evidence and the purposes to which it could be put.

As I have already noted, it is my view that the evidence was admitted at a point where it was relevant for purposes other than those generally associated with "similar fact". The majority of the Court of Appeal was likewise of this view when Hinkson J.A. wrote, at p. 390:

> It would appear that the trial judge, having rejected the application of the Crown to adduce the evidence as evidence of similar facts, and subsequently having decided to admit it as necessary to the unfolding of the narrative, thereafter treated the evidence as simply evidence that was relevant and admissible to the issues in the case.

I agree.

However, even if it is argued that the evidence of prior sexual contact constituted similar fact evidence when it was admitted subsequent to the *voir dire*, I do not consider the charge to the jury to be defective.

I have no quarrel with the description by my colleague Sopinka J. of the three possible prejudicial effects which similar fact evidence can have on the minds of a jury. However, any evidence given by Crown witnesses can have a prejudicial effect on the accused. The fact that in some cases similar fact evidence becomes admissible would indicate that the possibility of prejudicial effect cannot be the uppermost concern. The prejudice to be suffered by the accused must be such that it clearly outweighs any probative value of the evidence. To illustrate this point, I cite the following passage from *R. v. Stalder*, [1981] 2 N.S.W.L.R. 9 (C.C.A.), at p. 20:

> It cannot be gainsaid that the evidence in rebuttal led by the Crown was damning to the appellant. Indeed, he thereafter had a significantly diminished prospect of any verdict being returned other than one of murder. It is expecting a great deal to anticipate that the jury, no matter how carefully instructed and no matter how anxiously they deliberated, could avoid being markedly prejudiced towards a verdict of murder once the Crown had led evidence of the circumstances of the 1971 armed robbery conviction and of the two armed robbery type offences of 1979. To recognize these matters, however, does not necessarily import a requirement that, as a matter of discretion, the evidence ought not to have been admitted. It is not *mere* prejudice, no matter how inevitable or grave that may be, which is the touchstone: it is *undue* or *disproportionate* prejudice having regard to the probative significance of the evidence upon an issue falling for determination by the jury. [Emphasis in original.]

In my view, while the jury would most certainly be shocked and undoubtedly influenced by the evidence of the past sexual conduct of the accused, such evidence was of very high probative value.

The trial judge cannot be expected to completely eradicate any prejudicial effect created by such evidence. However, it is his duty, in his charge to the jury, to carefully direct the jury as to the proper use of the evidence, and the circumstances in which it may be taken into consideration.

In the present case, the trial judge repeatedly warned the jury not to consider the evidence of previous sexual incidents when assessing the guilt or innocence of the accused with respect to the charges he faced. His address to the jury contained numerous and repeated warnings concerning the proper use of the evidence of prior incidents. He began by reminding the jury of the particular events with which the accused was charged, and explained that he was not charged with anything respecting any prior assaults. He later repeated his warning that the accused was only charged with two specific counts. He warned the jury not to draw any conclusions from the evidence of prior incest charges. He emphasized that the material was background evidence only, and repeated the positions of both counsel with respect to the evidence. Further reminders are contained in his address.

The Court of Appeal found that the charge to the jury contained all of the requisite warnings (at p. 390):

> In his charge, the trial judge was careful to warn the jury that the accused was not on trial for any offences other than the two contained in the indictment. In particular he stressed to the jury the accused was not charged with any offences relating to the incidents about which the complainant testified had occurred between 1978 and May, 1981 nor for any incidents subsequent to May, 1981 and up to the end of June 1985. In particular he instructed

the jury the accused was not charged with incest. In this context he instructed the jury that the evidence of incidents prior to July, 1985 were simply background matters.

I am satisfied that the charge to the jury was not in any way deficient in explaining the proper use of the evidence.

4. Conclusion

It is my view that the evidence of prior sexual contact between the accused and his daughter was of such high probative value that the trial judge would have been correct had he admitted as similar fact evidence on a *voir dire*. However, as the trial progressed, the evidence became relevant to the credibility of the Crown's chief witness. As such, it was properly admitted by the trial judge, not as similar fact evidence, but rather for the purpose of establishing credibility.

Since the evidence was not admitted as similar fact evidence, the charge to the jury did not have to deal directly with the special problems relating to similar fact. However, even if it were to be considered as similar fact evidence, the charge to the jury was not in any way defective. The prejudicial effect of the evidence could not be completely removed from the minds of the jurors, but there is no requirement in law that this result be achieved. The trial judge gave numerous and repeated warnings concerning the proper use of the evidence. I agree with the majority of the Court of Appeal that these warnings were sufficient under the circumstances.

In the result, I would dismiss the appeal.

Appeal allowed and new trial ordered, L'HEUREUX-DUBÉ J. *dissenting.*

Solicitor for the appellant: Kenneth G. Young, Vancouver.

Solicitor for the respondent: The Ministry of the Attorney General, Vancouver.