R. *v.* Mohan, [1994] 2 S.C.R. 9

Her Majesty The Queen *Appellant*

v.

Chikmaglur Mohan *Respondent*

Indexed as: R. *v.* Mohan

File No.: 23063.

1993: November 9; 1994: May 5.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for ontario

Evidence -- Admissibility -- Expert evidence -- Nature of expert evidence -- Expert evidence as to disposition -- Pediatrician charged with sexual assault of patients -- Expert witness called to testify that character traits of accused not fitting psychological profile of putative perpetrator of offences -- Whether expert's testimony admissible.

Criminal law -- Expert evidence -- Nature of expert evidence -- Expert evidence as to disposition -- Pediatrician charged with sexual assault of patients -- Expert witness called to testify that character traits of accused not fitting

psychological profile of putative perpetrator of offences -- Whether expert's testimony admissible.

Respondent, a practising pediatrician, was charged with four counts of sexual assault on four female patients, aged 13 to 16 at the relevant time, during medical examinations conducted in his office. His counsel indicated that he intended to call a psychiatrist who would testify that the perpetrator of the alleged offences would be part of a limited and unusual group of individuals and that respondent did not fall within that narrow class because he did not possess the characteristics belonging to that group. The psychiatrist testified in a *voir dire* that the psychological profile of the perpetrator of the first three complaints was likely that of a pedophile, while the profile of the perpetrator of the fourth complaint that of a sexual psychopath. The psychiatrist intended to testify that the respondent did not fit the profiles but the evidence was ruled inadmissible at the conclusion of the *voir dire*.

Respondent was found guilty by the jury and appealed. The Court of Appeal allowed respondent's appeal, quashed the convictions and ordered a new trial. The Court of Appeal therefore found it unnecessary to deal with the Crown's sentence appeal. At issue here was the determination of the circumstances in which expert evidence is admissible to show that character traits of an accused person do not fit the psychological profile of the putative perpetrator of the offences charged. Resolution of this issue involved an examination of the rules relating to (i) expert evidence, and (ii) character evidence.

Held: The appeal should be allowed.

The evidence should be excluded.

Expert Evidence

Admission of expert evidence depends on the application of the following criteria: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert. Relevance is a threshold requirement to be decided by the judge as a question of law. Logically relevant evidence may be excluded if its probative value is overborne by its prejudicial effect, if the time required is not commensurate with its value or if it can influence the trier of fact out of proportion to its reliability. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence. Expert evidence should not be admitted where there is a danger that it will be misused or will distort the fact-finding process, or will confuse the jury.

Expert evidence, to be necessary, must likely be outside the experience and knowledge of a judge or jury and must be assessed in light of its potential to distort the fact-finding process. Necessity should not be judged by too strict a standard. The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions. Experts, however, must not be permitted to usurp the functions of the trier of fact causing a trial to degenerate to a contest of experts.

Expert evidence can be excluded if it falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself. The evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

In summary, expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

Expert Evidence as to Disposition

The Crown cannot lead expert evidence as to disposition in the first instance unless it is relevant to an issue and is not being used merely as evidence of disposition. The accused, however, can adduce evidence as to disposition, but this evidence is generally limited to evidence of the accused's reputation in the community with respect to the relevant trait or traits. The accused in his or her own testimony may also rely on specific acts of good conduct. Evidence of an expert witness that the accused, by reason of his or her mental make-up or condition of the mind, would be incapable of committing or disposed to commit the crime does not fit either of these categories. A further exception, however, has developed that is limited in scope. Although the exception has been applied to

abnormal behaviour usually connoting sexual deviance, its underlying rationale is based on distinctiveness.

Before an expert's opinion as to disposition is admitted as evidence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt. Although this decision is made on the basis of common sense and experience, it is not made in a vacuum. The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group. A finding that the scientific community has developed a standard profile for the offender who commits this type of crime will satisfy the criteria of relevance and necessity. The evidence will qualify as an exception to the exclusionary rule relating to character evidence provided the trial judge is satisfied that the proposed opinion is within the field of expertise of the expert witness.

Application to This Case

Nothing in the record supported a finding that the profile of a paedophile or psychopath has been standardized to the extent that it could be said that it matched the supposed profile of the offender depicted in the charges. The expert's group profiles were not seen as sufficiently reliable to be considered helpful. In the absence of these indicia of reliability, it could not be said that the evidence would be necessary in the sense of usefully clarifying a matter otherwise

unaccessible, or that any value it may have had would not be outweighed by its potential for misleading or diverting the jury.

The similarities detailed by the judge dealt with the perpetrator's *modus operandi* of the acts subject to the individual counts. These were not matters to which the expert evidence related. Moreover, whether a crime is committed in a manner that identifies the perpetrator by reason of striking similarities in the method employed in the commission of other acts is something that a jury can, generally, assess without the aid of expert evidence.

Cases Cited

Considered: *R. v. Lupien*, [1970] S.C.R. 263; *R. v. Chard* (1971), 56 Cr. App. R. 268; *Lowery v. The Queen*, [1974] A.C. 85; *R. v. Turner*, [1975] Q.B. 834; **referred to**: *R. v. Robertson* (1975), 21 C.C.C. (2d) 385; *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, aff'd [1977] 2 S.C.R. 824; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. French* (1977), 37 C.C.C. (2d) 201; *R. v. Taylor* (1986), 31 C.C.C. (3d) 1; *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. B.(G.)*, [1990] 2 S.C.R. 30; *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Béland*, [1987] 2 S.C.R. 398; *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348; *R. v. Bourguignon*, [1991] O.J. No. 2670 (Q.L.); *R. v. Lafferty*, [1993] N.W.T.J. No. 17 (Q.L.); *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672; *Director of Public Prosecutions v. Jordan*, [1977] A.C. 699; *R. v. Marquard*, [1993] 4 S.C.R. 223; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193, leave to appeal refused [1981] 1 S.C.R. xi; *Thompson v. The King*, [1918] A.C. 221; *R. v. Garfinkle* (1992), 15 C.R. (4th) 254.

Statutes and Regulations Cited

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APPEAL from a judgment of the Ontario Court of Appeal (1992), 8 O.R. (3d) 173, 55 O.A.C. 309, 71 C.C.C. (3d) 321, 13 C.R. (4th) 292, allowing an appeal from convictions by Berstein J. sitting with jury and ordering a new trial. Appeal allowed.

Jamie C. Klukach, for the appellant.

Brian H. Greenspan and *Sharon E. Lavine*, for the respondent.

//*Sopinka J.*//

The judgment of the Court was delivered by

SOPINKA J. -- In this appeal we are required to determine under what circumstances expert evidence is admissible to show that character traits of an accused person do not fit the psychological profile of the putative perpetrator of the offences charged. Resolution of this issue involves an examination of the rules relating to expert and character evidence.

I. Facts

A. *The Events*

The respondent, a practising pediatrician in North Bay, was charged with four counts of sexual assault on four of his female patients, aged 13 to 16 at the relevant time. The alleged sexual assaults were perpetrated during the course of medical examinations of the patients conducted in the respondent's office. The complainants had been referred to the respondent for conditions which were, in part, psychosomatic in nature.

Evidence relating to each complaint was admitted as similar fact evidence with respect to the others. The complainants did not know one another. Three of them came forth independently. Following a mistrial, which was publicized, the fourth victim came forward, having heard about the other charges. Three of the four complainants had been victims of prior sexual abuse. With respect to two of them, the respondent knew about their sexual abuse at the hands of others. The alleged assaults consisted of fondling of the girls' breasts and digital

penetration and stimulation of their vaginal areas, accompanied by intrusive questioning of them as to their sexual activities. All of the complainants testified that the respondent did not wear gloves while examining them internally. The respondent, who testified in his own defence, denied the complainants' evidence.

At the conclusion of the respondent's examination in chief, counsel for the respondent indicated that he intended to call a psychiatrist who would testify that the perpetrator of the offences alleged to have been committed would be part of a limited and unusual group of individuals and that the respondent did not fall within that narrow class because he did not possess the characteristics belonging to that group. The Crown sought a ruling on the admissibility of that evidence. The trial judge held a *voir dire* and ruled that the evidence tendered on the *voir dire* would not be admitted.

The jury found the respondent guilty as charged on November 16, 1990. He was sentenced to nine months' imprisonment on each of the four counts, to be served concurrently, and to two years' probation. The respondent appealed his convictions and the Crown appealed the sentence. The Court of Appeal allowed the respondent's appeal, quashed the convictions and ordered a new trial. Accordingly, the Court of Appeal found it was not necessary to deal with the Crown's sentence appeal and refused the Crown leave to appeal.

The appellant sought leave to appeal to this Court against the decision of the Ontario Court of Appeal pursuant to s. 693 of the *Criminal Code*, R.S.C., 1985, c. C-46. On December 10, 1992 leave to appeal was granted by this Court, [1992] 3 S.C.R. viii.

B. *The Excluded Evidence*

In the *voir dire*, Dr. Hill, the expert, began his testimony by explaining that there are three general personality groups that have unusual personality traits in terms of their psychosexual profile perspective. The first group encompasses the psychosexual who suffers from major mental illnesses (*e.g.*, schizophrenia) and engages in inappropriate sexual behaviour occasionally. The second and largest group contains the sexual deviation types. This group of individuals shows distinct abnormalities in terms of the choice of individuals with whom they report sexual excitement and with whom they would like to engage in some type of sexual activity. The third group is that of the sexual psychopaths. These individuals have a callous disregard for people around them, including a disregard for the consequences of their sexual behaviour towards other individuals. Another group would include pedophiles who gain sexual excitement from young adolescents, probably pubertal or post-pubertal.

Dr. Hill identified pedophiles and sexual psychopaths as examples of members of unusual and limited classes of persons. In response to questions hypothetically encompassing the allegations of the four complainants, the expert stated that the psychological profile of the perpetrator of the first three complaints would likely be that of a pedophile, while the profile of the perpetrator of the fourth complaint would likely be that of a sexual psychopath. Dr. Hill also testified that, if but one perpetrator was involved in all four complaints described in the hypothetical questions, he would uniquely categorize that perpetrator as a sexual psychopath. He added that such a person would belong to a very small, behaviourally distinct category of persons. Dr. Hill was asked whether a physician

who acted in the manner described in the hypothetical questions would be a member of a distinct group of aberrant persons. His answer was that such behaviours could only flow from a significant abnormality of character and would be part of an unusual and limited class. In cross-examination, Dr. Hill said: "You bring an extra abnormal, extra component for the abnormality when you talk about a physician in his or her office." According to Dr. Hill, physicians who were also sexual offenders would be a small group because not only would they be breaking the usual norms of society, but they would also be breaking out against the norms of the medical profession which are very strict given the intimate contact necessary to treat patients. It was contemplated that Dr. Hill would go on to testify "to the effect that Doctor Mohan does not have the characteristics attributable to any of the three groups in which most sex offenders fall."

II. Judgments Below

A. *High Court of Justice* (Ruling on *Voir Dire*) (Bernstein J.)

In ruling on the admissibility of Dr. Hill's evidence, the trial judge stated the issues as follows:

> One: Did the offences alleged to have been committed by the accused have unusual features which would indicate that anyone who committed them was a member of a limited and distinguishable group?
>
> Two: Did the psychiatrist have the necessary qualifications and expertise to venture an opinion on the first issue so as to be helpful to the jury?

The trial judge noted that Dr. Hill had personally interviewed and treated three doctors who engaged in criminal sexual misconduct with their patients. He also noted that Dr. Hill admitted that he was not aware of any scientific study or literature related to the psychiatric make-up of doctors who sexually abuse their patients and that his experience with three admitted offenders who were doctors was not a sufficient basis to allow him to make any generalizations on the subject. Dr. Hill acknowledged that he, as a psychiatrist, is unable to diagnose individuals as having the distinct characteristics of a pedophile or of a homosexual until the patient has performed an overt act which suggests the existence of the characteristic.

The trial judge reviewed the case law in which the use of such psychiatric evidence had been discussed (*i.e., R. v. Lupien,* [1970] S.C.R. 263; *R. v. Robertson* (1975), 21 C.C.C. (2d) 385 (Ont. C.A.); *R. v. McMillan* (1975), 23 C.C.C. (2d) 160 (Ont. C.A.); *R. v. Lavallee,* [1990] 1 S.C.R. 852; *R. v. French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.); *R. v. Taylor* (1986), 31 C.C.C. (3d) 1 (Ont. C.A.)). From these cases, the trial judge concluded that the use of psychiatric evidence has been greatly expanded since *R. v. Lupien*. He cited the following words of Martin J.A. in *R. v. Robertson* (at p. 423):

> Evidence that the offence has distinctive features which identified the perpetrator as a person possessing unusual personality traits constituting him a member of an unusual and limited class of persons would render admissible evidence that the accused did not possess the personality characteristics of the class of persons to which the perpetrator of the crime belonged.

The trial judge also relied on the following passage of *R. v.McMillan* (at p. 175):

> I leave open, until the question is required to be decided, whether when the crime is one assumed to be committed by normal persons, *e.g.*, rape, psychiatric evidence is admissible to show that the accused is a member of an abnormal group, possessing characteristics which make it improbable that he committed the offence, *e.g.*, that he is a homosexual with an aversion to heterosexual relations. I am disposed, however, to think that such evidence is admissible.

After relying on *R. v. McMillan*, the trial judge held:

> Doctor Hill is of the opinion that sexual assault is a crime committed by a distinguishable group. As I read the cases, I came to the conclusion that it is the size and the degree of distinctiveness of the "unusual and limited class of persons" which determines whether expert opinion will be helpful in defining the class and categorizing accused persons within or without the group. These days it is trite to say that a large number of men from all walks of life commit sexual offences on young women. While all may have some type of character disorder, I doubt that expert evidence regarding the normality of any given accused would be of assistance to a trier of fact absent some more distinguishing within the wide spectrum of sexual assault.
>
> The evidence of Doctor Hill is not sufficient, I believe, to establish that doctors who commit sexual assaults on patients are in a significantly more limited group in psychiatric terms than are other members of society. There is no scientific data available to warrant that conclusion. A sample of three offenders is not a sufficient basis for such a conclusion. Even the allegations of the fourth complainant ... are not so unusual, as sex offenders go, to warrant a conclusion that the perpetrator must have belonged to a sufficiently narrow class.
>
> I conclude that if the evidence was received as proposed, it would merely be character evidence of a type that is inadmissible as going beyond evidence of general reputation, and does not fall within the proper sphere of expert evidence.

B. *Ontario Court of Appeal* (1992), 8 O.R. (3d) 173

It was apparent for Finlayson J.A., who wrote the court's judgment, that the trial judge's conclusions were based on a misapprehension of the evidence of Dr. Hill. Finlayson J.A. stated that Dr. Hill did not base his opinion on case

studies of the three physicians he had as patients who were accused of sexual crimes. Rather, Finlayson J.A. was of the view at p. 177 that, in concluding that the perpetrators in the hypothetical examples would fall into an unusual and limited class of persons, and that, if the perpetrator were a physician, the class into which he would fall would be even narrower, Dr. Hill based his opinion on all of his experience:

> With respect, I think the learned trial judge was in error, in that he ruled on the sufficiency of the evidence of Dr. Hill, not its admissibility. It was up to the jury to consider what weight should be given to the expert opinion. Crown counsel suggested on appeal that the trial judge was ruling on the qualifications of the expert witness to give the opinion that he did. I do not think that is a correct interpretation of the trial judge's reasons. Dr. Hill's qualifications are outstanding and no attempt was made at trial to challenge them. I think the trial judge was saying that Dr. Hill's personal experience in dealing with sex-offending physicians and the lack of scientific literature specific to such physicians did not justify Dr. Hill giving the opinion that he did. In my opinion, in restricting his interpretation of Dr. Hill's testimony to "doctors who commit sexual assaults on patients", the trial judge misapprehended the opinion of Dr. Hill and the broad psychiatric experience upon which it was based.

Finlayson J.A. went on to say that the evidence of Dr. Hill was admissible on two bases. On the first basis, given that similar fact evidence was admitted showing that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence, Dr. Hill's testimony was admissible to show that the offences alleged were unlikely to have been committed by the same person (*R. v. C. (M.H.)*, [1991] 1 S.C.R. 763).

On the second basis, it was admissible to show that the respondent was not a member of either of the unusual groups of aberrant personalities which could have committed the offenses alleged. Referring to *R. v. Lupien*, *supra*, at pp. 275-

78, *R. v. Robertson*, *supra,* at p. 425, and *R. v. McMillan*, *supra*, Finlayson J.A. held that it is settled law that opinion evidence showing that the accused did or did not possess the distinguishing characteristics of an abnormal group is admissible in a criminal case, where it would appear that the perpetrator of the crime alleged is a person with an abnormal propensity or disposition which stamps him or her as being a member of that special and extraordinary class (or group). In this case, the psychiatrist showed that pedophiles and sexual psychopaths are members of special and extraordinary classes. Considering also the issues put to the jury in the case at bar (complex psychological issues, testimonial trustworthiness), Finlayson J.A. held that evidence of persons with professional psychiatric experience in dealing with sexual offences would be of assistance (based on: *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. Lavallee, supra*; *R. v. B.(G.),* [1990] 2 S.C.R. 30).

The court allowed the respondent's appeal, quashed the convictions and ordered a new trial. Accordingly, the Court of Appeal refused leave to the Crown's sentence appeal.

III. Analysis

The admissibility of the rejected evidence was analyzed in argument under two exclusionary rules of evidence: (1) expert opinion evidence, and (2) character evidence. I have concluded that, on the basis of the principles relating to exceptions to the character evidence rule and under the principles governing the admissibility of expert evidence, the limitations on the use of this type of evidence require that the evidence in this case be excluded.

(1) *Expert Opinion Evidence*

Admission of expert evidence depends on the application of the following criteria:

(a) relevance;

(b) necessity in assisting the trier of fact;

(c) the absence of any exclusionary rule;

(d) a properly qualified expert.

(a) Relevance

Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as question of law. Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See *McCormick on Evidence* (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general

exclusionary rule (see *Morris v. The Queen*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. As La Forest J. stated in *R. v. Béland*, [1987] 2 S.C.R. 398, at p. 434, with respect to the evidence of the results of a polygraph tendered by the accused, such evidence should not be admitted by reason of "human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science". The application of this principle can be seen in cases such as *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348, in which Moldaver J. applied a threshold test of reliability to what he described, at p. 353, as "a new scientific technique or body of scientific knowledge". Moldaver J. also mentioned two other factors, *inter alia*, which should be considered in such circumstances (at p. 353):

> (1) Is the evidence likely to assist the jury in its fact-finding mission, or is it likely to confuse and confound the jury?
>
> (2) Is the jury likely to be overwhelmed by the "mystic infallibility" of the evidence, or will the jury be able to keep an open mind and objectively assess the worth of the evidence?

A similar approach was adopted in *R. v. Bourguignon*, [1991] O.J. No. 2670 (Q.L.), where, in ruling upon a *voir dire* concerning the admissibility of

D.N.A. evidence, Flanigan J. admitted most of the evidence but excluded statistical evidence about the probability of a match between the DNA contained in samples taken from the accused and those taken from the scene of a crime. The learned judge explained:

> This Court does not think that the criminal jurisdiction of Canada is yet ready to put such an additional pressure on a jury, by making them overcome such fantastic odds and asking them to weigh it as just one piece of evidence to be considered in the overall picture of all the evidence presented. There is a real danger that the jury will use the evidence as a measure of the probability of the accused's guilt or innocence and thereby undermine the presumption of innocence and erode the value served by the reasonable doubt standard. As said in the Schwartz case: "dehumanize our justice system".
>
> I would therefore, rule admissible the D.N.A. testing evidence but not the statistic probabilities. This restriction can be easily overcome by evidence that "such matches are rare" or "extremely rare" or words to the same effect, which will put the jury in a better position to assess such evidence and protect the right of the accused to a fair trial.

It should be noted that, subsequently, other courts have rejected the distinction drawn by Flanigan J. and have admitted both DNA evidence and the evidence regarding statistical probabilities of a match. (See, *e.g.*, *R. v. Lafferty*, [1993] N.W.T.J. No. 17 (Q.L.)). I rely on *R. v. Bourguignon*, *supra*, simply to illustrate the mode of approach adopted there and leave the specific issue decided by Flanigan J. to be considered when it arises.

(b) Necessity in Assisting the Trier of Fact

In *R. v. Abbey*, *supra*, Dickson J., as he then was, stated, at p. 42:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's

> function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, *per* Lawton L.J.)

This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, *supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672, at p. 684, this Court, quoting from *Beven on Negligence* (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge". More recently, in *R. v. Lavallee*, *supra*, the above passages from *Kelliher* and *Abbey* were applied to admit expert evidence as to the state of mind of a "battered" woman. The judgment stressed that this was an area that is not understood by the average person.

As in the case of relevance, discussed above, the need for the evidence is assessed in light of its potential to distort the fact-finding process. As stated by Lawton L.J. in *R. v. Turner*, [1975] Q.B. 834, at p. 841, and approved by Lord

Wilberforce in *Director of Public Prosecutions v. Jordan*, [1977] A.C. 699, at p. 718:

> "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."

The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions.

There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.

These concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. Although the rule is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue. Expert evidence as to credibility or oath-helping has been excluded on this basis. See *R. v. Marquard*, [1993] 4 S.C.R. 223, *per* McLachlin J.

(c) <u>The Absence of any Exclusionary Rule</u>

Compliance with criteria (a), (b) and (d) will not ensure the admissibility of expert evidence if it falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself. For example, in *R. v. Morin*, [1988] 2 S.C.R. 345, evidence elicited by the Crown in cross-examination of the psychiatrist called by the accused was inadmissible because it was not shown to be relevant other than as to the disposition to commit the crime charged. Notwithstanding, therefore, that the evidence otherwise complied with the criteria for the admission of expert evidence it was excluded by reason of the rule that prevents the Crown from adducing evidence of the accused's disposition unless the latter has placed his or her character in issue. The extent of the restriction when such evidence is tendered by the accused lies at the heart of this case and will be discussed hereunder.

(d) A Properly Qualified Expert

Finally the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

(2) *Expert Evidence as to Disposition*

In order to decide what principles should govern the admissibility of this kind of evidence, it is necessary to consider the limitations imposed by the rules relating to character evidence, having regard to the restrictions imposed by the criteria in respect of expert evidence.

I have already referred to *R. v. Morin*, wherein an unanimous court decided that the Crown cannot lead such evidence in the first instance unless it is relevant to an issue and is not being used merely as evidence of disposition. As I stated, at p. 371:

> In my opinion, in order to be relevant on the issue of identity the evidence must tend to show that the accused shared a distinctive unusual behavioural trait with the perpetrator of the crime. The trait must be sufficiently distinctive that it operates virtually as a badge or mark identifying the perpetrator. The judgment of Lord Hailsham in *Boardman*, quoted above, provides one illustration of the kind of evidence that would be relevant.
>
> ...
>
> Conversely, the fact that the accused is a member of an abnormal group some of the members of which have the unusual behavioural characteristics shown to have been possessed by the perpetrator is not sufficient. In some cases it may, however, be shown that all members of the group have the distinctive unusual characteristics. If a reasonable inference can be drawn that the accused has those traits then the evidence is relevant subject to the trial judge's obligation to exclude it if its prejudicial effect outweighs its probative value. The greater the number of persons in society having these tendencies, the less relevant the evidence on the issue of identity and the more likely that its prejudicial effect predominates over its probative value.

When, however, the evidence is tendered by the accused, other considerations apply. The accused is permitted to adduce evidence as to

disposition both in his or her own evidence or by calling witnesses. The general rule is that evidence as to character is limited to evidence of the accused's reputation in the community with respect to the relevant trait or traits. The accused in his or her own testimony, however, may rely on specific acts of good conduct. See *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193, at p. 348; leave to appeal refused, [1981] 1 S.C.R. xi. Evidence of an expert witness that the accused, by reason of his or her mental make-up or condition of the mind, would be incapable of committing or disposed to commit the crime does not fit either of these categories. A further exception, however, has developed that is limited in scope. I propose to examine the extent of this exception.

In England, with the exception of non-insane automatism, expert psychiatric and psychological evidence is not admissible to show the accused's state of mind unless it is contended that the accused is abnormal in the sense of suffering from insanity or diminished responsibility. In *R. v. Chard* (1971), 56 Cr. App. R. 268, the trial judge refused to allow medical evidence that the accused who was not alleged to be suffering from a disease of the mind lacked the necessary *mens rea*. In the Court of Appeal, Roskill L.J. stated at p. 271 that it was "not permissible to call a witness, whatever his personal experience, merely to tell the jury how he thinks an accused man's mind -- assumedly a normal mind -- operated at the time of the alleged crime...."

In *Lowery v. The Queen*, [1974] A.C. 85 (P.C.), such evidence was admitted when tendered by one co-accused against another. It was a case involving the sadistic murder of a young girl. Lowery and King were both charged, and it was obvious that one, the other, or both of them were guilty. In this

context, King sought to prove that he feared Lowery and that Lowery dominated him. The Privy Council held that the trial judge acted properly in allowing King to call a psychiatrist to swear that he was less likely to have committed the crime than Lowery. That is, character evidence tendered by a psychiatrist was held to be admissible. Lord Morris of Borth-y-Gest of the Privy Council stated, at p. 103:

> Lowery and King were each asserting that the other was the completely dominating person at the time Rosalyn Nolte was killed: each claimed to have been in fear of the other. In these circumstances it was most relevant for King to be able to show, if he could, that Lowery had a personality marked by aggressiveness whereas he, King, had a personality which suggested that he would be led and dominated by someone who was dominant and aggressive.... Not only however was the evidence which King called relevant to this case: its admissibility was placed beyond doubt by the whole substance of Lowery's case.

Moreover, in *R. v. Turner*, *supra*, the accused unsuccessfully pleaded provocation in answer to a charge of murder of his girlfriend whom he alleged that he had killed in a fit of rage caused by her sudden confession of infidelity. He appealed on the grounds that the trial judge had wrongly refused to admit the evidence of a psychiatrist. That psychiatrist was to testify to the effect that the accused was not mentally ill, that he had a great affection toward the victim and that he deeply regretted his act of murder. The evidence was rejected on the basis that it was not the proper subject of expert evidence. As for *Lowery v. The Queen*, it was confined to its own facts.

C. Tapper in *Cross on Evidence* (7th ed. 1990), at p. 492, reconciled *Lowery v. The Queen* and *R. v. Turner* using a principled approach:

> Juries do not need to be told that normal men are liable to lose control of themselves when their women admit to infidelity, but they require

> all the expert assistance they can get to help them determine which of two accused has the more aggressive personality.

Tapper then proceeded to reconcile the two cases using a more technical approach:

> Another way of reconciling the cases would be to treat the fact that Lowery had put his character in issue as crucial to the decision of the Privy Council, the psychiatric evidence then being admissible to impugn the credibility of his testimony. Unfortunately we are left without any guidance on the subject from the Court of Appeal who contented themselves with saying that *Lowery*'s case was decided on its special facts.

With respect to the development of the exception in Canada, *R. v. Lupien, supra*, is a good starting point. It involved a respondent who was convicted of attempting to commit an act of gross indecency, and whose defence was that he lacked the requisite intent to commit the act because he thought his companion was a woman. He sought to prove his "lack of intent" by tendering psychiatric evidence which showed that he reacted violently against any type of homosexual activity and, therefore, could not have knowingly engaged in an act of gross indecency. Ritchie J. concluded, at pp. 277-78, that the evidence was admissible for the following reasons:

> I am far from saying that as a general rule psychiatric evidence of a man's disinclination to commit the kind of crime with which he is charged should be admitted, but the present case is concerned with gross indecency between two men and I think that crimes involving homosexuality stand in a class by themselves in the sense that the participants frequently have characteristics which make them more readily identifiable as a class than ordinary criminals. See *Reg. v. Thompson* [(1917), 13 Cr. App. R. 61 at 81]. In any event, it appears to me that the question of whether or not a man is homosexually inclined or otherwise sexually perverted is one upon which an experienced psychiatrist is qualified to express an opinion and that if such opinion is relevant it should be admitted at a trial such as this even if it involves the psychiatrist in expressing his conclusion that the

> accused does not have the capacity to commit the crime with which he is charged.

It is this passage that created the abnormal group exception which is often sought to be applied to various contexts other than the homosexual context.

The Ontario Court of Appeal, and specifically Martin J.A., further looked into this exception of proving the disposition of the accused through psychiatric evidence in the following two cases: *R. v. McMillan, supra,* aff'd [1977] 2 S.C.R. 824, and *R. v. Robertson, supra*.

R. v. McMillan involved an accused who was charged with the murder of his infant child and whose defence was that it was in fact his wife and not he who killed the child. The trial judge allowed the accused to call a psychiatrist who testified that the accused's wife had a psychopathic personality disturbance with brain damage. This psychiatric evidence showed that a third party, the accused's wife, was more likely to have committed the crime because of her abnormal personality/disposition. Martin J.A., speaking for the Court, found that disposition to commit a crime is generally relevant since it goes to the probability/propensity of the person doing or not doing the act charged. He then referred to *R. v. Lupien,* at p. 169, as creating the following exception:

> One of the exceptions to the general rule that the character of the accused, in the sense of disposition, when admissible, can only be evidenced by general reputation, relates to the admissibility of psychiatric evidence where the particular disposition or tendency in issue is characteristic of an abnormal group, the characteristics of which fall within the expertise of the psychiatrist.

After having noted the applicability of *R. v. Lupien*, Martin J.A. engaged in a lengthy discussion of the exception and in fact extended *R. v. Lupien*. This extension, at pp. 173-75 of *R. v. McMillan*, was affirmed by the Supreme Court of Canada:

> I do not consider that, because the crime under consideration was not one that could only be committed by a person with a special or abnormal propensity, psychiatric evidence with respect to Mrs. McMillan's disposition, was, therefore, inadmissible, in the circumstances of this case.
>
> All evidence to be admissible must, of course, be relevant to some issue in the case. Psychiatric evidence with respect to the personality traits or disposition of a person, whether of the accused or another, may be admissible for different purposes. While those purposes are not mutually exclusive, evidence which is relevant for one purpose may not be for another.
>
> Psychiatric evidence with respect to the personality traits or disposition of an accused, or another, is admissible provided:
>
> (a) the evidence is relevant to some issue in the case;
>
> (b) the evidence is not excluded by a policy rule;
>
> (c) the evidence falls within the proper sphere of expert evidence.
>
> One of the purposes for which psychiatric evidence may be admitted is to prove identity when that is an issue in the case, since psychical as well as physical characteristics may be relevant to identify the perpetrator of the crime.
>
> Where the offence is of a kind that is committed only by members of an abnormal group, for example, offences involving homosexuality, psychiatric evidence that the accused did or did not possess the distinguishing characteristics of that abnormal group is relevant either to bring him within, or to exclude him from, the special class of which the perpetrator of the crime is a member. In order for psychiatric evidence to be relevant for that purpose, the offence must be one which indicates that it was committed by a person with an abnormal propensity or disposition which stamps him as a member of a special and extraordinary class.
>
> Psychiatric evidence with respect to the personality traits or disposition of the accused, or another, if it meets the three conditions of admissibility above set out, is also admissible, however, as bearing

on the *probability* of the accused, or another, having committed the offence.

It would appear that it was upon this latter ground that the psychologist's evidence was held to be admissible in *Lowery v. The Queen, supra*, although the features of the offence in that case were sufficiently indicative of the possession of an abnormal propensity by the perpetrator, that the expert evidence might have been relevant to the issue of identity as well. Since in that case the evidence was offered by the accused King, it was not excluded by the policy rule which prevents the prosecution from introducing evidence to prove that the accused by reason of his criminal propensities is likely to have committed the crime charged. Both accused in *Lowery v. The Queen* had psychopathic personalities (although the features of King's psychopathic personality were less severe than Lowery's) and hence their personality traits fell within the proper sphere of expert evidence.

...

Where the crime under consideration does not have features which indicate that the perpetrator was a member of an abnormal group, psychiatric evidence that the accused has a normal mental make-up but does not have a disposition for violence or dishonesty or other relevant character traits frequently found in ordinary people is inadmissible. The psychiatric evidence in the circumstances postulated is not relevant on the issue of identity to exclude the accused as the perpetrator any more than the possession of violent or dishonest tendencies by the accused or a third person would be admissible to identify the accused or the third person as the perpetrator of the crime.

"So common a characteristic is not a recognisable mark of the individual." (*Per* Lord Sumner in *Thompson v. Director of Public Prosecutions* (1918), 26 Cox C.C. 189 at p. 199.)

While such evidence is relevant as bearing on the probability of the accused having committed the crime, the psychiatric evidence proffered in such circumstances really amounts to an attempt to introduce evidence of the accused's good character, as a normal person, through a psychiatrist. Such evidence does not fall within the proper sphere of expert evidence and is subject to the ordinary rule applicable to character evidence which, in general, requires the character of the accused to be evidenced by proof of general reputation.

I leave open, until the question is required to be decided, whether when the crime is one assumed to be committed by normal persons, *e.g.*, rape, psychiatric evidence is admissible to show that the accused is a member of an abnormal group, possessing characteristics which make it improbable that he committed the offence, *e.g.*, that he is a homosexual with an aversion to heterosexual relations. I am disposed, however, to think that such evidence is admissible. [Emphasis in original.]

The evidence of the psychiatrist was held to be admissible.

Martin J.A. elaborated on the reasoning set out above in *R. v. Robertson, supra*. That case involved a 16-year-old accused charged with brutally murdering a nine-year-old girl by kicking her. The defence sought to introduce expert psychiatric evidence to show that a propensity for violence or aggression was not a part of the accused's psychological make-up. This tended to rebut evidence led by the Crown as to the accused's violent character. Martin J.A. summed up, at p. 426:

> While the judgment of Ritchie, J., deals only with the admissibility of psychiatric evidence with respect to disposition in offences involving homosexuality, there would appear to be no logical reason why such evidence should not be admitted on the same principle in other cases where there is evidence tending to show that, by reason of the nature of the offence, or its distinctive features, its perpetrator was a person who, in the language of Lord Sumner, was a member of "a specialized and extraordinary class", and whose psychological characteristics fall within the expertise of the psychiatrist, for the purpose of showing that the accused did not possess the psychological characteristics of persons of that class. Obviously, where such evidence is adduced by the accused, the prosecution is entitled to call psychiatric evidence in order to rebut the evidence introduced by the defence.
>
> In my view, however, the judgment of Ritchie, J., in *R. v. Lupien, supra,* provides no support for a conclusion that, in the case of ordinary crimes of violence, psychiatric evidence is admissible to prove that the accused's psychological make-up does not include a tendency or disposition for violence.

Martin J.A. further stated, at pp. 429-30:

> In my view, psychiatric evidence with respect to disposition or its absence is admissible on behalf of the defence, if relevant to an issue in the case, where the disposition in question constitutes a characteristic feature of an abnormal group falling within the range of study of the psychiatrist, and from whom the jury can, therefore, receive

> appreciable assistance with respect to a matter outside the knowledge of persons who have not made a special study of the subject. A *mere* disposition for violence, however, is not so uncommon as to constitute a feature characteristic of an abnormal group falling within the special field of study of the psychiatrist and permitting psychiatric evidence to be given of the absence of such disposition in the accused. [Emphasis in original.]

Given this reasoning, Martin J.A. concluded that the crime was not specially marked and so the conditions for the admissibility of psychiatric evidence were not met.

A useful summary of the principles that emerge from the cases is made by Alan W. Mewett, "Character as a Fact in Issue in Criminal Cases" (1984-85), 27 *Crim. L.Q.* 29, at pp. 35-36, of his article where he points out the various contexts in which an accused can tender character evidence by way of an expert:

> There are thus three basic requirements that must be met before such psychiatric evidence can even be considered as potentially admissible. First, it must be relevant to an issue. Second, it must be of appreciable assistance to the trier of fact and third, it must be evidence that would otherwise be unavailable to the ordinary layman without specialized training, but these requirements only set forth the general requirements for the admissibility of expert testimony.
>
> Once these hurdles have been passed, a number of different scenarios may be postulated. The crime may be an "ordinary" one (which I take to mean a crime for which no special mental characteristics on the part of the perpetrator would be required) and the accused is an "ordinary" person; the crime may be an "ordinary" one, but the accused an "extraordinary" person (*i.e.*, having some peculiar mental make-up that would tend to show that he would not commit that "ordinary" crime); the crime may be "extraordinary", but the accused "ordinary"; or the crime may be "extraordinary" and the accused "extraordinary", in a different direction.
>
> In the first scenario, the evidence is irrelevant because it is simply not probative of anything. In the second it is probative and admissible but only if the extraordinary characteristic of the accused tends to show that he would not commit an ordinary crime of that nature (such as a homosexual being charged with a heterosexual offence). In the third,

> if it is shown that the crime is such that it could only, or in all probability would only, be committed by a person having identifiable peculiarities that the accused does not possess, it would be admissible. In the last scenario, the situation is the same provided that the difference in the abnormalities tends to exclude the accused from the probable group of perpetrators.

I question whether use of the terms "abnormal" and "normal" is the best way to describe the concept that underlies their use. The term "abnormal" is derived from the English cases in which it usually connotes the mental state of insanity or diminished responsibility. See *R. v. Chard*, *supra*, at p. 270. The basic rationale of these cases is that "normal" human behaviour is a matter which a judge or jury can assess without the assistance of expert evidence. Canadian cases have extended the exception to include what has been described as sexually deviant behaviour. See Rosemary Pattenden, "Conflicting Approaches to Psychiatric Evidence in Criminal Trials: England, Canada and Australia", [1986] *Crim. L.R.* 92, at p. 100. The rationale underlying this extension is the relevance of the evidence based on the distinctiveness of the behavioural traits of either the putative perpetrator of the crime or the accused. This distinctiveness tends to exclude the accused from the category of persons that could or would likely commit the crime.

There are other reasons why the use of the term "abnormal" is no longer satisfactory. Even in medical circles there are differing views as to what constitutes abnormality. See Pattenden, *supra*, at p. 100, and David C. Rimm and John W. Sommervill, *Abnormal Psychology* (1977), at pp. 31 and 32. Moreover, it imports a value judgment on the lifestyle of some groups in society. This is aptly illustrated by considering the statement of Lord Sumner in *Thompson v. The King*, [1918] A.C. 221, at p. 235:

> The evidence tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognized as properly bearing that name. Experience tends to show that these offences against nature connote an inversion of normal characteristics which, while demanding punishment as offending against social morality, also partake of the nature of an abnormal physical property. A thief, a cheat, a coiner, or a house-breaker is only a particular specimen of the genus rogue, and, though no doubt each tends to keep to his own line of business, they all alike possess the by no means extraordinary mental characteristic that they propose somehow to get their livings dishonestly. So common a characteristic is not a recognizable mark of the individual. Persons, however, who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity.

The difficulty in defining what is abnormal was recently referred to by McCarthy J.A. in *R. v. Garfinkle* (1992), 15 C.R. (4th) 254. At pages 256-57, speaking for the court, he stated:

> What dispositions are to be classified as abnormal, as outside ordinary human experience, for the purpose of admitting psychiatric evidence may be a difficult question. A disposition for sadism is clearly abnormal. Dispositions for violence (short of sadism or something akin thereto), or for dishonesty, are clearly too common to be classified as abnormal. In sexual offences, classification is less easy. However, it seems to me that, whether it be called pedophilia or something else, a disposition in an adult to use boys of 10 and 11 for sexual gratification must be classified as abnormal. Accordingly, in the present case, psychiatric evidence is admissible to show that Garfinkle does not have such a disposition.

In my opinion, the term "distinctive" more aptly defines the behavioural characteristics which are a pre-condition to the admission of this kind of evidence.

How should the criteria for the admission of this type of evidence be applied? I find the following statement of Professor Mewett, *supra*, at p. 36, to be

an apt characterization of the nature of the decision which the trial judge must make:

> The categorization of crimes into the "ordinary" and the "extraordinary" is therefore a legal question to be determined by the judge, as is the "normality" or "abnormality" of the accused – to the despair, no doubt, of psychiatrists. But admissibility of evidence is a legal question and depends primarily upon relevance, that is, upon its assistance to the trier of fact in his inference-drawing process, and this is governed, not by expertise, but by common sense and experience; words like "ordinary", "extraordinary" or "abnormal" are not meant to be scientific expressions but assessments of relevance and are thus clearly within the domain of the judge.

Before an expert's opinion is admitted as evidence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt. Although this decision is made on the basis of common sense and experience, as Professor Mewett suggests, it is not made in a vacuum. The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group. Put another way: Has the scientific community developed a standard profile for the offender who commits this type of crime? An affirmative finding on this basis will satisfy the criteria of relevance and necessity. Not only will the expert evidence tend to prove a fact in issue but it will also provide the trier of fact with assistance that is needed. Such evidence will have passed the threshold test of reliability which will generally ensure that the trier of fact does not give it more weight than it deserves. The evidence will qualify as an exception to the exclusionary rule relating to character evidence provided, of course, that the trial

judge is satisfied that the proposed opinion is within the field of expertise of the expert witness.

(3) *Application to This Case*

I take the findings of the trial judge to be that a person who committed sexual assaults on young women could not be said to belong to a group possessing behavioural characteristics that are sufficiently distinctive to be of assistance in identifying the perpetrator of the offences charged. Moreover, the fact that the alleged perpetrator was a physician did not advance the matter because there is no acceptable body of evidence that doctors who commit sexual assaults fall into a distinctive class with identifiable characteristics. Notwithstanding the opinion of Dr. Hill, the trial judge was also not satisfied that the characteristics associated with the fourth complaint identified the perpetrator as a member of a distinctive group. He was not prepared to accept that the characteristics of that complaint were such that only a psychopath could have committed the act. There was nothing to indicate any general acceptance of this theory. Moreover, there was no material in the record to support a finding that the profile of a pedophile or psychopath has been standardized to the extent that it could be said that it matched the supposed profile of the offender depicted in the charges. The expert's group profiles were not seen as sufficiently reliable to be considered helpful. In the absence of these *indicia* of reliability, it cannot be said that the evidence would be necessary in the sense of usefully clarifying a matter otherwise unaccessible, or that any value it may have had would not be outweighed by its potential for misleading or diverting the jury. Given these findings and applying the principles

referred to above, I must conclude that the trial judge was right in deciding as a matter of law that the evidence was inadmissible.

The Court of Appeal also supported the admissibility of the evidence on the basis that Dr. Hill's evidence tended to rebut alleged similarities between the evidence on the respective counts. On this point, Finlayson J.A. stated at p. 178:

> Where, as here, the Crown alleges that the probative value of the similar fact evidence arises from the circumstance that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence, the defence is equally entitled to lead evidence as to features of the alleged acts which demonstrate dissimilarities....

The judgment of the Court of Appeal was not supported on this ground either in the respondent's factum or in the oral argument.

The use to which the jury could put the evidence was explained by the trial judge in his charge to the jury. The key passage in the charge in this respect was the following:

> If you conclude when considering any of the specific counts that evidence relating to any or all of the other counts is so similar that common sense dictates the relevancy of such evidence to one or more of the issues I mentioned earlier, then you may not must, draw the inferences to which I have referred. [Emphasis added.]

The similarities, which were detailed by the judge, were with respect to the *modus operandi* of the perpetrator of the acts which were the subject of the individual counts. No objection was taken to this aspect of the charge. This use of the similar fact evidence relates to a different issue from the subject matter of the

proposed evidence of Dr. Hill. As discussed above, the dissimilarities addressed in Dr. Hill's proposed evidence are not as to *modus operandi* but rather with respect to the comparative psychological make-up of the respondent on the one hand and the alleged perpetrator of the acts charged, on the other. Furthermore, whether a crime is committed in a manner that identifies the perpetrator by reason of striking similarities in the method employed in the commission of other acts is something that a jury can, generally, assess without the aid of expert evidence. As stated by the trial judge, it is a matter of common sense.

I would allow the appeal, set aside the judgment of the Court of Appeal, restore the convictions and remit the matter to the Court of Appeal for disposition of the sentence appeal.

Appeal allowed.

Solicitor for the appellant: The Ministry of the Attorney General, Toronto.

Solicitors for the respondent: Greenspan, Humphrey, Toronto.