

KEEPING CURRENT

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Harvey Weinstein and the Law of Similar Fact Evidence (*The People v. Weinstein*)

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#MeToo is a social movement that gained prominence beginning in 2017. The purpose of the movement is to campaign against sexual abuse, sexual harassment and rape culture, and to empower those who have been sexually assaulted to publicize their experiences, especially in the workplace. The movement spread rapidly on social media amid sexual abuse allegations against Harvey Weinstein, a powerful man in the entertainment industry. In 2022, Mr. Weinstein was convicted of rape in California. Two years earlier, in 2020, he had also been convicted of sexual assault of a former production assistant and rape of an aspiring actress in New York.

On April 25, 2024, the State of New York Court of Appeals, in [The People v. Weinstein](#), overturned Mr. Weinstein's New York convictions and potentially negatively impacted the #MeToo movement.

As expressed in the dissenting opinion of Justice Singas:

Fundamental misunderstandings of sexual

violence perpetrated by men known to, and with significant power over, the women they victimize are on full display in the majority's opinion. By whitewashing the facts to conform to a he-said/she-said narrative, by ignoring evidence of defendant's manipulation and premeditation, which clouded issues of intent, and by failing to recognize that the jury was entitled to consider defendant's previous assaults, this Court has continued a disturbing trend of overturning juries' guilty verdicts in cases involving sexual violence.

However, the impact of the decision on the #MeToo movement may be insignificant because the majority of the court based their decision on the evidentiary complexities of the case and fundamental legal principles, which we can also find in Canadian law. Particularly, the court held that the trial judge had erred in permitting the prosecution to lead similar fact evidence

of Mr. Weinstein's alleged bad character as part of its case against him and to challenge his credibility on such evidence if he testified. This evidence was prejudicial to Mr. Weinstein and undermined his right to be presumed innocent and to a fair trial.

Mr. Weinstein had been charged with one count of a first-degree criminal sexual act in connection with forcibly having performed oral sex on Complainant A; one count of first-degree rape and one count of third-degree rape based on forcible intercourse and oral sex with Complainant B; and two counts of predatory sexual assault based on allegations that he engaged in the attacks against Complainants A and B after having raped Complainant C.

The prosecution's theory of the case was that Mr. Weinstein abused his power in the entertainment industry to take advantage of the complainants and to coerce them into unwanted sexual encounters as part of a *quid pro quo* arrangement, which was both a common behaviour and a well-known secret throughout the film industry.

Before trial, the court had granted the prosecution's application to admit certain testimony of uncharged crimes and miscellaneous bad acts against Mr. Weinstein to prove that he not only used force with the complainants, but that he used force understanding that the victims did not consent. In essence, this pre-trial ruling would have allowed the prosecution to cross-examine Mr. Weinstein on acts which had little, if any, probative value to his credibility.

The evidence in connection with the uncharged crimes involved three women who testified about their unwanted sexual encounters with Mr. Weinstein. The evidence of miscellaneous bad acts included, among other things, bullying and fits of anger toward employees, restaurant workers and business associates.

The majority of the appellate court found that the trial judge erred in allowing the prosecution to lead this evidence. A general rule of evidence in New York is that the state cannot provide evidence against an accused of any crime not alleged against them, either as a foundation for a separate punishment, or as aiding the proof that they are guilty of the crime charged. Such evidence tends only to demonstrate an accused's propensity to commit the crime charged and would accordingly, lead to convictions upon particular charges by proof of other acts that might in no way be connected to those charges. Permitting such evidence raises an improper presumption of guilt on the grounds that by having committed one crime, it must make it likely that the accused would have committed the other crime.

Under New York law, evidence of other crimes can be used to prove the charged crime when such evidence tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial. However, this is an exception to the general.

The majority of the court found that the purpose of "similar fact" evidence from the non-complainant witnesses was to bolster the credibility of the complainant witnesses by showing that others behaved similarly toward Mr. Weinstein even after he had made unwanted sexual demands. This was an impermissible propensity purpose. The evidence was irrelevant.

The majority of the court also found that the evidence of the acts for which Mr. Weinstein was not charged and the evidence of the miscellaneous acts of bullying and fits of anger deprived Mr. Weinstein of a fair trial because it had a disproportionate impact on the jury and deterred Mr. Weinstein from taking the stand.



In the majority's view, the criminal charges against Mr. Weinstein turned on credibility, and neither of the trial judge's errors were harmless to Mr. Weinstein's ability to defend himself against the charges.

In the Canadian context, evidence of bad character as a result of having committed other similar crimes is also excluded, unless the evidence is relevant to a material issue and the probative value of the evidence is sufficiently strong to outweigh its prejudicial effect: see, for example, *R. v. Handy*, [2002 SCC 56 \(CanLII\)](#) at paragraphs [50-54](#).

In cases such as *R. v. Leblanc*, [1975 CanLII 190 \(SCC\)](#) and *R. v. D (L.E.)*, [1989 CanLII 74 \(SCC\)](#), the Supreme Court of Canada determined that similar fact evidence can result in impermissible moral prejudice by causing a trier of fact to overlook weaknesses in the prosecution's case and to convict an accused for being a bad person generally or as punishment for past immoral conduct.

In *R. v. K, (C.P.)*, [2002 CanLII 23599 \(ON CA\)](#), the Court of Appeal for Ontario noted that similar fact evidence can cause impermissible reasoning prejudice where the evidence increases the complexity of the trial and diverts the jury's attention away from the facts that form the offence for which the accused stands charged.

In *R. v. Clermont*, [1986 CanLII 26 \(SCC\)](#), evidence that an accused had previously been convicted for rape five years earlier was found to be inadmissible in connection with another charge for rape, which the accused defended on the grounds that the complainant had consented, or, in the alternative, that he was under the mistaken belief that the complainant had consented. The Supreme Court of Canada found the previous conviction was irrelevant to the charge against the accused and that, at its highest, the prior conviction only showed a general disposition of the accused to engage in

non-consensual sexual acts. Accordingly, the evidence did not meet the probative/prejudice test for admissibility.

Based on the foregoing, applying Canadian law, the decision of the majority of the New York appellate court would likely have been the same.

The separate dissenting opinions of Justices Singas and Cannataro contended that the majority had erred in finding that the "similar fact" evidence was irrelevant. These judges concluded that the evidence of the "similar fact" witnesses was relevant to contested issues of lack of consent and forcible compulsion. These judges also concluded that the prejudicial effect of the evidence of these witnesses did not outweigh its probative value, with Justice Cannataro specifically noting that the jury had acquitted Mr. Weinstein on some charges.

From a public policy perspective, the dissenting opinions were underpinned by the notion that the opinion of the majority was based on outdated notions of sexual violence and a naïve narrative. Justice Singas stated that as a result of the majority's opinion "the road to holding defendants accountable for sexual assault has become significantly more difficult."

Justice Cannataro stated that the "... majority decision represents an unfortunate step backwards from recent advances in our understanding of how sex crimes are perpetrated and why victims sometimes respond in seemingly counterintuitive ways, endangering decades of progress in this incredibly complex and nuanced area of law."

Although this case was a victory for Mr. Weinstein and will result in some of the evidence used against him in the original trial from being excluded at a potential retrial, the decision of the State of New York Court of Appeals should not necessarily discourage women from continuing to seek justice for acts

of sexual violence, whether inside or outside the workplace. The key takeaway from this case should be that the admissibility of similar fact evidence remains challenging, particularly in criminal law, as a result of the fundamental legal principles which presume that an accused is innocent until proven guilty and that an accused is entitled to a fair trial. Otherwise, it ought to remain inherent that sexual violence has no place in our society and that any form of sexual violence or harassment in the workplace should not be tolerated.

It remains to be seen whether Mr. Weinstein will face a retrial in New York, and, if so, whether he will be found guilty or not guilty. Despite the finding of the State of New York Court of Appeals, Mr. Weinstein remains in custody.

Contact us

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