

CANADA / JUDGMENT

C.L.H. v. K.A.G.

2025 BCSC 2284

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Supreme Court of British Columbia

DECIDED

31 May 2021

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2025 BCSC 2284 C.L.H. v. K.A.G

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.L.H. v. K.A.G.,

2025 BCSC 2284

Date: 20210531

Docket: S17849

Registry: Duncan

Between:

C.L.H.

Plaintiff

And

K.A.G.

Defendant

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SEALED FILE (IN PART)

Before: The Honourable Mr. Justice Veenstra

Oral Ruling at Trial - Similar Act Evidence

Counsel for Plaintiff:

N.W.P. Fraser

M. Selly

Counsel for Defendant:

C. Tyhurst

J.M.P. Firestone

Places and Dates of Trial:

Duncan and Victoria, B.C.

May 6-7, 10-14, 17-21,

25 and 31, 2021

Place and Date of Ruling:

Duncan, B.C.

May 31, 2021

- [1] THE COURT: This is a civil action in which the plaintiff claims against the defendant for historical sexual assaults, dating back to the 1970s and early 1980s, when the parties were children. The trial is being heard by judge alone.
- [2] The plaintiff initially reported the allegations underlying this action to the RCMP in 2011. The RCMP decided not to proceed with the matter, and no charges were ever laid. In 2017, the plaintiff commenced the present action.
- [3] The parties are siblings. The plaintiff sister is 3½ years younger than the defendant brother.
- [4] The plaintiff tendered evidence from a male cousin, M.F., who is 5½ years younger than the defendant and two years younger than the plaintiff. The evidence of M.F. was heard on a voir dire. The defendant objects to most of the evidence of M.F. being admitted at trial.
- [5] M.F. gave evidence as to three specific interactions with the defendant. In addition, he had general comments as to the character and disposition of the defendant - that is, that M.F. viewed the defendant as a bully and did not like him.
- [6] The first interaction described by M.F. was that "[the defendant] had me give him oral sex, then he gave oral sex to me". M.F. said that this occurred in a park behind his parents' property, and that it happened at some point while he was in elementary school.

- [7] The second interaction described by M.F. was that, at one point while the defendant was babysitting him at their grandmother's house, "he had us stick our penises inside the vacuum". He said that he watched the defendant do it and then volunteered to do it himself.
- [8] Both of these interactions were said to have occurred while M.F. was in elementary school. He was quite uncertain as to time. On cross-examination, he said he could have been as young as eight or as old as 12 at the time of the first interaction.
- [9] The third interaction described by M.F. was an occasion when the plaintiff had some female friends over to the grandmother's house and planned to go swimming in the grandmother's backyard pool. M.F. testified that the defendant "had this idea we would hide inside the bedroom they were changing in and watch them change". His evidence was that the defendant hid in the closet while M.F. hid under the bed.
- [10] The plaintiff has pleaded a number of incidents of sexual assault and abuse by the defendant which were alleged to have occurred between the years 1974 and 1984, when the plaintiff was between the ages of six and almost 17 years of age. The pleadings include a specific allegation of "confining the plaintiff and forcing the plaintiff to watch him masturbate with a vacuum hose". The plaintiff gave evidence with respect to this allegation.
- [11] The plaintiff also gave evidence that dovetailed with M.F.'s evidence of the third incident - saying that once while changing into swimwear in a bedroom at her grandmother's house, she saw the defendant peeking through a slightly ajar closet door. [I note that, as a result of various trial scheduling exigencies, the plaintiff testified after hearing M.F.'s evidence.]
- [12] The plaintiff also tendered read-in evidence from an examination for discovery of the plaintiff. That evidence included:
- a) An admission by the defendant of the allegations of oral sex with respect to M.F.; and
 - b) A denial by the defendant that he had watched the plaintiff and her friends change at the grandmother's house in the presence of M.F.
- [13] The plaintiff argues that the evidence of M.F. is relevant to the credibility of the plaintiff's evidence, given that the defendant has denied the plaintiff's allegations. The plaintiff argues that the probative value of the evidence exceeds the resultant prejudice because the force of similar circumstances defies coincidence or other innocent explanation.
- [14] The plaintiff argues that there are similarities between the allegations of the plaintiff and M.F. All of the allegations are alleged to have occurred during childhood - at times when the defendant was a preteen or teen and the plaintiff and M.F. were several years younger. The allegations with respect to the vacuum cleaner and the hiding in the closet are said to be particularly similar.
- [15] The plaintiff has also tendered evidence indicating that the defendant, while under psychiatric treatment in 2011, made statements to some medical professionals acknowledging having sexually molested his sister. The plaintiff argues that, because of

these admissions - all of which are very general in nature - the Court need not be further concerned about the prejudicial value of similar fact evidence. The argument appears to be that, because there has been an admission of some sort of misconduct, prejudicial effect is no longer a concern.

- [16] The defendant argues that the evidence of oral sex and of the incident with the vacuum cleaner are both highly prejudicial, in that both reasoning and moral prejudice arising from the allegations are high. The defendant argues that neither is sufficiently similar to the acts alleged by the plaintiff, and that as a result, the admission of this evidence would be more prejudicial than probative.
- [17] The defendant raises concerns about collusion between the plaintiff and M.F., given that the respective allegations of sexual misconduct were matters of controversy and discussion within the family from 2010 onward.
- [18] With respect to the evidence of the alleged voyeurism (watching the plaintiff and her friends change), the defendant acknowledges that this evidence is not technically similar fact evidence. Although it is both tenuous and more prejudicial than evidence of a material fact in issue, it is not objectionable on the basis of being similar act evidence.
- [19] The defendant argues that the alleged admissions are all very general in nature and are irrelevant in any event to a determination of the admissibility of similar facts.

Law

- [20] The general exclusionary rule was summarized by Justice McLachlin (as she then was) in *R. v. B.* (C.R.), [1990] 1 S.C.R. 717, who, after a review of the jurisprudence, set out the following conclusions as to the law as it then stood in Canada at para. 63:

The analysis of whether the evidence in question is admissible must begin with the recognition of the general exclusionary rule against evidence going merely to disposition. evidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. In a case such as the present, where the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value of the evidence must be high indeed to permit its reception. The judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, to the end of determining whether, in the context of the case before him, the probative value of the evidence outweighs its potential prejudice and justifies its reception.

[21] In *R. v. Handy*, 2002 SCC 56, the prosecution tendered evidence of the ex-wife of the accused who testified as to the accused's interest in sex that is painful to his partner. As noted by Justice Binnie at para. 26, such evidence was only circumstantial evidence in respect of the allegations of the complainant in that case. As such:

The argument for admitting this circumstantial evidence is that the jury may infer firstly that the respondent is an individual who derives pleasure from sex that is painful to his partner, and will not take no for an answer, and secondly, that his character or propensity thus established gives rise to the further inference that he proceeded wilfully in this case knowing the complainant did not consent.

[22] In *Sopinka, Lederman & Bryant*, *The Law of Evidence in Canada*, 5th ed. at para. 11.241, the reasoning underlying similar fact evidence is described in a more general sense as follows:

The reasoning process for true similar act cases is that upon proof of Fact A (act(s) or omission(s) on other occasions), it is inferred that the opposite party has a disposition or propensity to act or think in a particular way (Fact B), from which it is further inferred that the opposite party acted in conformity with his or her disposition or propensity on the specific occasion in question (Fact C). The theory of admissibility in true similar act cases turns on the improbability of coincidence.

[23] In *Handy*, Justice Binnie noted at para. 31 the general exclusionary rule, and the dangers that "the jury might be confused by the multiplicity of incidents and put more weight than is logically justified on the ex-wife's testimony ("reasoning prejudice") or by convicting based on bad personhood ("moral prejudice"). He then proceeded to set out the test for admissibility of similar act evidence at paras. 41-42:

41 While emphasizing the general rule of exclusion, courts have recognized that an issue may arise in the trial of the offence charged to which evidence of previous misconduct may be so highly relevant and cogent that its probative value in the search for truth outweighs any potential for misuse, per *Sopinka J.*, dissenting, in *B. (C.R.)*, *supra*, at p. 751:

The fact that the alleged similar facts had common characteristics with the acts charged, could render them admissible, and, therefore, supportive of the evidence of the complainant. In order to be admissible, however, it would be necessary to conclude that the similarities were such that absent collaboration, it would be an affront to common sense to suggest that the similarities were due to coincidence [Emphasis added.]

42 The "common sense" condemnation of exclusion of what may be seen as highly relevant evidence has prompted much judicial agonizing, particularly in cases of alleged sexual abuse of children and adolescents, whose word was sometimes unfairly discounted when opposed to that of ostensibly upstanding adults. The denial of the adult, misleadingly persuasive on first impression, would melt under the history of so many prior incidents as to defy innocent explanation. That said, there is no special rule for sexual abuse cases. In any case, the strength of the similar fact evidence must be such as to outweigh "reasoning prejudice" and "moral prejudice". The inferences sought to be drawn must accord with common sense, intuitive notions

of probability and the unlikelihood of coincidence. Although an element of "moral prejudice" may be introduced, it must be concluded by the trial judge on a balance of probabilities that the probative value of the sound inferences exceeds any prejudice likely to be created.

[24] The question of similarity was further analyzed in *Handy* at paras. 81-82:

81 The decided cases suggest the need to pay close attention to similarities in character, proximity in time and frequency of occurrence. Wigmore put it this way:

Since it is the improbability of a like result being repeated by mere chance that carried probative weight, the essence of this probative effect is the likeness of the instance. . . .

It is just this requirement of similarity which leaves so much room for difference of opinion, and accounts for the bewildering variances of rulings in the different jurisdictions and even in the same jurisdiction and in cases of the same offense.

(Wigmore on Evidence, vol. 2 (Chadbourn rev. 1979), at pp. 245-46)

See also: *Arp*, supra, at para. 44; *R. v. Smith*, [1992] 2 S.C.R. 915, at p. 941; and *Cloutier v. The Queen*, [1979] 2 S.C.R. 709, at pp. 730-31. Thus it was the required degree of similarity, or the lack of it, that divided the Court in *B. (C.R.)*, supra, at pp. 739 and 753. Similarity in this respect does not necessarily require a strong peculiarity or unusual distinctiveness underlying the events being compared, although similar facts manifesting a singular trait (such as necrophilia) would likely be a powerful tool in the hands of the prosecution.

82 The trial judge was called on to consider the cogency of the proffered similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves. Factors connecting the similar facts to the circumstances set out in the charge include:

- (1) proximity in time of the similar acts;
- (2) extent to which the other acts are similar in detail to the charged conduct;
- (3) number of occurrences of the similar acts;
- (4) circumstances surrounding or relating to the similar acts;
- (5) any distinctive feature(s) unifying the incidents;
- (6) intervening events;
- (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.

[Citations removed.]

[25] In Handy, there was evidence that the complainant and the ex-wife had spoken prior to the alleged offence, and the ex-wife had given advice on how to obtain funds from a criminal injury compensation program. The trial judge had concluded that the possibility of collusion was a matter properly left to the jury. This was found to be in error. Justice Binnie noted, at paras. 104, 106 and 110, that:

104 I mention this issue at the outset because if collusion is present, it destroys the foundation on which admissibility is sought, namely that the events described by the ex-wife and the complainant, testifying independently of one another, are too similar to be credibly explained by coincidence.

106 In my view, the trial judge cannot assess "the objective improbability of coincidence" without addressing the issue of whether the apparent "coincidence" is in fact the product of collusion. Admissibility is a question of law for the judge alone. I agree with the respondent that "[i]t is only through an accurate and full preliminary assessment of probative value that prejudice can be kept within manageable bounds".

110 I would not agree, however, that suspected collusion would play less strongly against otherwise powerful evidence than in a borderline case. In that sense, suspected collusion is more than just another "factor". Cogency is derived from the improbability of coincidence. Collusion is a factor, yes, but more than that it is a crucial factor because the existence of collusion rebuts the premise on which admissibility depends.

[26] The analysis of the collusion issue in Handy may be contrasted with that in R. v. Shearing, 2002 SCC 58, a case involving numerous complainants as to sexual assaults by a cult leader. There was evidence of some communication among the complainants. At para. 44, Binnie J. commented:

44 The evidence here is far more speculative than in Handy. In that case, there was consultation between the complainant and the similar fact witness prior to the alleged offence about the prospect of financial profit. Here, there is some evidence of opportunity for collusion or collaboration and motive, but nothing sufficiently persuasive to trigger the trial judge's gatekeeper function. There is no reason here to interfere with the trial judge's decision to let the collusion issue go to the jury. He instructed the jury to consider "all of the circumstances which affect the reliability of that evidence including the possibility of collusion or collaboration between the complainants". He defined collusion as the possibility that the complainants, in sharing their stories with one another, intentionally or accidentally allowed themselves to change or modify their stories in order that their testimony would seem more similar or more convincing. It was for the jury to make the ultimate determination whether the evidence was "reliable despite the opportunity for collaboration" or that "less weight or no weight should be given to evidence which may have been influenced by the sharing of information".

[27] Thus, he concluded that the trial judge was justified in letting the collusion issue go to the jury with an appropriate warning.

[28] The above-noted judgments all involve criminal cases. The plaintiff argues that, because this is a civil case, the principle should not be as strictly applied. In *Mood Music Publishing Co Ltd v De Wolfe Ltd*, [1976] Ch 119 (C.A.), Lord Denning M.R. stated at p. 127:

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 *Reg v Boardman* [1975] AC 421. 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.

[29] The plaintiff noted that in *O'Brien v Chief Constable of South Wales Police*, [2005] UKHL 26, the House of Lords concluded at paras. 51-53 that the approach to similar fact evidence in criminal law matters should not be used in civil cases and adopted relevance as the applicable test of admissibility of similar fact evidence in a civil suit. The plaintiff noted that this approach had been cited with approval in the Saskatchewan Court of Queen's Bench in *Bautz Estate v. Advantage Credit Union*, 2011 SKQB 215 at paras. 27-38.

[30] The British Columbia courts have not adopted that approach. Less than a year after *Handy*, in *Gorman v. Tyhurst*, 2003 BCCA 224, the Court applied the test from the criminal law in a civil matter. Justice Huddart commented at paras. 18-19 that:

[18] The test for the admissibility of similar fact evidence was set down by McLachlin J. in *R. v. B.* (C.R.), *supra*, at para. 24:

evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.

[19] That is the test the trial judge sought to apply. As explained in *Handy*, *supra*, this test for admissibility requires first the determination of the probative value of the proffered evidence and the moral and reasoning prejudice the defendant will suffer from its admission, then the balancing of one against the other to ensure a fair trial and do justice between the parties.

[31] In her discussion of reasoning prejudice, Huddart J.A. commented at para. 54 that:

[54] In *R. v. B.* (C.R.), *supra*, McLachlin J. commented at para. 20 that *Boardman*, *supra*, introduced the "idea of a sliding scale of admissibility." That idea flows naturally from the view that the degree of probative value required to establish the admissibility of similar fact evidence will vary with the prejudice to be overcome. Generally, the prejudice will be less in civil cases than in criminal cases, but more in civil cases alleging morally blameworthy

conduct. A sliding scale leaves room for consideration of the different interests of plaintiffs in civil cases and the Crown in criminal cases. However, because the prejudice from the collateral issue rule as applied in this case cuts both ways, I can leave those interesting questions for another day.

- [32] Subsequent civil cases in British Columbia have continued to apply the Handy framework within the civil context - see *J.C.N. v. R.J.H.*, 2007 BCSC 820 at paras. 104-108 and *Randhawa v. 420413 B.C. Ltd.*, 2009 BCCA 602 at paras. 48-65.
- [33] More recently, in *Karimi v. Gu*, 2016 BCSC 1060, Justice Fleming was dealing with an action by an investor in a doughnut shop against the franchise owner. The plaintiff sought to tender "similar fact" evidence showing the franchise owner's willingness to engage in cash transactions. She summarized the applicable law as follows at paras. 155-156:
- [155] Similar fact evidence is presumptively inadmissible unless its probative value outweighs its prejudicial effect (*R. v. Handy*, 2002 SCC 56 at para. 55). The essence of probative value in this context is the similarity between two acts (at paras. 81-82). Similar fact evidence regarding general propensity or disposition is not admissible, because evidence showing nothing more than a tendency to act badly is not sufficiently probative. In the criminal context, factors which have been found helpful in assessing prejudice include the inflammatory nature of the similar acts (*R. v. D.(L.E.)*, [1989] 2 S.C.R. 111 at p. 124) and whether the Crown can prove its point with less prejudicial evidence, *Handy*, at para. 83. In addition, the court is required to take into account whether the evidence may distract the trier of fact from a proper focus on the facts alleged, and the potential for undue time consumption. This is also described as reasoning prejudice. The other concern is moral prejudice, or the danger the trier of fact will decide the matter not based on what happened but because the accused is of bad character.
- [156] I was not provided with any authorities that have considered *Handy* in the civil context. In *Sopinka, Lederman and Bryant, The Law of Evidence in Canada*, 3rd ed. (Markham, Ont: LexisNexis, 2009), the editors observed the following:

The general principles that govern the admission of similar fact evidence in criminal cases apply equally to civil cases. Thus, evidence of discreditable conduct on other occasions is presumptively inadmissible and evidence tendered solely to show a general disposition or a mere propensity to act or think or feel in a particular way is inadmissible. The party who proffers evidence of discreditable conduct on other occasions must satisfy the trial judge on the balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudicial effect.

(As cited in *ICBC v. Atwal*, 2010 BCSC 338)

- [34] She concluded that the similar fact evidence tendered in that case was not admissible.

[35] I conclude that in British Columbia civil cases, the courts will apply the framework set out in Handy in determining the admissibility of similar fact evidence. I note as well that, to the extent there might be considered a "sliding scale" of admissibility as discussed in Gorman, this is a "civil case alleging morally blameworthy conduct" in which the considerations of prejudice will be substantially similar to those in a criminal case in any event. As noted above, the claims underlying this action were initially reported to the RCMP as a criminal matter, but no charges resulted from that report.

Analysis

[36] As noted above, the plaintiff seeks to tender the evidence of M.F. in order to support her own credibility. That is, by establishing that the defendant had a propensity to act in the ways described by M.F., it is more likely that her evidence as to the defendant's actions is reliable and should be accepted.

[37] In accordance with the Handy framework, I will begin with considering, in respect of each of the two interactions in issue:

- a) The probative value, and in particular, whether the similarities are such that absent collaboration, it would be "an affront to common sense to suggest that the similarities were due to coincidence" - this would include reference to the factors considered at para. 82 of Handy; and
- b) The potential prejudice - including both moral and reasoning prejudice.

[38] In accordance with Handy, I then consider whether on a balance of probabilities the probative value of the evidence exceeds any prejudice likely to be created.

Allegations of Oral Sex

[39] With respect to the similarity factors:

- a) The similarity between the acts is found in their sexual nature and the fact that M.F. was younger than the defendant. A major difference between the acts is that the acts testified to by M.F. were male-male, as opposed to the plaintiff's evidence which was all as to male-female acts. There is no expert evidence that would tie propensity toward the sort of activity described by M.F. to the allegations made by the plaintiff.
- b) Although M.F. was unable to give much detail as to timing, the event testified to by him appears to fall within the 10-year range of claims asserted by the plaintiff;
- c) M.F. gave evidence as to a single act, whereas the plaintiff estimated that she was subject to approximately 500 acts of sexual assault.
- d) While I do not give much weight to this distinction, I note that M.F. testified as to an event outdoors in a park, while nearly all of the plaintiff's allegations related to indoor activities.

- [40] With respect to moral prejudice, the acts alleged give rise to a significant risk of moral prejudice, and there is a risk that the trier of fact might be led by the evidence to conclude in a general way that the defendant is prone to sexually inappropriate activity.
- [41] In my view, there is insufficient similarity between the evidence of M.F. and the allegations advanced by the plaintiff. The evidence is not highly probative and is prejudicial. The evidence is not admissible.

Allegations with respect to Vacuum Cleaner

- [42] With respect to the similarity factors:
- a) The allegation as to the specific actions of the defendant - that is, placing his penis in a vacuum cleaner - is very similar as between M.F. and the plaintiff. As well, the fact that M.F. was younger than the plaintiff is also similar. However, the plaintiff gave descriptive evidence as to the defendant using the vacuum cleaner to masturbate - a fact that is absent from the evidence of M.F. As well, the surrounding circumstances are quite different. M.F. gave evidence of happening to be in the room where the activity occurred, observing the defendant's acts with the vacuum cleaner, and then voluntarily doing the same himself. The plaintiff's evidence was that she was forcibly confined in a room and forced to watch the defendant's acts.
 - b) Although M.F. was unable to give much detail as to timing, the event testified to by him appears to fall within the 10-year range of claims asserted by the plaintiff.
 - c) M.F. gave evidence of only a single act. The plaintiff's evidence, while not specific as to number of incidents, indicated a number of acts involving the vacuum cleaner.
- [43] The prejudice factors are the same as with respect to the oral sex allegations.
- [44] While this is a more difficult determination, my conclusion is that I am not able to conclude on the balance of probabilities that there is sufficient similarity between the evidence of M.F. and the allegations advanced by the plaintiff to give it a probative value that overcomes the prejudice. The evidence is not admissible.

Risk of Collusion

- [45] The defendant argued that the fact that allegations against the defendant have been a matter of open discussion within the family for over 10 years gives rise to a significant risk of collusion, and that markers of collusion can be found in similarities in the evidence of the parties, including the evidence with respect to the defendant hiding in the closet and the fact that both M.F. and the plaintiff used nearly identical language in describing the defendant as a "bully".

- [46] M.F. was cross-examined with respect to the possibility of collusion. He denied having discussed his allegations with the plaintiff and said, in respect of preparing to give his trial evidence, that he discussed the allegations with the plaintiff's lawyer rather than with the plaintiff. M.F. also gave evidence that he was testifying under subpoena.
- [47] I am alive to the possibility of collusion, and the similarities pointed to by the defendant are of concern. However, in my view the suggestion of collusion in this matter is more speculative in nature than in Handy. As in Shearing, had I considered the evidence to be sufficiently probative to overcome its prejudicial effect, I would have allowed it to become part of the record and considered the risk of collusion as part of the weighing of the evidence.

Impact of Admissions

- [48] The plaintiff, in submissions on this issue, made numerous arguments with respect to the impact on this ruling of the statements made by the defendant to his medical advisors or to his mother in 2011. Having reviewed the law, as set out above, I see no place in the analysis of admissibility of the similar fact evidence of M.F. for a consideration of those statements.
- [49] The statements attributed to the defendant have been admitted into evidence. They will be weighed at the conclusion of the trial with all of the other evidence. That will include consideration of what exactly is contained in the statements and any commonalities and differences as between what was in those statements, the viva voce evidence of the plaintiff, and the viva voce evidence of the defendant.

Conclusion

- [50] I would not admit into evidence the similar fact evidence of M.F. with respect to allegations of oral sex and of the incidents with the vacuum cleaner. I would similarly not admit into evidence the read-in evidence of the defendant with respect to the allegations of oral sex involving M.F.

"Veenstra J."

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Prepared on 26 October 2026 · Esheria