5 pages.

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ROYAL COURT
(Samedi Division)

21st January, 1994

Before: F.C. Hamon, Esq., Commissioner, and Jurats Vint and Vibert

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Between:	Stanton Limited	First Plaintiff
And:	George Julien Louis and Sharon Margaret Louis (née O'Brien)	Second Plaintiff
And:	D.O. Moon P.C. de C. Mourant K.S. Baker R.F.V. Jeune C.E. Coutanche I.C. James A.R. Binnington J.D.P. Crill T.J. Herbert and J.A. Richomme (exercising the profession of advocates solicitors and notaries public under the name and style of Mourant du Feu and Jeune)	Defendants

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Admissibility of similar fact evidence

Advocate P.C. Sinel for the plaintiffs.
Advocate T.J. Le Cocq for the defendants.

JUDGMENT

THE COMMISSIONER: This is an interlocutory matter in a case of negligence against the defendants and, in particular, one of their partners, Mr. James Crill.

The situation arises because, as his opening question in cross-examination, Mr. Sinel said: "Mr. Crill, you have been sued for professional negligence before this, have you not? Your firm has, as a result of your actions and omissions".

Mr. Le Cocq objected, not only as to the relevance of the question, but also because he had received no prior warning that anything outside the terms specifically referring to the trial were going to be put. The Court adjourned for legal submissions to be prepared and we have now heard those submissions.

The rule on similar fact evidence is well stated in Phipson on Evidence at paragraph 17-24 where the learned authors state:

> ***"Subject to two exceptions stated below, evidence of facts or transactions similar to the fact or transaction directly in issue is admissible if it is logically probative, that is if it is logically relevant in determining the matter which is in issue, and is not otherwise excluded, e.g. by the rule against hearsay. The two exceptions, which apply to civil as well as to criminal proceedings, are these: to prove an act done by, or the state of mind at the time of his act of a person, evidence is not admissible:***
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> ***(1) of similar acts done by himself, if they do no more than show a general disposition, habit or propensity to commit such acts and a consequent probability of his having committed the act, or possessed the state of mind in question; and***
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> ***(2) of similar acts done by others, similarly circumstanced to himself, to show that he would be likely to act as they did.***
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> ***If, however, evidence of similar acts done by the person whose act or state of mind is in question is such that it might lead a reasonable jury to the conclusion that the similarity could not be explained by coincidence, or conspiracy by the witnesses to make similar false allegations, or repetition as facts of things read or heard, e.g. on television, the evidence is admissible on the basis that the probative force of two or more such similar acts is greater than of one alone".***

The principles of exclusion, again expressed most cogently in Phipson 17-68 are these:

"As we have seen, facts which are merely similar, however, and prove nothing more than the disposition or likelihood of repetition, though logically relevant, are rejected as in criminal cases on grounds of fairness, since they tend to waste time, embarrass the inquiry with collateral issues, prejudice the parties with the jury (if there be one) and encourage attacks without notice".

The case upon which Mr. Sinel most strongly relied was Mood Music Publishing Co. Ltd. -v- de Wolfe Ltd. (1976) 1 All ER 763 where, at p.766 Lord Denning M.R. said this:

"The admissibility of evidence as to 'similar facts' has been much considered in the criminal law. Some of them have reached the highest tribunal, the latest of them being Boardman -v- Director of Public Prosecutions (1974) 3 All ER 887. The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice: and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue: provided that it is not oppressive or unfair to the other side: and also that the other side has fair notice of it and is able to deal with it".

Mr. Sinel seemed to imply that the restraints had now been loosened to the extent that the restrictions on similar fact evidence were now very relaxed. If that were the case, then it seems surprising that in Thorpe -v- Chief Constable of the Greater Manchester Police (1989) 2 All ER 827 at 830, Dillon LJ was able, in his judgment, to give this example:

"But in an action for damages for professional negligence against a solicitor evidence of other claims for negligence made or established against the defendant by other clients in respect of other matters would be irrelevant and inadmissible, and discovery in respect of such other matters would be oppressive; a plaintiff charging a solicitor with negligence in one matter could not investigate other areas of his practice in an endeavour to establish that he had a propensity to be careless".

All the authorities and cases cited to us this morning lead ineluctably to that clear conclusion. As is said in 17 Halsbury paragraph 47:

"The rule in civil proceedings may be illustrated by a case in which the question was whether a brewer supplied good beer

to a publican. The brewer sought to establish this by proving, inter alia, that during the material period he supplied good beer to other publicans. The evidence was rejected, the court remarking that a man might deal well with one and not with others. Again, where the question was whether a surgeon had performed an operation negligently, evidence that he had been negligent or skilful in performing similar operations on other patients was rejected. In an action against the acceptor of a bill of exchange, who defends on the ground that his acceptance is a forgery by a particular person, evidence that that person had forged other bills is not admissible".

It seems to us that the admissibility of similar fact evidence depends almost entirely upon its degree of relevance. Irrelevant similar fact evidence can be excluded because it is irrelevant. It is simply that "loosening" of the rules to which, in our view, Lord Denning was alluding. The balancing process which this Court sees as its duty is the balance between relevant evidence and irrelevant evidence. There must be a particular cogency in the evidence (provided there is no special rules of exclusion) which justify its admissibility.

Mr. Sinel says that Mr. Crill spoke in his evidence in chief of his "invariable practice" in going through documents. Now if Mr. Crill had admitted negligence on previous occasions where his "invariable practice" in going through documents had been found to be flawed, we would have allowed the question. If, as Mr. Sinel intimated to us, he has knowledge of a successful negligence claim against Mr. Crill (because he acted for the successful party) and which was successful because Mr. Crill (or his firm) failed to act within a prescribed time limit we will not allow the question. We are not prepared to allow the question because it is not, in our view, logically probative.

Mr. Sinel can ask Mr. Crill searching questions on the system he set up. Mr. Crill cannot be asked questions about previous negligence claims unless they are based on facts similar to the clear and specific allegations of negligence set out in the Order of Justice.

Authorities

Cross on Evidence: (7th Ed'n): pp. 378-81.

4 Halsbury 17: paras. 47-53.

Phipson on Evidence: paragraphs 12.06-12.23
12.34-12.35
17.65-17.76
19.01-20.03

Mood Music Publishing Co., Ltd., -v- de Wolfe, Ltd., (1976) 1 All ER 763 @766.

Thorpe -v- Chief Constable of Greater Manchester Police (1989) 2 All ER 827 @ 830.

Kennedy -v- Dodson (1895) 1 Ch. 334.

James -v- Audigier (25th November, 1932) 49 T.L.R. 36.