

Preserving the Rules of Evidence in Civil Cases

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INTRODUCTION

The rules of evidence play a crucial role in criminal trials. Do the traditional rules of evidence continue to play a meaningful role in civil trials? Should they? If so, should they be applied with a lighter, more lenient and forgiving touch and without slowing down to make formal rulings?

I argue that the rules of evidence should have a significant role in civil trials and should neither be abandoned nor applied in diluted form. Instead, they should be taken seriously, applied and where necessary, be made the subject of formal rulings.

To abandon or attenuate the rules of evidence in civil cases would be to lose an essential boundary-setting device on the scope of trials, a source of predictability that can promote settlement, and (most importantly) a means of ensuring that courts can get at the truth.¹

Most of the leading cases in evidence have arisen in the context of criminal trials; very few in civil trials. A trial is a trial, but the policy considerations shaping criminal trial procedures are different in some important respects from those bearing on civil trials. Thus, the rules of evidence should not always be transplanted without modification from the criminal context; rather, they should sometimes be shaped for use in the civil context by specific policy considerations applicable there.

I do not at all mean to suggest that there should be a dual system: the rules of evidence are complicated enough already. Instead, I suggest that the principled approach, with its requirement to balance probative value and prejudicial effect in a contextual and fact-specific way, may permit the rules of evidence to be deployed rationally and effectively in civil cases.

After beginning with an attempt to enumerate the major similarities and differences between civil and criminal trials, I will illustrate the sometimes uneasy fit between criminal rules and civil contexts by looking at two specific areas (standards

¹ I also agree with the need to ensure that young counsel gain familiarity with the rules of evidence: see John J. Adair in the lively essay "Jenny Craig is beating Browne and Dunn: A weighty problem with the law of evidence" (Spring 2012) 30(4) Adv J at 18-20.

of proof and similar fact evidence) where courts have had occasion to address policy considerations affecting civil and criminal trials.

COMPARISON BETWEEN CIVIL AND CRIMINAL TRIALS

Identifying the major similarities and differences between civil and criminal trials seems a useful first step in considering whether evidentiary rules in general, or specific evidentiary rules, should be the same, and applied the same way in both contexts.

Civil and criminal trials share many common characteristics.

They are formal hearings for the adjudication of rights, under state authority, presided over by judicial officers who are independent and sworn to be impartial. Both sides have the right to be heard and to be represented by counsel. Judges must provide reasons for judgment (which can be precedential). The results of trials are binding and may have serious implications for those involved. People trying to settle and avoid trial take into account, among other matters, what evidence will be admissible under principles and precedents established in previous cases. The credibility and reliability of witnesses may be crucial factors in making findings of fact. Cases can proceed to trial on an “oath against oath” basis. Conclusions about fact are binary: the trier of fact decides whether or not an event happened (based on the applicable burden of proof on the issue and the standard of proof in the case); once a finding of fact is made, for the purposes of the case that event happened (or did not). Findings of fact can be disturbed on appeal only in exceptional circumstances.

Equally significant are the ways in which criminal and civil trials are different. The accused is presumed innocent in criminal cases; no such presumption applies in civil cases. There is a strong societal interest in avoiding wrongful criminal convictions, but society is indifferent as between plaintiffs and defendants in civil cases, instead emphasizing the need for fairness and impartiality.

Moreover, the standards of proof are different. In criminal cases, the rights and freedoms guaranteed in the *Charter* have pervasive influence. A deprivation of liberty or state-imposed penalty may result from a criminal trial; that is seldom the case with a civil trial (though financial ruin, loss of children, loss of family home, and other devastating outcomes may result from a loss). In a civil trial, the requirement to provide information to the other side is symmetrical, while in criminal cases, disclosure basically goes one way, from the Crown to the accused. All witnesses are compellable in civil trials, while the accused and, in some instances, the accused’s spouse are not compellable in criminal trials. In criminal trials, even relatively junior counsel tend to have spent considerable time in trials with witnesses; junior and sometimes senior counsel in civil trials may not have had much trial experience -- thus, there is greater likelihood that counsel in criminal trials are familiar with the rules of evidence. Criminal trials always have a single core issue:

has the Crown proved the accused guilty of the offences charged beyond a reasonable doubt? Civil trials concern a wide variety of issues possibly arising from diverse areas of the law, and the issues are sometimes diffuse and elusive of early, precise identification. Juries are the triers of fact in many more criminal than civil cases. In the criminal law, the only route to determination is trials, aside from settlement or diversion, for example to a community or drug court. On the other hand, civil litigants can choose from an array of competing routes: summary trial procedures, mediation, arbitration, recourse to statutory tribunals -- none of which typically requires application of the formal rules of evidence. In civil trials, generally both parties are spending their own resources; in criminal trials, at least one side (the Crown) is not; where there is legal aid, neither side is.

Given the similarities between criminal and civil trials, what difference should the differences between them make when it comes to the rules of evidence? Examining some areas in which policy considerations have been explicitly identified may prove enlightening. I have chosen two: standard of proof and character or similar fact evidence. They both illustrate the sometimes uneasy fit between evidentiary rules and civil contexts.

TWO AREAS IN WHICH THE POLICIES AT PLAY HAVE BEEN IDENTIFIED

(1) Standard of Proof

In criminal cases, the Crown is required to prove the guilt of the accused beyond a reasonable doubt. This is “inextricably linked to the presumption of innocence”² and is now enshrined as part of the constitutional right to be presumed innocent until proven guilty.³ In civil cases, to discharge the burden of proof a plaintiff or defendant must produce evidence that establishes what they assert on a preponderance of evidence or on a preponderance of probability.⁴

It is not uncommon for proceedings in administrative, civil and criminal contexts all to address the same facts. For example, an alleged sexual assault by a physician may result in professional disciplinary proceedings, a civil action for damages and a criminal trial. Cases involving other forms of assault, fraud, or arson can also provide those multiple possibilities. The differential standards of proof can give rise to questions about inconsistency and the rationale for the difference.

The law has sometimes struggled with the appropriate response. It may be that the focus on the issue was sharpened when persons subjected to sexual assault began to sue for damages and when limitation periods for such actions were amended or removed, thereby permitting civil actions for historical sexual assaults.

² *R v Lifchus*, [1997] 3 SCR 320 at para 13.

³ *R v Oakes*, [1986] 1 SCR 103.

⁴ *Smith v Smith*, [1952] 2 SCR 212.

Until 2008 and *FH v McDougall*,⁵ Canadian courts experimented with the notion that, where a civil trial concerns criminal activity or morally blameworthy conduct, a different (intermediate) standard of proof should be applied, or the civil standard should be applied differently (requiring assessment of the evidence with “greater care”).

In *FH v McDougall*, the plaintiff sought damages for sexual and physical abuse at the Sechelt Residential School based on events some 36 years before the trial. The trial judge⁶ applied the then-prevailing law in British Columbia, which was that in cases involving serious allegations and grave consequences, the civil standard of proof that is “commensurate with the occasion” applied.⁷ The Court of Appeal divided, with two members of the Court allowing the appeal from the part of the order allowing damages for the alleged sexual assault.⁸ Rowles J.A. concluded that the trial judge had failed to consider serious inconsistencies in the plaintiff’s evidence and had failed to scrutinize the evidence in the manner required by law. Southin J.A., concurring, suggested that corroboration should be required, stating that choosing the plaintiff’s evidence over the defendant’s required “an articulated reason founded in evidence other than that of the plaintiff.”⁹ She went further, and held that the approach to evaluating evidence articulated in a criminal case, *R v W(D)*,¹⁰ should be applied in civil cases.¹¹

The Supreme Court of Canada allowed the appeal, upholding the trial judge’s conclusion that the plaintiff had proved his case. Rothstein J. considered various options for dealing with civil actions based on criminal or morally blameworthy conduct¹² and rejected the proposition that there should be more than two standards of proof, or a shifting standard of probability, stating:

⁵ 2008 SCC 53 [*McDougall*].

⁶ 2005 BCSC 1518.

⁷ Applying *HF v Canada (Attorney General)*, 2002 BCSC 325. The origin of the approach was said, by Rothstein J., to be *Bater v Bater*, [1950] 2 All ER 458 (CA) at 459, where Lord Denning expressed the view that within the civil standard of proof on a balance of probabilities “there may be degrees of probability within that standard.”

⁸ 2007 BCCA 212.

⁹ *Ibid* at para 106.

¹⁰ [1991] 1 SCR 742.

¹¹ Rothstein J., *McDougall*, *supra* note 5, describes *W(D)* in these terms at para 84: “*W.(D.)* was a decision by this Court in which Cory J., at pp. 757-58, established a three-step charge to the jury to help the jury assess conflicting evidence between the victim and the accused in cases of criminal prosecutions of sexual assaults: First, if you believe the evidence of the accused, obviously you must acquit. Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit. Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.” He added that the three-step charge is not sacrosanct, but is meant to serve as a guidepost to the meaning of reasonable doubt (at para 84).

¹² The options were, where criminal or morally blameworthy conduct is alleged in a civil case:

(1) the criminal standard applies depending on the seriousness of the allegation; (2) an intermediate standard applies commensurate with the occasion; (3) no heightened standard of proof applies but the evidence must be scrutinized with greater care where the allegation is serious; (4) no heightened standard of proof applies but the evidence must be clear, convincing and cogent; or (5) no heightened standard applies, but the more improbable the event the stronger the evidence is needed to meet the balance of probabilities test (at para 39).

... it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities.¹³

He then added:

Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.¹⁴

The Supreme Court addressed the suggestion that corroboration of sexual assault allegations is required, stating:

The reasons of the majority of the Court of Appeal may be read as requiring, as a matter of law, that in cases of oath against oath in the context of sexual assault allegations, that a sexual assault victim must provide some independent corroborating evidence.¹⁵

The Court said that corroborative evidence is always helpful and may strengthen a case, but it is not a legal requirement. Rothstein J. observed that requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case, since the former corroboration requirement applicable in many criminal sexual assault cases was removed by statute in 1985. He concluded on this point:

Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration.¹⁶

The Court also firmly rejected the notion that the *W(D)* approach should be imported from the criminal law into civil cases, stating:

The *W.(D.)* steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with conflicting testimonial accounts. Lack of credibility on the part of an accused is not proof of guilt beyond a reasonable doubt.

However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases,

¹³ *McDougall*, *supra* note 5 at para 40.

¹⁴ *Ibid.*

¹⁵ *Ibid* at para 77.

¹⁶ *Ibid* at para 81.

provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case. *W.(D.)* is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases.¹⁷

While the *W(D)* instructions have been the source of confusion and the subject of much criticism and controversy, their role in criminal cases is not the subject of this paper. However, in my respectful view, the Court's explanation why *W(D)* does not apply in civil cases could create further confusion, for the reasons I will explain.

As Christine Boyle observes,¹⁸ the Court in *FH* does not explain why a conclusion based on the believed evidence of the complainant 'provided the judge has not ignored evidence' would not be consistent with *W(D)* and unsuitable in the context of a proof beyond a reasonable doubt standard. However, explanation is called for. It is not only in civil cases that a conclusion that witness A is telling the truth may, in some circumstances, inexorably require the conclusion that witness B is not telling the truth and that an event occurred in the manner described by witness A. It must be recalled that in the *Criminal Code*, consent is defined subjectively.¹⁹ If the sole live issue in a criminal trial is consent to sexual activity, and there is no air of reality to a defence based on mistaken belief in consent, unreserved acceptance of the evidence of the complainant that she did not consent logically entails rejection of the accused's evidence and a conclusion that the Crown has met its burden of proof.

Insofar as the distinction drawn in *FH* between civil and criminal cases is based on the proposition that accepting the evidence of one party may be conclusive of the result only in civil cases, it may not be maintainable; further, it casts doubt on other authorities such as *R v JJD*, which held that "An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence."²⁰

The *raison d'être* of the *W(D)* instructions is to avoid the "either/or" fallacy, in which a trier of fact might erroneously go straight from a conclusion that the complainant is telling the truth to the conclusion that the accused is lying and the Crown has proved its case beyond a reasonable doubt. Instead, the trier of fact

¹⁷ *Ibid* at para 85-86.

¹⁸ Christine Boyle, "Reasonable doubt in credibility contests: sexual assault and sexual equality" (2009) 13(4) E & P 269.

¹⁹ *R v Ewanchuk*, [1999] 1 SCR 330.

²⁰ 215 CCC (3d) 252 (ON CA) at para 53, leave to appeal denied, [2007] SCCA No 69.

must consider, taking into account all of the evidence, including the evidence of the accused, whether the Crown has established every element of the offence beyond a reasonable doubt.

I suggest that it is not only in criminal cases that the “either/or” fallacy must be avoided. In civil cases, too, the trier of fact must not proceed straight from a conclusion that the plaintiff is telling the truth to a conclusion that the defendant is liable; instead, the trier of fact must consider all of the evidence and assess whether the plaintiff has established each of the constituent elements of the cause of action on a balance of probabilities.

Thus, it is this writer’s respectful view that there are strong reasons for not importing the *W(D)* requirement into civil cases, but those reasons arise from the fact that the *W(D)* steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with conflicting testimonial accounts. The presumption of innocence is what drives the analysis, but there are no presumptions, let alone a robust presumption of innocence, in civil trials.

Notably, the Court’s analysis in *FH* of the reasons for keeping the civil and criminal standards of proof separate refers first to the fact that the criminal standard is linked to the presumption of innocence which does not apply in civil cases, where society is indifferent as to who wins.²¹ Rothstein J. also refers to these additional reasons: (2) an intermediate standard of proof presents practical problems²² and it would “seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur;”²³ (3) it would be inappropriate for the law to recognize different levels of scrutiny of the evidence because in all cases evidence should be scrutinized with care; (4) similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test; and (5) inherent improbability may be taken into account by trial judges, without a rule of law imposing a formula for doing so.

The Court also referred to the reasoning in United Kingdom jurisprudence on this subject, including *In re B (Children)*²⁴ where the House of Lords described the “confusion” regarding standard of proof in civil cases. Rothstein J. in *FH* quoted Lord Hoffman, who stated²⁵ that “the law operates a binary system in which the only values are zero and one.” If the proof of a fact is legally required, there is no room for finding that the fact might have happened. The trier of fact must conclude either that it happened or that it did not.

²¹ *McDougall*, *supra* note 5 at para 42.

²² The Court refers to LR Rothstein, RA Centa & E Adams, “Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof” in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2003), at 466.

²³ *McDougall*, *supra* note 5 at para 44.

²⁴ [2008] 3 WLR 1, [2008] UKHL 35.

²⁵ *McDougall*, *supra* note 5 at para 44, quoting from Lord Hoffman’s reasons at para 2.

FH v McDougall is a significant case, not only for its holding that there is a single balance of probabilities standard of proof in civil cases, but also for its recognition that criminal and civil contexts differ significantly from one another. Those different contexts may mean, as they did with the attempt to expand the reach of *W(D)*, that rules and approaches cannot straightforwardly be transposed from one to the other.

(2) Character and Similar Fact Evidence²⁶

Character Evidence

As has often been observed, in everyday life we act quite rationally when we choose business partners, tradespeople, friends and even spouses on the basis of their reputation and on the basis of what we know about their conduct in the past. Martin Luther King Jr.'s "I Have a Dream" speech makes the positive point about character: that we would prefer that people be judged by their character rather than by other, irrelevant characteristics: "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

Because most trials are about what someone has done on a specific occasion in the past rather than who someone is, and because we subscribe to the belief that people can change their behaviour over time, a general exclusionary rule prohibits the Crown from leading evidence of the bad character of the accused when his/her character is not an issue in the proceeding (as it would be, for example, in dangerous offender proceedings). The exclusionary rule forms an exception to the overarching inclusionary principle that all relevant evidence is admissible.

In criminal cases, while an exception exists for evidence of good character²⁷ in the form of "reputation in the community," policy considerations prevent the Crown from leading evidence of bad character (including on cross-examination) except where the accused has put his character in issue. (A different rule applies when a co-accused attacks another co-accused's character, or the evidence in a criminal trial relates to a witness other than the accused.)

In civil cases, character evidence with respect to parties is excluded (although cross-examination as to character and discreditable conduct may be permitted as going to credibility²⁸). Bryant, Lederman and Fuerst argue²⁹ that while the courts appear to exclude character evidence on the basis of irrelevance, the real rationale is the policy to restrain civil proceedings within manageable limits and to prevent

²⁶ In describing the legal principles governing character and similar fact evidence, I have drawn upon Alan Bryant et al, *The Law of Evidence in Canada*, 2d ed (Canada: LexisNexis, 2009) [Bryant].

²⁷ *R v Rowton* (1865), 169 ER 1497.

²⁸ The collateral facts rule prevents contradiction on the answers unless the cross-examination bears on material issues relevant beyond credibility.

²⁹ Bryant, *supra* note 26 at 626.

unfairness to civil litigants. I would suggest, in addition, that this may be an example of the unquestioned transposition of evidentiary principles developed in a criminal context.

The reasoning in *Plester v Wawanesa Mutual Insurance*³⁰ illustrates the pervasive influence of the criminal context. The plaintiffs were allowed to call evidence of their general reputation in the community to rebut the defendant insurance company's allegation that they had committed arson. The Court reasoned that the evidence would have been permitted in a criminal case, and arson is a criminal matter.

Similar Fact Evidence

In criminal cases it follows from the general exclusionary rule against character evidence that the prosecution cannot adduce similar fact evidence -- that is, evidence of the accused's specific discreditable conduct, other than that which forms the subject matter of the charge.

The similar fact evidence rule is an exception to the general exclusionary rule against character evidence. The similar fact evidence rule permits, in a limited range of circumstances, evidence of discreditable conduct on other occasions.

The leading case on similar fact evidence, *R v Handy*, arose in criminal proceedings.³¹ The accused was charged with sexual assault causing bodily harm (forced, painful anal sex). Similar fact evidence from his former wife was admitted at trial, alleging that the accused had a propensity to inflict painful sex, including anal sex, and when aroused would not take no for an answer. The accused denied the assault with which he was charged, and denied the seven alleged prior assaults on his ex-wife. His ex-wife acknowledged that she had met the complainant a few months before the alleged sexual assault took place and that she had told the complainant about the accused's criminal record, her allegations of abuse, that she had received \$16,500 from the Criminal Injuries Compensation Board, and that all she had to do to collect the money was say that she had been abused.

In the outcome, the Supreme Court of Canada agreed with the Ontario Court of Appeal majority that the evidence should not have been admitted and that a new trial should be held.

The Court stated the general principle:³²

Similar fact evidence is (...) presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to

³⁰ 275 DLR (4th) 552 (ON CA), leave to appeal denied: [2006] SCCA No 315.

³¹ [2002] 2 SCR 908 [*Handy*].

³² *Ibid* at para 55.

a particular issue outweighs its potential prejudice and thereby justifies its reception.

Factors bearing on the probative value of similar fact evidence include: its connectedness to the issue in the case (how focused and specific is the evidence in relation to the circumstances alleged? Would coincidence or innocent explanation be plausible?) and its provenance (has the Crown disproved collusion where there is an air of reality that the witnesses may have collaborated?) The overall question is whether the evidence of disposition or propensity is strong enough to be capable of raising in the minds of a reasonable jury two inferences: (1) that the accused has a certain propensity; and (2) that he acted consistently with that propensity on the occasion leading to the charge.

Factors bearing on the prejudicial effect of similar fact evidence include: “moral prejudice” (the accused is a bad person, therefore should be convicted) and “reasoning prejudice” (distraction, undue prolongation of the trial, overemphasis on the similar fact evidence).

Bryant, Lederman and Fuerst describe the law with respect to character evidence in civil cases as “somewhat of a hodge-podge,” showing no consistent, logical connection between the various rules, and excluding some apparently logically relevant evidence. “The over-zealousness on the part of the courts to protect character is perhaps the hallmark of an advanced civilization,” they suggest.³³ Given that the exclusion of character evidence is the wellspring of the similar fact evidence rule, it is not surprising that the analytical framework governing admission of similar fact evidence in civil cases could also be described as a “hodge-podge.”

Might utilization of the *Handy* framework serve to sort out the hodge-podge? It seems to be fairly widely assumed that the *Handy* framework will apply in civil cases. Bryant, Lederman and Fuerst argue that the *Handy* framework is “fact driven and ... sufficiently flexible to determine the admissibility of similar fact evidence in the context of diverse civil cases.”³⁴ I would agree, so long as the civil context is borne clearly in mind when the framework is applied, particularly at the prejudicial effect stage.

What does the Court’s discussion in *Handy* regarding the policy behind the exclusion of similar fact evidence tell us about the exclusionary rule’s applicability outside criminal proceedings, and the adaptations that may be necessary to make it appropriate for use in a civil context? Binnie J. wrote:³⁵

The policy basis for the exclusion is that while in some cases propensity inferred from similar facts may be relevant, it may also capture the attention of

³³ *Bryant, supra* note 26 at 621.

³⁴ *Ibid* at 757.

³⁵ *Handy, supra* note 31 at paras 37-40.

the trier of fact to an unwarranted degree. Its potential for prejudice, distraction and time consumption is very great and these disadvantages will almost always outweigh its probative value. It ought, in general, to form no part of the case which the accused is called on to answer. It is excluded notwithstanding the general rule that all relevant evidence is admissible [citations omitted].

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.

It is, of course, common human experience that people generally act consistently with their known character. We make everyday judgments about the reliability or honesty of particular individuals based on what we know of their track record. If the jurors in this case had been the respondent's inquisitive neighbours, instead of sitting in judgment in a court of law, they would undoubtedly have wanted to know everything about his character and related activities. His ex-wife's anecdotal evidence would have been of great interest. Perhaps too great, as pointed out by Sopinka J. in *B. (C.R.)*, supra, at p. 744:

The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries there would be a strong] inclination to conclude that a thief has stolen, a violent man has assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning.

The policy of the law recognizes the difficulty of containing the effects of such information which, once dropped like poison in the juror's ear, "swift as quicksilver it courses through the natural gates and alleys of the body": Hamlet, Act I, Scene v, ll. 66-67.

[Emphasis added.]

Most of the policy considerations referred to are present in both civil and criminal cases, but their importance may differ. Significantly, a central policy factor in criminal cases would rarely pertain to civil cases: the societal objective of rehabilitation of offenders.

Even where policy considerations are similar, nuances in their application may be required. In the civil context there is a concern about fairness (thus, a need to avoid moral prejudice or reasoning prejudice that may tilt the balance unfairly toward one side or the other), but not the overwhelming concern about prejudice

(and the spectre of wrongful convictions) affecting an individual facing accusations of crime. On the other hand, in the civil context there may be a heightened concern about the impact of the evidence on the trial process -- for example, the need for notice of an intention to call similar fact evidence and for documentary and oral discovery on the issues, affecting the economical and speedy resolution of civil disputes. To put it in the terms used in *Handy*, in civil cases the risk of moral prejudice may tend to be lower, while the risk of reasoning prejudice is higher.

In *O'Brien v Chief Constable of South Wales Police*³⁶ the House of Lords rejected the proposition that the model adopted for similar fact evidence in criminal cases should also be followed in civil cases. It adopted a model, however, that balances probative value against prejudicial effect in a manner similar to that of the *Handy* framework.

Although I have suggested that there are some relevant differences between civil and criminal proceedings with respect to the identification and weighing of prejudice, when it comes to assessment of the probative value of evidence, there seems little difference between civil and criminal trials. The risks of collusion are presumably the same (although collusion may be easier to detect in civil cases, through pre-trial discovery). Determination of the cogency of the evidence will be fact-specific in any case.³⁷ As well, in both criminal and civil cases the probative value of the evidence will inevitably rest in part on the common sense and experience of the trier of fact, as Justice Charron put it in *R v B(L)*.³⁸

In summary, in my view, the *Handy* framework can be used in civil cases, because the principled approach that it embodies requires taking account of the specifics of probative value and prejudicial effect. However, for the *Handy* framework to be appropriately used in civil cases, the focus must be on the specific factors bearing on probative value and prejudicial effect in that context.

I conclude by noting one other matter with respect to similar fact evidence in civil cases: the need to consider carefully whether the similar fact evidence rule applies at all.

It will be recalled that the similar fact evidence rule is an inclusionary exception to the general exclusionary rule against character evidence, which, in turn, is an exception to the overall principle that all relevant evidence is admissible. Circumstantial evidence about previous conduct of a defendant or plaintiff in a civil case may or may not be discreditable. If the evidence does not discredit the character of the party, the only question is whether it is relevant.

³⁶ [2005] UKHL 26. In *O'Brien* the plaintiff sued the Chief Constable for misfeasance in public office and malicious prosecution. Evidence about the practices of the police officers in past cases was found to be relevant and probative as to what they did in the instant case, and the House of Lords held that on balance the trial judge was correct in concluding that its probative value outweighed its prejudicial effect.

³⁷ See, for example, *G(JRI) v Tyhurst* (2002), 226 DLR (4th) 447 (BCCA).

³⁸ (1997), 35 OR (3d) 35.

However, there has been little discussion in civil cases about what counts as discreditable. Certainly, in an action for damages for sexual assault, evidence regarding previous sexual assaults would be discreditable and would have to pass the test for admissible similar fact evidence. On the other hand, as illustrated in the venerable case of *Metropolitan Asylum District v Hill*,³⁹ evidence that there is a statistical correlation between Fact X (there, the presence of smallpox hospitals in an area) and Fact Y (the prevalence of cases of smallpox in the same area) would not run afoul of the similar fact evidence rule.

This issue is particularly significant in civil cases. In both criminal and civil cases, a party may seek to lead evidence that is prejudicial, in that it may give rise to an inference adverse to the other party, but that does not bear on the character of the party. Many civil cases concern conduct that would not constitute a crime, and would not necessarily be seen as demonstrating bad character of the party. Further, many claims in civil cases do not concern intentional conduct at all; instead, they allege negligence. In my view it is debatable whether, in an action for negligence, evidence that the defendant has been negligent in a similar way on other occasions would be “discreditable.” Would such evidence be relevant? If so, would it reflect adversely on the character of the defendant? I suggest that those questions must be asked and answered before the similar fact evidence framework is wheeled into place and deployed.

In all instances it is important to consider whether the evidence is relevant and, if so, precisely what inferences it may support, prior to embarking upon a similar fact evidence analysis.⁴⁰

CONCLUSION

In this paper I have argued that the rules of evidence must continue to play a meaningful role in civil cases. I have briefly considered two areas, burden of proof and similar fact evidence, to illustrate the problems that arise if the differences between civil and criminal contexts are ignored when applying the rules of evidence. I argue that, if the rules of evidence are to be preserved in civil cases, the principled approach can make their application both more rational and more effective, by

³⁹ (1882), 47 LT 29, 47 JP 148 (HL).

⁴⁰ For example, in *Ferrero v Bowater Pulp and Paper Canada*, 2005 BCSC 675, an employer had established a policy for repurchase or remuneration of the value of homes of employees who lost their jobs through layoffs. The plaintiff Ferrero applied for a declaration that his home was not a mobile home within the meaning of the policy, which excluded mobile homes without defining that term. The plaintiff sought to call evidence from another employee who had received reimbursement for his home, which was similar to the plaintiff's in most relevant ways. Counsel made submissions about, and the court applied, the similar fact evidence framework from *Handy*. However, it does not appear that the matter of relevance was explicitly addressed. It could have been argued that the evidence about the employer's treatment of a different employee's application under the policy was irrelevant to the issue in the case, which was the meaning of the policy. On the other hand, it could have been argued that the evidence was relevant because it bore on whether the employer was acting in good faith in denying the plaintiff's application. If the evidence was irrelevant, it was unnecessary to consider it further. If it was relevant, then arguably it was admissible for what it was worth without going through the *Handy* framework, because the exclusionary rule against character evidence simply did not apply.

recognizing and taking into account the specific policy considerations affecting the civil trial process.