

CANADA / JUDGMENT

R. v. Ateyah

2026 ONCA 287

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Ateyah

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Judges

van Rensburg, Katherine; Paciocco, David M.; Wilson, Darla A.

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Ateyah, 2026 ONCA 287[1]

DATE: 20260421

DOCKET: COA-23-CR-1136

van Rensburg, Paciocco and Wilson JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Wameed Ateyah

Appellant

Scott Hutchison and Brandon Chung, for the appellant

Catherine Weiler and Holly Loubert, for the respondent

Heard: September 23, 2025

On appeal from the convictions entered by Justice Jill C. Cameron of the Superior Court of Justice, on September 22, 2023, with reasons reported at 2023 ONSC 5286.

Paciocco J.A. (dissenting in part):

I. OVERVIEW [1] Wameed Ateyah, a medical doctor, was found guilty after a judge-alone trial of having committed 16 counts of sexual assault and 1 count of sexual exploitation against 13 patients.[2] The offences all occurred during medical examinations Dr. Ateyah conducted in his small-town medical clinic, primarily between 2015 and 2018. He received a global sentence of nine years in jail, minus eight days of credit for five days of pre-trial custody. He is appealing all the convictions and asks for his sentence to be varied if any of those appeals succeed. His grounds of appeal relate to the trial judge's admission and use of cross-count similar fact evidence.

[2] In simple terms, pursuant to the similar fact evidence rule, evidence presented in support of one of the charges in a multi-count indictment may not be used by the Crown as evidence on another charge in that indictment unless it supports probative permissible inferences relating to that charge, and the cross-count use of the evidence is more probative than prejudicial. In this case the trial judge gave a universal ruling that cross-count use of the evidence on each count was admissible on all other counts as evidence that each of the other alleged events happened.[3] Given the use to which similar fact evidence was being put, its probative value depended on the improbability that the complainants would coincidentally and independently come up with similar testimony if it was not true.

[3] Dr. Ateyah argues on appeal that the trial judge erred in: (A) concluding that in the circumstances of the case there was “no danger” of prejudice in using the evidence across counts; (B) using counts she acquitted on as similar fact evidence; (C) finding that the allegations were sufficiently similar to support the universal ruling; and (D) discounting the risk that each account was not independent but rather tainted by other allegations or the product of collusion between complainants.[4]

- [4] As I will explain, there were problems with the trial judge's universal admissibility ruling relating to both her "sufficient similarity" and "collusion and tainting" reasoning, issues (C) and (D) in the appeal. However, the trial judge ultimately relied on cross-count evidence relating to only two of the convictions: one involving C.W. (Count 5) and one involving S.H. (Count 19). I am satisfied that she did not impermissibly use the cross-count evidence relating to the remaining 14 convicted counts and would therefore dismiss the appeals from those convictions.
- [5] However, I am persuaded that the reasoning errors the trial judge committed relating to tainting and collusion affected her finding of guilt on Count 5, relating to C.W. The conviction and sentence on that count must therefore be set aside. She also committed a similar error relating to one of the two sexual assault allegations supporting Count 19 involving S.H. Since the trial judge did not err relating to the other sexual assault finding supporting Count 19, the conviction stands but a modification to the sentence may be required, a point I address below.
- [6] I would therefore allow the appeal in part, by setting aside the conviction on Count 5 and ordering a new trial on only that count. I would set aside the sentence imposed on Count 5 of six months in jail to be served consecutively.
- [7] Before explaining the dispositions that I have arrived at, I will describe the general principles that apply. Doing so will give context to the summary of material facts that follows, as well as the ruling. I will address additional legal principles that apply to the issues on appeal as those issues are being analyzed.

II. GENERAL PRINCIPLES OF LAW A. The Prohibited Inference and Presumptive Inadmissibility

[8] It is a prohibited inference to reason based on evidence showing the bad or discreditable character of the accused that the accused is the kind of person to commit the criminal offence charged (the "prohibited inference"): *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 72. As Doherty J.A. explained in *R. v. Batte* (2000), 49 O.R. (3d) 321 (C.A.), at para. 100:

It is a fundamental tenet of our criminal justice system that persons are charged and tried based on specific allegations of misconduct. If an accused is to be convicted, it must be because the Crown has proved that allegation beyond a reasonable doubt and not because of the way the accused has lived the rest of his or her life. An accused must be tried for what he or she did and not for who he or she is.

- [9] The law guards against this prohibited inference in different ways in criminal trials depending upon whether the discreditable conduct evidence offered by the Crown is "extraneous" (i.e., unrelated to any of the charges before the court) or proved when establishing another charge in a multi-count indictment. In either case, the discreditable conduct evidence is "presumptively inadmissible": *Handy*, at para. 55; *R. v. Norris*, 2020 ONCA 847, 398 C.C.C. (3d) 1, at para. 23 (a multi-count indictment case). Therefore, in the case of extraneous bad character evidence, the evidence of prior discreditable conduct is not to be received into evidence during the prosecution unless an exception to the rule

applies. Evidence the Crown calls about the criminal conduct alleged in a count in a multi-count indictment can always be received and used with respect to that count, no matter how badly it reflects on the accused's character: *R. v. T.J.F.*, 2024 SCC 38, 497 D.L.R. (4th) 441, at para. 77. But that evidence is not admissible evidence relating to any other count, unless an exception applies.

B. The Similar Fact Evidence Rule [10] Handy remains the leading case on the admissibility exception of concern in this case – the similar fact evidence rule. Binnie J. explained the rule in Handy, at para. 55:

The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.

[11] I will describe the material components of the rule which arise in this case, beginning with the probative value inquiry.

1. Probative Value [12] There are two material preliminary limitations on the probative value assessment.

[13] First, probative value cannot rest in any case on the prohibited inference. Evidence which “shows only that the accused is the type of person likely to have committed the offence in question is inadmissible”: *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, at p. 730 (emphasis in original).

[14] Second, there is a general rule, subject to exceptions, that evidence of prior misconduct for which the accused has been acquitted cannot be used as similar fact evidence because of issue estoppel considerations: *Grdic v. The Queen*, [1985] 1 S.C.R. 810; *R. v. Verney* (1993), 87 C.C.C. (3d) 363 (Ont. C.A.). I will address this rule below, as it arises with respect to issue “B” in this case.

[15] Apart from these two rules, the probative value of proposed similar fact evidence is gauged by: (1) the strength of the evidence in proving that the similar fact incident occurred; (2) its cogency in supporting the inferences sought; and (3) its nexus to a material live issue in the proceeding: *R. v. Z.W.C.*, 2021 ONCA 116, 155 O.R. (3d) 129, at para. 98; *R. v. Ukabam*, 2024 SKCA 15, 434 C.C.C. (3d) 32, at para. 78.

[16] Consideration (1) requires a pre-admissibility finding that the similar fact evidence is reasonably capable of belief: Handy, at para. 134. This component of the probative value analysis is not at issue in this case.[5] Consideration (3) is not at play either as it was not contested that the issues the similar fact evidence was called to address were live issues in the case. This appeal turns on consideration (2), the cogency of the similar fact evidence in supporting the inferences sought.

[17] Since it is circumstantial evidence, the usefulness or cogency of similar fact evidence rests “entirely on the validity of the inferences it is said to support with respect to the matters in issue”: Handy, at para. 26. The validity of inferences is a matter of logic, not fixed rules.

- [18] Ordinarily, but not invariably, the cogency of similar fact evidence derives from the similarity between the evidence sought to be admitted or used and the allegation it is offered to prove.[6] Since it is a matter of logic, the degree of similarity needed to yield probative value varies and will depend upon the issue that the Crown is offering the evidence to prove: Handy, at para. 78; Norris, at para. 18. For example, where similar fact evidence is used to prove identity, “striking similarities” between the similar fact incident and the incident alleged in the charge in question are needed to satisfy the cogency inquiry: see *R. v. Arp*, [1998] 3 S.C.R. 339, at paras. 43-49; *Ukabam*, at para. 81. However, striking similarities are generally not required to give similar fact evidence its cogency where, as here, the cross-count use of the evidence is offered to prove that alleged acts happened: Norris, at para. 15; *R. v. S.S.*, 2025 ONCA 865, at para. 20. Although it can no doubt enhance the case for admission to show some “hallmark” or “calling card” behaviour, or some “highly distinctive” or “signature” act by the accused, this is not required on all issues and it is not required here: see *Ukabam*, at para. 80; *Neverson c. R.*, 2024 QCCA 519, at para. 58, leave to appeal refused, [2024] S.C.C.A. No. 255.
- [19] In Handy, at para. 82, Binnie J. set out a non-exhaustive list of general factors to consider where the cogency of similar fact evidence depends upon the similarities between the similar fact evidence and the charge under consideration. This is a helpful list of considerations, but given that cogency is a matter of logic, this list was never intended to operate as a legal rule or list of preconditions to be mechanistically addressed in every case: *R. v. Fiorino*, 2008 ONCA 568, 233 CCC (3d) 293, at para. 66; *Neverson*, at para. 13.
- [20] The general principles in Handy govern in cases involving sexual offence allegations against doctors involving their patients: see *R. v. C.D.*, 2023 ONCA 790, 93 C.R. (7th) 363, at para. 8. Because cogency is a matter of logic, which is situational, even in such cases there is no “categorical approach” and there are no special rules that apply: Norris, at para. 18.
- [21] Fairburn A.C.J.O. confirmed in Norris, at para. 17, that in cases such as this, where the cross-count evidence is being offered to prove that alleged acts happened, “the probative value of the evidence ... [lies] in the objective improbability of coincidence that more than one person (acting independently) would coincidentally give the same type of evidence”. This requires a two-part cogency analysis.
- [22] First, the trial judge must assess whether the counts are sufficiently similar such that it would be objectively improbable that one or more of them could be inaccurate allegations that coincidentally featured the same similarities (the “similarity requirement”). If the answer to the first inquiry is yes, the second cogency consideration is whether the complainants acted independently such that similarities identified in the first consideration are not compromised by collaboration between the complainants (the “independence requirement”). If the complainants did not act independently on a balance of probabilities, the objective improbability of coincidence needed to give the similarities probative value is undermined: *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, at para. 40. The law of similar fact evidence addresses this issue by inquiring whether the similarity between the evidence

and the allegation under consideration could be the product of intentional “collusion” between complainants to provide false allegations, or “inadvertent or unintentional tainting” through exposure by complainants to common suggestive information between them: see *R. v. F.(J.)* (2003), 177 C.C.C. (3d) 1 (Ont. C.A.), at para. 77; *R. v. Wilkinson*, 2017 ONCA 756, 356 C.C.C. (3d) 314, at paras. 37-39; and *Ukabam*, at paras. 157-58.

- [23] In cases where there is an “air of reality” on the evidence to the prospect that either or both forms of tainting may have occurred, a legal burden of proof is imposed on a trial Crown to disprove tainting on a balance of probabilities: *Handy*, at para. 112; *Shearing*, at para. 41. Whether the Crown has discharged this burden is a factual determination that does not require any specific kinds of questions to be asked, or any specific kinds of evidence to be presented. The choice of evidence to lead is a matter of prosecutorial discretion: *Norris*, at para. 36. But if that burden is not satisfied either because the Crown has made improvident tactical decisions or has been unable to marshal adequate evidence to show that the accounts are independent on a balance of probabilities, the similar fact evidence, which is presumptively inadmissible, cannot be admitted or used count-to-count.
2. Potential Prejudice [24] Even where the probative value of similar fact evidence is established by demonstrating permissible probative inferences relating to live issues in the case, similar fact evidence will not be admissible across counts unless the probative value of using the evidence across counts “outweighs its potential prejudice”: *Handy*, at para. 55. Prejudice has been helpfully organized into two non-exclusive categories – moral prejudice and reasoning prejudice: *Handy*, at paras. 139-47. I will distinguish between them when analyzing issue “A”, relating to the trial judge’s finding that there was no danger of prejudice in using the evidence across all counts.
3. Balancing and the Standard of Review [25] Even though admissibility is a question of law ordinarily reviewed on a standard of correctness, the exercise of balancing the probative value of similar fact evidence against its potential prejudice is entitled to “substantial deference”: *Handy*, at para. 153; *Norris*, at para. 26. I take the deference requirement to be applicable to the assessments of the probative value of the evidence and its potential for prejudice, and not just the ultimate balancing. Unless the determinations made on these issues are unreasonable or undermined by legal error or a misapprehension of material evidence, appellate courts must refrain from interfering: *Wilkinson*, at para. 27, citing *R. v. James* (2006), 84 O.R. (3d) 227 (C.A.), at para. 33; *R. v. Riley*, 2017 ONCA 650, 137 O.R. (3d) 1, at para. 157, leave to appeal refused, [2018] S.C.C.A. No. 216 (*Atkins*), and [2019] S.C.C.A. No. 412 (*Riley*).

III. MATERIAL FACTS [26] The chronology of events begins with the allegations made by C.W. On October 3, 2016, C.W., who was 51 years of age at the time, consulted Dr. Ateyah with lower back pain near her kidneys. She alleged that during her examination he told her that there was something he needed to check and thought it could be “really serious”. C.W. testified that Dr. Ateyah put his ungloved hand under her pants and underwear and pushed down on her vagina and labia, a procedure that was not medically indicated.

[27] Three days later, on October 6, 2016, C.W. submitted an online complaint to the College of Physicians and Surgeons of Ontario (“CPSO”). This was the first known formal complaint made against Dr. Ateyah. That complaint resulted in a CPSO investigation and discipline hearing, as well as practice conditions being imposed on Dr. Ateyah, including that effective May 30, 2017, Dr. Ateyah could not be alone with female patients. He was to post signage in his office informing readers of the condition.

[28] S.F. alleged that on several occasions between 2008 and 2017, Dr. Ateyah performed inappropriate or unnecessary breast and genital examinations on her and performed three pap tests for cervical cancer after she had undergone a complete hysterectomy removing her cervix. She also complained to the CPSO and gave a formal statement to CPSO investigators on March 12, 2018. In cross-examination, she agreed that her complaint was not referred to the formal Discipline Committee, but instead to the Inquiries, Complaints and Reports Committee, which rendered a decision on April 8, 2020.

[29] The parties appear to agree that by May 2017 (i.e., before S.F. made her complaint to the CPSO), a “Notice of Hearing” document which included a summary of C.W.’s allegations against Dr. Ateyah, was posted on the CPSO website. It also appears to be common ground that information relating to Dr. Ateyah’s practice conditions was posted on the CPSO website at that time, as well.

[30] Beyond this, only general testimony was provided throughout the 24-day trial relating to the contents of the CPSO website from time to time. Neither the relevant pages of the CPSO website nor copies of any of the linked documents found on the website were put into evidence. However, the witnesses’ testimony demonstrated that, at a minimum, prior to the other complainants contacting the police, the CPSO website contained information about allegations made by a “Patient A” and “Patient B”. The testimony of one of the complainants, L.H., confirmed that “decisions that had been made about [Dr. Ateyah] in the past with respect to any complaints” were available on Dr. Ateyah’s profile page on the CPSO website. A different complainant, S.T., testified that she learned from the CPSO website that “two people were giving a case, like a trial against this College thing ... and that those two people, whatever they did say and the outcome of it, of the two cases held within the College”. Another complainant, A.R., testified that an internet search of Dr. Ateyah’s name returned at least one result of a PDF document describing the allegations by Patient A and Patient B against Dr. Ateyah, suggesting that information was available via a general internet search without the searcher needing to navigate through Dr. Ateyah’s profile on the CPSO website.

- [31] C.W. agreed in cross-examination that the Discipline Committee decision related to her complaint contained a detailed summary of both her and Dr. Ateyah's testimony from the CPSO hearing, as well as majority and dissenting reasons of the Committee. C.W. also agreed in cross-examination that she was identified as Patient A on the CPSO website, and the parties proceeded on this basis. No evidence was given as to the identity of Patient B. The parties proceeded on the basis that Patient B was S.F., but this inference is problematic given that S.F.'s complaint was never referred to the CPSO Discipline Committee, and there was evidence that details of a CPSO Discipline Committee decision may have been included on the CPSO website relating to Patient B.
- [32] On August 13, 2020, more than two years after S.F. complained about Dr. Ateyah to the CPSO, she made an online police complaint. She was interviewed by the police on September 1, 2020. Prior to September 16, 2020, another complainant, whose allegation was not prosecuted or presented as similar fact evidence, made an additional police complaint. One or both complaints led to Dr. Ateyah's arrest. On September 16, 2020, the police issued a news release announcing his arrest and appealing for other victims to contact police. The news release was widely covered in community news outlets in the Greater Toronto Area and was shared broadly on social media, including in a local Facebook group. Nine of the complainants whose allegations were the subject of this trial, including C.W., made police complaints in the following two weeks, and the five remaining complainants in this trial came forward in the weeks after a second police news release on October 2, 2020. Copies of the police news releases and media reports were not put into evidence but were referenced by several of the complainants in their testimony.
- [33] There were therefore 15 complainants included in the 24-count indictment. The Crown's cross-count similar fact evidence application related to 14 of those complainants and 18 counts in total. S.F. was not included in the application by the time the trial judge rendered her admissibility decision because, by that point, the Crown had already invited the trial judge to acquit Dr. Ateyah on the charges relating to S.F. due to concerns about S.F.'s reliability. The trial judge did not mention S.F.'s evidence in her analysis of the similar fact evidence and spoke in her ruling of the "14 patients" who shared the "compelling similarity" of "concocted reasons to do non-medically necessary examinations or incorrect examinations of the breasts and genitals".
- [34] As will become apparent from my reasoning below, I need not review the testimony of the allegations made by the remaining complainants in detail. Suffice it to say all the complainants were female patients seen by Dr. Ateyah at his medical clinic when staff or others were nearby, and all the allegations included intimate medical examinations that were not necessary or medically legitimate. The trial judge relied upon the testimony of the Crown's expert witness in concluding that the medical examinations were unnecessary or conducted improperly. The trial judge also found that in the case of all the convicted counts, Dr. Ateyah concocted reasons to do the non-medically necessary or incorrect examinations of their breasts or genitals. And she found that he created false medical reports about what

had transpired with respect to several of the complainants during their medical visits.

IV. THE RULING [35] The Crown brought an application for a universal ruling permitting the evidence on each count to be used as similar fact evidence across all other counts. Since the proposed similar fact evidence was admissible in any event to prove the counts to which it pertained, the trial proceeded as a blended voir dire in which the evidence and arguments on both the similar fact admissibility application and the charges themselves would be presented together. Following the trial, the trial judge gave her similar fact evidence ruling and her ultimate ruling on the charges in the same reasons for decision, as she was entitled to do. Appropriately, in para. 216, she resolved the admissibility issue before going on to determine Dr. Ateyah's guilt. This was the correct way to proceed because determinations of guilt are to be made only on admissible evidence. It is therefore necessary to resolve outstanding issues of admissibility before adjudicating the allegations. These issues cannot be dealt with simultaneously since they are distinct legal questions, turning on their own legal tests and standards.

[36] Although Dr. Ateyah appeared to concede the admissibility of some of the similar fact evidence in an isolated passage in his written submissions on the admissibility issue,[7] the parties, and the trial judge, proceeded as if the admissibility of all the similar fact evidence was in issue. This, too, was the appropriate way to proceed, since in the balance of his written submissions, and in his oral submissions that followed, Dr. Ateyah's trial counsel advanced arguments that, if successful, would prevent the use of any of the proposed similar fact evidence.[8] Not surprisingly given Dr. Ateyah's overall position, the trial Crown did not rely on any concessions of admissibility in its submissions. In her admissibility decision, the trial judge referred to Dr. Ateyah's trial counsel's concession of sufficient similarity only when addressing the sufficiency requirement. She did not rely on any concessions made by Dr. Ateyah when resolving the collusion and tainting issue,[9] or when delivering her admissibility ruling. Given the way the submissions of both parties developed, the trial judge was correct to treat admissibility as an open question on all the proposed similar fact evidence and in my view, that is how it must be treated on appeal.

[37] As I have indicated, in her admissibility ruling the trial judge accepted the Crown's universal application, permitting the evidence on all counts to be used as similar fact evidence on all other counts. With respect to the "similarity requirement" she found the similar fact evidence to be sufficiently similar that "the allegations with respect to each complainant may be used as evidence in support of a finding with respect to the others". In reviewing sufficient similarity, the trial judge identified six categories of distinctly similar complaints, the first four of which were the clusters that Dr. Ateyah's trial counsel conceded to be sufficiently similar. Some complainants fell into more than one category. The six categories identified by the trial judge include:

- (a) C.G., J.H.(2), T.R. and S.T. reported that Dr. Ateyah instructed them to go onto their side or stomach for an internal examination without a chaperone;

- (b) E.B., S.H. and S.T. reported that Dr. Ateyah conducted a pap test with a chaperone and then came back into the room without a chaperone to do an internal examination;
- (c) K.S., L.H., M.R., A.R. and C.W. all described vaginal exams where Dr. Ateyah did not wear gloves; and
- (d) C.G. and S.H. reported that Dr. Ateyah put his finger in and out of their vaginas multiple times.

[...]

[(e)] C.G., E.G. and S.H. all alleged that Dr. Ateyah conducted breast exams while they were sitting up and he had them open or lift up their top then touched their breasts inappropriately.

[(f)] J.H.(1), E.B., K.S., L.H., C.G., A.R. and C.W. all reported that they were not offered privacy to change or given draping while being asked to remove their clothing.

- [38] The trial judge also noted that the alleged concoction of reasons to do non-medically necessary or incorrect examinations, which she found to be common across all the allegations, “is a very compelling similarity between all of [the complainants] in the sense that it strains the boundaries of logic and common sense that this could be a coincidence”. She found that across all counts, the evidence showed a relevant “situation specific behaviour” and “observed pattern of propensity operating in a closely defined and circumscribed context”, relying broadly on the language in Handy, at para. 90.
- [39] With respect to the “independence requirement”, the trial judge found that “there is an air of reality to the possibility of tainting or collusion such that the Crown must disprove it on a balance of probabilities”, but that the Crown had satisfied that burden.
- [40] The trial judge also engaged in the required balancing and found that the probative value of the cross-count use of the evidence outweighed the risk of prejudice in using it across counts.
- [41] After allowing the cross-count similar fact evidence application, the trial judge engaged in a detailed assessment of the credibility and reliability of the evidence before her. She did not believe the exculpatory testimony of Dr. Ateyah, nor was she left in doubt by it. She found him to be neither credible nor reliable. In considering whether the charges had been proved beyond a reasonable doubt on the evidence she accepted, the trial judge found the testimony of all but two of the complainants – C.W. and S.H. – to be credible and reliable enough to support convictions without considering the similar fact evidence.[10] In cases where she convicted on this basis, she went on to explain how the redundant cross-count evidence would also have supported the convictions. As I will explain, in my view this feature of her decision is critical in my decision to dismiss the appeals relating to 14 of the 16 convicted counts.

V. THE ISSUES [42] For convenience, I repeat the issues that arise from Dr. Ateyah's grounds of appeal:

- (a) Did the trial judge err by concluding that there was "no danger" of prejudice in using the evidence across counts?
- (b) Did the trial judge err in using evidence on counts on which Dr. Ateyah was acquitted as similar fact evidence?
- (c) Did the trial judge err in finding sufficient similarity to support the universal ruling?
- (d) Did the trial judge err by discounting the risk that each account was not independent but rather tainted by other allegations or the product of collusion between complainants?

VI. ANALYSIS A. Did the Trial Judge Err by Concluding That There Was "No Danger" of Prejudice in Using the Evidence Across Counts? [43] Dr. Ateyah argues that the trial judge erred in concluding that there was no danger of prejudice in permitting the cross-count use of the allegations before her. In the impugned passage of her reasons for decision she said:

The prejudicial effect of the admission of the similar fact evidence does not outweigh its probative value. As a judge sitting without a jury there is no danger that I will use the evidence to engage in inappropriate propensity reasoning. The risk of reasoning prejudice is not engaged because all of the allegations were before me on one indictment and this was a judge alone trial.

[44] Dr. Ateyah submits that there is always a risk of prejudice when similar fact evidence is admitted, including across counts in a judge-alone trial, and that the trial judge's mistaken belief that there was "no danger" of prejudice amounts to a failure to caution herself. In his view, this failure to self-direct about the risk of prejudice undermines not only her conclusion on the admissibility of the similar fact evidence, but her credibility evaluations as well.

[45] As I will explain, I agree that the risk of prejudice is never eliminated completely, even in multi-count indictment cases, and that it would be better for judges not to proceed as if there is no risk of prejudice. I also agree that it is an error for a trial judge to permit cross-count use in multi-count indictment cases without considering the risk of prejudice, notwithstanding that the risk may be attenuated: *R. v. MacCormack*, 2009 ONCA 72, 241 C.C.C. (3d) 516, at para. 56; *R. v. Tsigirlash*, 2019 ONCA 650, at paras. 38-39, 43. But I would not find the trial judge's treatment of prejudice to constitute a reversible error, and I would dismiss this ground of appeal.

[46] First, I do not accept the submission that the trial judge's conclusion that there was no risk of prejudice amounted to a failure by her to caution herself or self-direct about the risk of prejudice. Quite the contrary. Before coming to this conclusion, she did all of the following: she said explicitly "I am mindful of the danger of propensity reasoning"; she described the prohibited bad character inference; she recognized the need to consider prejudice; and she provided a detailed and accurate description of both moral and reasoning prejudice. The

trial judge was clearly aware of the risks she had to consider and turned her mind to them before concluding that there was no risk of prejudice in this case. When her reasons are read in their entirety, as they must be, she was in effect saying, “I know the risks of prejudice, I have considered whether those risks might materialize in this case, and I conclude that they will not”. The trial judge did not fail to self-direct or caution herself.

- [47] The question remains whether, notwithstanding the trial judge’s awareness and consideration of the risks, it was nonetheless an error for her to conclude that there was no danger of prejudice. I note, as the Crown pointed out, that the trial judge whose similar fact evidence decision was upheld by the Supreme Court of Canada in *R. v. Jesse*, 2012 SCC 21, [2012] 1 S.C.R. 716, had also concluded there was no moral or reasoning prejudice in that case: *Jesse*, at paras. 16-17. However, I do not see this case as dispositive on the issue of whether it is permissible for trial judges to reach such a conclusion. The issues in the Supreme Court of Canada appeal in *Jesse* had to do with the probative value of the similar fact evidence and the entitlement of the accused to challenge the similar fact allegation where it has been confirmed by a prior conviction, not the trial judge’s prejudice assessment. Nonetheless, I am not persuaded that in the circumstances of this case that the trial judge’s conclusion that there was no danger of prejudice undermined her decision to admit the similar fact evidence, given how attenuated the risk of prejudice was. I will explain by closely examining each such risk.
1. Moral Prejudice [48] The primary risk of moral prejudice where discreditable conduct evidence is before the decision-maker is that they will draw the prohibited inference by concluding that, given the discreditable character the similar fact evidence reveals, the accused is a bad person likely to be guilty of the offence charged. Relatedly, there is a “human tendency to ‘punish the accused for past misconduct by finding that accused guilty of the offence charged’”, even in the face of a reasonable doubt: *T.J.F.*, at para. 76, citing *R. v. D. (L.E.)*, [1989] 2 S.C.R. 111, at p. 128. These moral prejudice risks are materially reduced in judge-alone trials if the trial judge has conducted a proper assessment of the probative value of the evidence and articulated the limited use they are permitted to make of the evidence: see *R. v. Pilgrim*, 2017 ONCA 309, 347 C.C.C. (3d) 141, at para. 60. In engaging in that inquiry, a trial judge will have identified permissible lines of reasoning that do not rely upon prohibited reasoning. The fact that the trial judge in this case went through that exercise, recognized the prohibited inference, and then identified other lines of reasoning that she proposed to use materially reduced the risk that she would engage in morally prejudicial reasoning.
- [49] Moreover, the risks of moral prejudice that I have identified are present in any multi-count indictment case, even where the cross-count use of similar fact evidence is not permitted. This is because even if the use of similar fact evidence across counts is not requested or is denied, the Crown can prove all the allegations made in the indictment no matter how badly they reflect on the character of the accused: *T.J.F.*, at para. 77. Therefore, unlike in applications for the admission of extraneous similar fact evidence that the trier of fact

would not hear without an admissibility ruling, in a multi-count indictment case the trier of fact will inevitably learn about charged discreditable allegations and will be exposed to the risk of engaging moral prejudice in their reasoning in any event. This is why jurors are ordinarily directed not to rely on the prohibited inference in all multi-count indictment cases, even where the cross-count use of the evidence is not permitted. That being so, the material concern in determining cross-count admissibility in a multi-count indictment case is not simply whether there is a risk of bad character reasoning, but whether granting the similar fact evidence application will add to or aggravate the risk of bad character reasoning that already exists. I recognize that the cross-count use of allegations may result in repeated attention being given to each discreditable allegation throughout the reasoning process, but in my view any increased risk of moral prejudice that this would create would be marginal if not minuscule: see *R. v. T.B.*, 2009 ONCA 177, 95 O.R. (3d) 21, at paras. 33-34.

- [50] I have considered Dr. Ateyah's submission that the risk of moral prejudice was enhanced in this case because some of the allegations were more serious and morally objectionable than others and would therefore taint the assessment of the less inflammatory allegations with moral prejudice. I do not agree with this submission. I appreciate that there were degrees of invasiveness of the touching alleged, but this is not a case where particularly revolting or inflammatory conduct was grouped with comparatively much less offensive conduct: see *D. (L.E.)*, at p. 124; *R. v. Thomas* (2004), 72 O.R. (3d) 401 (C.A.), at para. 36. Therefore, this is not a case where the nature of the allegations alone significantly elevates the risk that moral prejudice will taint the reasoning on some of the counts.
- [51] Having said this, it must be recognized that the reason moral prejudice poses a risk is that it represents an emotional rather than rational response to discreditable conduct, which arises naturally and understandably from the revulsion the allegations evoke. This is primarily why I am skeptical of a trial judge's claim that there is "no danger" of moral prejudice. I echo the comment made by the panel in *R. v. Villeda*, 2011 ABCA 85, 502 A.R. 83, at para. 18, as follows:

Human nature and its attendant weaknesses and vulnerabilities may, on occasion, intrude upon the most rigorous and conscientious fact-finding. The spectre of moral or reasoning prejudice is always a concern regardless of who is sitting in judgment of the guilt or innocence of an accused.

- [52] It follows that a trier of fact must always bear in mind that they are to confine themselves to the evidence and proper inferences, even after admitting similar fact evidence, and they must remain mindful of their obligation to resist responding to the evidence emotionally. Still, given the fact that the trial judge turned her mind to appropriate inferences, identified the impermissible lines of reasoning, and was going to be exposed to the multi-count allegations in any event, I am persuaded that the risk of moral prejudice was so attenuated that her overstated claim of "no danger" did not adversely affect her admissibility determination. In my view, her conclusion that there was "no danger" of moral prejudice did not bring her decision to permit the cross-count use of the evidence into error.

2. Reasoning Prejudice [53] I come to the same conclusion with respect to reasoning prejudice, which is also attenuated in the circumstances of this case almost to the vanishing point: see MacCormack, at para. 69. The primary danger of reasoning prejudice is that the trier of fact's attention will be "deflected from the main purpose of their deliberations which is the transaction charged": D. (L.E.), at p. 128. This "[d]istract[ion] can take different forms": Handy, at para. 145. The admission of similar fact evidence can complicate trials, consume undue time and resources, and/or tax the resources and focus of the defence, which may face the tactical need to try to defend not only the offences charged, but also the similar fact allegations: Handy, at paras. 144-46; Shearing, at paras. 68-70. These risks can be particularly pressing where extraneous bad character evidence is being offered. However, they are far less pressing in cross-count similar fact evidence applications given that in a multi-count indictment case, regardless of whether the similar fact application is granted, the trier of fact is going to learn about each allegation in detail and the accused will have to be prepared to answer each allegation accordingly. That is the case here. In my view, given how attenuated the risk of reasoning prejudice was, the trial judge's conclusion that there was no danger of reasoning prejudice is not a reversible error.

[54] Similarly, I am not persuaded that the trial judge's conclusion that the risk of reasoning prejudice was "not engaged" tainted her evaluation of the credibility of the complainants. O'Bonsawin J., writing for the majority, affirmed in T.J.F. that "[w]hen an appellate court reviews reasons for errors of law ... [i]t must presume that a trial judge 'know[s] the law ... and deal[s] competently with issues of fact': para. 47, citing R. v. Sheppard, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 32. I see no basis in this case for concluding otherwise, and there is no foundation for accepting Dr. Ateyah's submission that the trial judge's reasoning may have been "silently infected" by a mistaken belief that "she is immune" from the risks of prejudice. I have already described how low those risks are in the circumstances of this case. Moreover, the trial judge focused her analysis on the credibility and reliability of the alleged victim in each count when deciding whether to convict on that count. Indeed, she made clear that she believed all the complainants, save for two of them (C.W. and S.H.) without the need to rely on the cross-count evidence. Absent indications to the contrary in the decision, of which there are none, we must accept that the trial judge's explanation for her decision is faithful to the reasoning process she engaged in.

[55] I would therefore dismiss this ground of appeal.

B. Did the Trial Judge Err in Using Evidence on Counts on Which Dr. Ateyah Was Acquitted as Similar Fact Evidence? [56] The trial judge acquitted Dr. Ateyah of counts involving S.F. and A.Z. Although he did not feature it in his factum, Dr. Ateyah argued before us that the trial judge erred in relying on their evidence as similar fact evidence, given that he was acquitted of those allegations. I do not agree. As I explained above in para. 33, the trial judge did not rely on S.F.'s testimony as similar fact evidence. Therefore, no such error could possibly have occurred relating to S.F.'s acquitted counts. Although the trial judge did find that A.Z.'s testimony on a count on which Dr. Ateyah was ultimately acquitted was admissible as similar fact evidence, she did not

err in doing so. The law allows this to be done in multi-count indictments as long as that evidence is not rejected. As I will explain, although the trial judge was left in reasonable doubt by A.Z.'s evidence, she did not reject it.

[57] The general bar against relying on allegations of misconduct for which the accused has been acquitted as similar fact evidence is subject to exceptions. The most significant exception is that this rule “has no application where the alleged similar acts are the subject of a multi-count indictment”: *Arp*, at para. 79. The general bar therefore operates solely in subsequent trials, and not during the proceeding where the acquittal is ordered. The reason for the exception is that the general bar is based on estoppel considerations arising from the earlier acquittal. In the case of multi-count indictments, the decision to admit the similar fact evidence is made before the acquittals are rendered, so no question of issue estoppel arises. Moreover, there is nothing unfair or illogical in having a reasonable doubt about whether an allegation occurred, thereby necessitating an acquittal, yet finding the evidence called in support of that charge is reliable enough to serve as similar fact evidence: *Arp*, at para. 79; *R. v. Huerta*, 2020 ONCA 59, 385 C.C.C. (3d) 481, at para. 67.

[58] That said, a trial judge cannot rely on evidence they have rejected as similar fact evidence. Therefore, a trier of fact should instruct themselves in a multi-count indictment case not to rely on evidence that they have rejected: *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at para. 72. Although the trial judge did not give this self-direction in this case, she did not have to do so, since she did not “reject” A.Z.'s evidence. The trial judge found that Dr. Ateyah “probably” did use A.Z.'s family history of breast cancer to offer a breast exam when she did not attend the clinic for that purpose, but the trial judge was left in a reasonable doubt by A.Z.'s absence of recollection of the circumstances leading up to the exam. The trial judge committed no error arising out of the fact that the appellant was ultimately acquitted of the count involving A.Z.

[59] Finally, even if such an error had occurred, it would have been harmless in this case. On the two counts for which the trial judge relied on cross-count similar fact evidence, relating to C.W. and S.H., she identified the cross-count evidence she was relying on. In neither case did she use the evidence provided by S.F. or A.Z. for that purpose.

[60] I would therefore dismiss this ground of appeal.

C. Did the Trial Judge Err in Finding Sufficient Similarity to Support the Universal Ruling? [61] Dr. Ateyah's trial counsel conceded that cross-count reasoning was admissible within four identified clusters of cases, but not across all counts. The trial judge disagreed and ruled that cross-count use of the evidence on each count was admissible on all other counts as evidence that each of the other alleged events happened (the “universal ruling”). Dr. Ateyah argued before us that the trial judge erred in making this universal admissibility ruling because there are insufficient similarities between each one of the counts to support it. I disagree. Although the trial judge committed two errors of logic in her reasoning that I detail below, she did not err in finding similarities between the accounts to be sufficient and I would not interfere with this conclusion.

1. The Universal Ruling [62] The degree of similarity required to support the admission of similar fact evidence depends on the purpose for which the evidence is sought. Here, the trial judge concluded that “[d]istinctive similarities in [the complainants’] versions of events”, which she later found to be present, “would enhance the truth-seeking function of the Court” on three issues: (1) “proving the acts occurred in the manner described”; (2) “assessing the credibility of the complainants”; and (3) “rebutting the assertion that the evidence has been tainted by media or concocted as a means to support other women”.
- [63] The trial judge was correct in identifying issues (1) and (2) as appropriate avenues for admission. As I have explained, in the absence of tainting or collusion, sufficient similarities between counts can operate as proof that the acts occurred, if they support the inference that it is unlikely that different complainants would independently provide such similar accounts if they did not in fact occur. If this inference is available, it in turn provides a basis for assessing the credibility of the accounts the witness has given.
- [64] The first error of logic the trial judge made was in identifying issue (3) as a basis for the admission of the similar fact evidence. The existence of similarities between witness accounts cannot logically rebut the prospect of tainting by media exposure or concoction. On the contrary, the material tainting concern is that media exposure or concoction can generate false similarities between witness accounts. Identifying similarities that ex hypothesi may exist because of tainting simply cannot rebut the risk of tainting. The trial judge should not have found the similar fact evidence to be admissible for this third purpose. Since this ground of admission was not further mentioned by the trial judge in her analysis and was a redundant basis for admission, this reasoning error was not an overriding one.
- [65] A second logical error occurred when the trial judge relied on similarities within clusters of counts as support for her conclusion that the evidence of each complainant was sufficiently similar to the evidence of all the other complainants to be admissible. Logically, the similarities within distinct clusters within a class cannot assist in showing that all allegations across the class are sufficiently similar. To support a universal ruling, the evidence of each and every complainant must be sufficiently similar to the evidence of every other complainant to make it unlikely that the similarities between those counts could be coincidental. To make the point in simple terms, if there were important similarities between two counts in a three-count indictment this may well support a ruling permitting the two counts to be used as evidence across those two counts. On the other hand, in no way can the similarities between the two counts justify using that evidence to prove the third count, which does not share the similarities.

- [66] Relatedly, in support of her ruling the trial judge also relied on the alleged creation of false or inaccurate medical records relating to the complainants' clinic visits, a feature applicable to several, but not all, of the allegations. The fact that false records were created relating to several of the visits is logically incapable of supporting similar fact admissibility on counts where there is no allegation that medical records were falsified.
- [67] Although it is a laborious task, a trial judge faced with a comprehensive cross-count similar fact evidence application in a multi-count indictment (as in this case) is obliged to consider each allegation in isolation, relative to each other allegation in isolation, to ensure that only allegations that are sufficiently similar relative to one another are used in supporting each other. Where there are distinct similarities between some counts but not others, those similarities can be relied upon between the counts which share them, but not when adjudicating the counts that do not. The trial judge did not follow this proper chain of reasoning, but this reasoning error was not an overriding one. The heart of her analysis is that each of the allegations were sufficiently similar in that they each described non-medically necessary or incorrect examinations, performed based on concocted reasons.
- [68] Dr. Ateyah strongly objected to this finding, arguing that the similarities across all counts are too generic to meet the standard of sufficient similarity. I do not agree. Whether similarities are too generic cannot be assessed in the abstract. This is to be judged according to whether the similarities are sufficient to support a probative inference that assists in establishing the material issue they are relied upon to prove. In this case, I agree with the trial judge that the evidence between counts[11] is sufficiently similar to provide cogent support for an inference that those similarities are unlikely to be the product of coincidence, which is an inference that does not require striking similarity to be available: Norris, at para. 15.
- [69] I recognize that some of the features, taken in isolation, are generic in the sense that they would necessarily apply in almost any improper touching allegation alleged against a physician by a patient. These features include: (1) all the allegations arose "in the context of the doctor-patient relationship"; (2) all the allegations involved medical examinations which were "not necessary nor medically legitimate" or "incorrect"; (3) all the allegations arose "in the course of medical examinations"; and (4) all the alleged acts took place "when staff or others [were] nearby".
- [70] Taken in isolation, similarities (1) and (2) would occur in every alleged sexual assault by a physician on a patient, since the doctor-patient relationship exists in all doctor-patient interactions, and there would be no sexual assault if the examinations were necessary, medically legitimate, and performed correctly (assuming, of course, that consent was provided). Meanwhile, similarities (3) and (4) are generic in the sense that for physicians, the opportunity for sexual abuse tends to occur during medical examinations, and it would be uncommon for there not to be staff or others nearby when the patient is in the examination room with a doctor at the doctor's place of practice. These contextual features are therefore unimpressive as similarities that can remove the improbability of coincidence. That said, each of these features provide material context to the allegations that must be

recognized in examining the sufficiency of the similarities as a whole. Notably, it was within this broader context that the trial judge made her key finding that for each alleged count, the female complainants not only alleged Dr. Ateyah sexually touched their breasts or genitals during medical examinations, but also that Dr. Ateyah offered “concocted reasons” to justify the touching in each case.[12]

- [71] In my view, this overall pattern of conduct – indicated by the nature of the relationship, the broadly similar form of sexual misconduct alleged, and Dr. Ateyah’s distinctive practice of creating a medical pretence for the improper touching – is sufficiently similar that it reduces the prospect that any of the core allegations which were being made by the complainants is an inaccurate or false account of what happened. This is enough to give the proposed similar fact evidence permissible probative value, as the trial judge found.
- [72] The similarities I have identified are not undermined by the acknowledged dissimilarities in the alleged touching. Given the nature of doctor-patient relationships, in cases where the accused is a physician the required degree of similarity can come as a matter of logic from the “‘force of similar circumstances’ ... rather than the similarity in conduct”: Ukabam, at para. 112 (emphasis in original; citations omitted). This is such a case.
- [73] Moreover, it is my view that the number of occurrences being alleged materially enhances the cogency of the inference of an unlikelihood of coincidence: see Handy, at para. 82. To be clear, the simple fact that multiple complainants allege criminal conduct by the same accused is not enough to warrant admission of similar fact evidence, since such reasoning standing alone would invite prohibited reasoning. It would open the door, for example, to using the past criminal record of any recidivist to support their prosecution on a kind of offence they have previously been convicted of committing, which is not permissible. But where multiple counts are sufficiently similar that they invite permissible inferences, as in this case, it stands to reason that the more such allegations are made, the more probative the body of similar fact evidence will be: see Batte, at para. 106. In this case, there were at least 13 complainants making similar allegations, not 2 or 3.
2. The Ultimate Reasoning [74] Despite the breadth of her admissibility ruling, the trial judge did not rely on the similar fact evidence she admitted in convicting Dr. Ateyah on 14 of the 16 convicted counts. As noted, in each of those cases she specifically said that she was finding Dr. Ateyah guilty without relying on the cross-count evidence.
- [75] When the trial judge went on to engage in the redundant process of describing how she would have used the similar fact evidence in each of those cases had she needed to rely upon it, she did not apply the universal ruling, either. She relied only on cross-count evidence that was either appropriately conceded by Dr. Ateyah’s trial counsel to be sufficiently similar within specific clusters or select evidence that contained additional strikingly similar details between the allegations.

[76] Finally, the trial judge did not employ the universal ruling or rely on A.Z.'s testimony in the two cases where she did rely upon cross-count evidence in deciding that the allegations had been proven beyond a reasonable doubt. Specifically:

- In convicting Dr. Ateyah of sexually assaulting C.W., the trial judge relied solely upon the cross-count testimony of five select complainants (J.H.(1), K.S., L.H., M.R., and E.B.) who, like C.W., were part of a “pattern of behaviour where a patient presents for a reason unrelated to their gynecological health and Dr. Ateyah asks them to undo their pants and puts his hand over or under their underwear (or both) and presses on their vagina”.
- In convicting Dr. Ateyah of sexually assaulting S.H., the trial judge relied solely upon the cross-count testimony of two select complainants (E.G. and C.G.) who, like S.H., reported similar specific experiences of inappropriate breast examinations while seated.

[77] Since the trial judge did not rely on her universal ruling in resolving the allegations before her, even if it would have been wrong to make that ruling, I would not have allowed this ground of appeal.

[78] I would therefore dismiss this ground of appeal.

D. Did the Trial Judge Err by Discounting the Risk That Each Account Was Not Independent but Rather Tainted by Other Allegations or the Product of Collusion Between Complainants? [79] As I have explained, the probative value of the cross-count use of complainant testimony depended entirely upon their accounts being independent. The trial judge was “satisfied that there [was] an air of reality to the possibility of tainting or collusion such that the Crown must disprove it on a balance of probabilities”. She went on to conclude that the Crown discharged its onus. Submissions made by Dr. Ateyah relating to the independence requirement engage four distinct issues that are best described and addressed as follows: (1) intentional collusion; (2) unintentional or inadvertent tainting; (3) the risk of concocted supportive allegations; and (4) collusion and tainting and the credibility analysis. I would find no errors relating to issues 1, 3 and 4. I would find that the trial judge erred in her assessment of issue 2, unintentional or inadvertent tainting. As I will explain, this error affects only the convictions on Count 5 (relating to C.W.) in whole and Count 19 (relating to S.H.) in part.

1. Intentional Collusion [80] In my view, except for two of the complainants, T.R. and A.R., who are mother and daughter, there was no air of reality to the prospect of intentional collusion between complainants, making it unnecessary for the trial judge to impose the burden of rebuttal on the Crown relating to that issue. There was no evidence that any of the other complainants knew each other or had communicated with each other in any way that could give rise to an air of reality that two or more of them conspired to give false testimony.

[81] With respect to T.R. and A.R., I take no issue with the trial judge's conclusion that there was an air of reality to the prospect of intentional collusion or with her finding that the Crown had met its burden of rebutting collusion between them by identifying the differences between their core allegations. Although the accounts provided by the two complainants

shared the similarities that I have described above in analyzing issue “C”, T.R. and A.R. each alleged different pretences for the touching that occurred while they were in different postures, and each account contained striking features not shared between them. T.R. alleged that after the chaperone left, Dr. Ateyah said he wanted to check one more thing and he performed an internal examination while she was on her stomach with her hips raised. A.R. alleged that Dr. Ateyah conducted an internal examination while she was lying on her back without a chaperone ever present, and that Dr. Ateyah was not wearing gloves and did not wash his hands afterwards. In my view, such differences provided the trial judge with a reasonable basis for finding that the Crown had met its onus of rebutting the risk of collusion.

[82] I therefore see no error in the trial judge’s decision to reject the prospect of intentional collusion.

2. Unintentional or Inadvertent Tainting [83] The trial judge did not offer a complainant-by-complainant analysis to explain her conclusion that the Crown had disproved unintentional or inadvertent tainting on a balance of probabilities. She provided one generic explanation, applicable to all 14 complainants whose evidence formed part of the similar fact application, for finding that the Crown met its burden, and then ruled the evidence to be admissible. She said:

The media reports did not include the specifics of the allegations, just that Dr. Ateyah was charged with sexually assaulting numerous female patients in his Schomberg clinic. Evidence as to what specific information or details of allegations that were on the CPSO website was not introduced at trial. Some of the complainants agreed that they had gone to the website and read about the allegations. At its highest, the evidence that had the potential for tainting was that there were inappropriate pelvic exams on his female patients by Dr. Ateyah with no specific details provided. [Emphasis added.]

[84] Dr. Ateyah argues that the trial judge erred in this ruling by discounting the risk of the unintentional or inadvertent tainting of each of the complainants arising from exposure to various media sources, including news reports, social media, physician rating websites, and the CPSO website. The parties generally agreed that the CPSO website was the most significant potential source of tainting, and Dr. Ateyah relied upon it extensively at trial in resisting the Crown’s similar fact evidence application. He argues that the trial judge did not adequately grapple with this issue.

[85] This ground of appeal can readily be dismissed relating to 14 of the 16 convicted counts. The trial judge did not use cross-count reasoning for those 14 counts. Therefore, even if the trial judge erred in her analysis of unintentional or inadvertent tainting, it had no effect on her decision. Things are not so simple relating to the remaining two counts, involving C.W. (Count 5) and S.H. (Count 19). In my view the trial judge committed errors relating to each count.

- a. The Conviction Pertaining to C.W. (Count 5) [86] C.W.'s core allegation was accepted by the trial judge because similar allegations of inappropriate pelvic exams had been made by the five complainants (J.H.(1), K.S., L.H., M.R., and E.B.) whose cross-count evidence she relied upon. Were it not for the similar fact evidence, the trial judge would have had a reasonable doubt on C.W.'s evidence alone.
- [87] In my view, the trial judge was correct in finding an air of reality to the prospect of inadvertent or unintentional tainting relating to all five of those complainants as part of her generalized conclusion relating to all the similar fact evidence. I am persuaded that she erred in finding that the Crown discharged its burden of disproving that inadvertent or unintentional tainting occurred.
- [88] Four of the five complainants the trial judge relied upon in evaluating C.W.'s allegations testified that they were directly or indirectly exposed to information contained on the CPSO website:
- (i) K.S. testified that she visited the CPSO website because she was "curious if ... there was a history" and "wanted to see ... what was going on". She originally testified that she "read the whole thing", but later clarified that she did not open any of the links to review the associated documents. She saw that there was a matter that was before the CPSO Discipline Committee about Dr. Ateyah and remembered reading that Dr. Ateyah had a "bit of history of ... misconduct". She testified several times that she did not remember the specifics of what information was contained on the website. The defence submitted at trial that her exposure to the CPSO website may have compromised her memory of encounters with Dr. Ateyah, causing those memories to inadvertently become more sinister.
- (ii) L.H. testified that she knew there was an investigation into Dr. Ateyah and that she would visit the CPSO website periodically to see if there was any new information posted about the investigation or proceedings. She agreed that Dr. Ateyah's profile page on the CPSO website listed whether there was a history or decision made about him in the past with respect to complaints. She also confirmed that there were summaries on the CPSO website about these matters, where she could get "at least some, maybe not every detail, but ... some information that ... is available to the public". She agreed that she sought out this information to "understand what this guy is all about". L.H. recalled reading about the allegations of Patient A and Patient B. She admitted that if there was a decision by the Discipline Committee on the website, she would have been interested in it, but she did not recall if she saw any such decision. She generally denied obtaining specific information about the nature of the allegations summarized on the CPSO website, but she also testified that she did not remember exactly what she saw on the website. The defence submitted at trial that L.H.'s "considerable exposure to publicly available information" gave rise to a potential for tainting, and noted that her discovery of other complainants led her to conclude her encounter with Dr. Ateyah was "probably not something that she overreacted to".

(iii) M.R. testified that she understood Dr. Ateyah had to relocate his clinic after he was “kicked out” of Schomberg because a patient lodged a complaint against him. This led her to conduct an internet search about Dr. Ateyah to try and find out more information about him. Her search returned a PDF document tied to the CPSO website, which was a “complaint” that contained an allegation of an inappropriate examination of the pelvic region. M.R. agreed that this stood out to her because she alleged the same thing happened to her. She only read one complaint and she “[did not] know much detail of [it]”. She testified that after reading the PDF document, the practice restrictions placed on Dr. Ateyah which she was already aware of “made sense to [her]”. The defence submitted at trial that the fact M.R.’s encounter with Dr. Ateyah was brought back into the forefront of her mind after learning of other allegations against him could have a tainting effect and impair the reliability of M.R.’s memory of what occurred during the appointments of concern.

(iv) E.B. does not appear to have visited the CPSO website herself. However, she testified that after a friend alerted her to a news article about Dr. Ateyah’s arrest, E.B.’s partner visited a “medical website” and found information about other complainants identified by letters of the alphabet. In cross-examination, E.B. adopted as true the statements she made in her police interview, including that her partner read her information about two women “called A and B ... in whatever file came out ... on the medical website”, and that “certain things just felt similar as to the way they had described certain things”. The defence submitted at trial that E.B. only came forward after exposure to information about the charges.

[89] Although J.H.(1) denied ever conducting an internet search about Dr. Ateyah or visiting the CPSO website, she testified to having knowledge of the practice restrictions on Dr. Ateyah. She claimed she learned this information via the sign posted in his clinic, but the defence and Crown agreed that she must have been mistaken about this, since the sign was not posted in 2016 when she was his patient. The defence submitted at trial that this proved she must have been exposed to other sources of information about the CPSO proceedings, which raised a tainting concern.

[90] As indicated, in her decision admitting similar fact evidence across counts, the trial judge focused on the CPSO website and relied solely upon her finding that it did not contain “specific details”. This analysis is deeply problematic. Even if the CPSO website did not contain “specific details” on the evidence before her, it nonetheless included content that could have tainted the perceptions of one or more of the five complainants relating to the examinations they received, a prospect that was not rebutted on a balance of probabilities. Exposure to the allegation that an inappropriate pelvic examination had occurred may have unintentionally affected the way any of the cross-count witnesses perceived and described the vaginal examinations they had received years before they reported their allegations to the police, thereby undermining the independence of their evidence. In my view, the trial judge materially misapprehended this evidence by failing to give it proper effect.

- [91] Moreover, and in any event, the trial judge's finding that specific details were not provided on the CPSO website is speculative. It was not only unsupported by the evidence before her, but contrary to it. C.W. testified that the CPSO website at a minimum contained a summary of her allegations against Dr. Ateyah. She also agreed that the CPSO Discipline Committee rendered a decision which contained a detailed summary of both her and Dr. Ateyah's testimony at the Committee hearing, as well as majority and dissenting reasons of Committee members. It is not disputed that the CPSO website also included links to decisions of the Discipline Committee. S.T. testified that she learned about two people "giving a case, like a trial" against Dr. Ateyah, and that the CPSO concluded Dr. Ateyah's conduct was inappropriate and he was disciplined. Meanwhile, S.F. testified that she recalled reading on the CPSO website the specific allegation that Dr. Ateyah put his hand down the pants of a patient and palpated her lymph nodes, which the patient felt was inappropriate and had a sexual connotation.
- [92] K.S. testified that she learned from the CPSO website that Dr. Ateyah had a history of misconduct and there was an allegation before the Discipline Committee. L.H. testified that she could not remember whether she opened the public Discipline Committee decisions on the CPSO website, where it seems clear the details S.F. described could be found. M.R. testified that she read a PDF document tied to the CPSO website which informed her another woman made an allegation of an inappropriate pelvic exam; this document could have been the Discipline Committee decision that C.W. said contained those details. E.B.'s partner learned about Patient A and Patient B's allegations on a "medical website" and shared them with E.B., who said in her police statement that "certain things just felt similar as to the way they had described certain things". Those allegations could also have come from the Discipline Committee decision related to C.W. or another complainant's allegations. In my view, this evidence showed it is more likely than not that the CPSO website did contain the very kinds of detail capable of distorting the testimony of witnesses relating to incidents that had occurred years before.
- [93] In contrast, there was no affirmative evidence that the CPSO website lacked specifics. None of the complainants contradicted the evidence recounted above about what it contained, and no direct evidence was led as to the website's contents. Some of the complainants who had visited the website testified that they did not remember seeing specific details. This was the case for two of the similar fact witnesses whose testimony was relied upon by the trial judge to convict Dr. Ateyah on Count 5 – K.S. and L.H. Evidence of a lack of memory, including a lack of memory of seeing specifics, is not affirmative evidence that there were none. These witnesses acknowledged viewing the CPSO website, which was known to the trial judge to carry the risk of tainting, but they simply could not recall what they had been exposed to. Their absence of a memory of specifics cannot provide a logical or reasonable foundation for finding that no specific details were provided on the CPSO website.

[94] Another similar fact witness relied upon to convict Dr. Ateyah on Count 5, M.R., acknowledged reading a complaint in a PDF document associated with the CPSO, and testified, “I only read one ... And that too I don’t know much detail of”. Since she testified that she did not look at other information on the website, she was therefore in no position to comment on what the balance of the website contained. With respect to the PDF document she read, she had the following exchange with defence counsel during cross-examination:

Q. ... I just mean in terms of what was alleged, the document that you read, okay, about the allegations made by some other patient, you said you remember she alleged an improper pelvic exam.

A. Okay. Yes.

Q. And I’m just wondering whether any details were in that document about whether he’d reached into clothing, whether it was exposed, anything like that?

A. No.

Q. And do you recall reading anything about improper breast examinations?

A. No.

Q. What about any allegations of improper texting or electronic communications?

A. No.

Q. So you didn't, you didn't see that on this occasion, I take it?

A. Not on that PDF file, no.

This was admissible evidence that the PDF document she saw did not have the kinds of details suggested by the questioner, but it is not evidence that it contained no other details or that the website did not contain specific information.

[95] Despite these examples of the complainants’ testimony which disclosed a real risk of exposure to potentially tainting sources, the trial judge did not address any of this evidence when concluding that the Crown had met the heavy burden of proof it carried. It must be reiterated that this burden – equivalent to the ultimate standard of proof in a civil lawsuit – exists for a critically important reason. As recently reiterated by Wagner C.J. in *R. v. Hussein*, 2026 SCC 2, 509 D.L.R. (4th) 387, at paras. 34-38, bad character evidence is presumed to be inadmissible, including when applying the similar fact evidence rule, because bad character reasoning is inherently dangerous and threatens trial fairness and the presumption of innocence. This explains the “strict” test for admissibility: *Hussein*, at para. 38. In a similar fact evidence application, the proposed evidence must be independent, and hence untainted, before it logically carries any probative value. The serious burden of proving the independence of the evidence must be discharged before the Crown is permitted the exceptional opportunity to rely on the accused’s other behaviour to prove what they did on the occasion charged. In my view, the trial judge’s reasoning cannot

support a finding that this burden was discharged.

- [96] In its arguments in support of the trial judge's conclusion on inadvertent tainting, the Crown seeks to turn the absence of evidence about the specific content available on the CPSO website at material points in time to its advantage. In substance, it advanced the position that given the uncertainty about what witnesses saw when they were exposed to the website, the trial judge was entitled to find on a balance of probabilities that tainting was unlikely. I cannot accept this reasoning. Where there is an air of reality to the risk of tainting, which the trial judge found there to be in a ruling not challenged on appeal, the onus is on the Crown to disprove that tainting occurred. Evidentiary gaps work against the party having a legal burden.
- [97] Respectfully, even the trial judge appears to have lost sight of this in her exchanges with defence counsel during closing submissions, when she challenged his submissions on inadvertent tainting as being speculative, and noted that none of the potentially tainting sources of information, including the CPSO website, were before her to permit a comparison to the evidence the complainants had provided. Given the air of reality that existed, it was for the Crown to allay the tainting concern, not for Dr. Ateyah to confirm it. The trial judge's inability to compare the complainants' evidence to the content of the potential source of tainting undermined the Crown's ability to discharge its onus in the circumstances of this case. It did not work against the defence.
- [98] To be clear, I am not saying that the Crown can never meet its burden of rebutting an air of reality to tainting without producing the source of potentially tainting information. The point is that where, as here, it is known that proposed similar fact evidence witnesses were exposed to potentially tainting information that raises an air of reality to the risk of tainting, uncertainty as to precisely what they saw cannot support a finding that tainting was unlikely, nor can that uncertainty weaken a defence submission that tainting has not been disproven.
- [99] In my view, the trial judge's conclusion that the Crown rebutted the risk that the evidence relied upon to convict on Count 5 concerning C.W. may have been tainted was based on faulty reasoning, and we have not been provided with evidence capable of rebutting the tainting risk. I would find that the trial judge did not give proper effect to the evidence before her and committed a reversible error in discounting the risk of tainting relating to similar fact evidence that she depended upon to convict Dr. Ateyah on Count 5.
- [100] This problem cannot be cured by the fact that the trial judge ultimately believed the similar fact evidence that was relied upon cross-count. I offer three reasons to explain why.
- [101] First, the trial judge did not rely on her ultimate belief of the similar fact witnesses in explaining in her admissibility ruling why the Crown had met its burden of disproving unintentional or inadvertent tainting. It is clear from the paragraph of her reasons that I excerpted above at para. 83 that the foundation of the trial judge's finding on this issue was her conclusion that "no specific details" were provided on the CPSO website. In the face of the explanation that she expressly provided, her ultimate belief in the witnesses cannot be

ascribed to her as a basis for admissibility.

- [102] Second, as I have explained, evidence must be found to be admissible before it can be used in adjudication. It necessarily follows that admissibility must, as a matter of principle, be resolved before presumptively inadmissible evidence is relied upon in adjudication. This remains true of the cross-count admissibility of similar fact evidence, even though the resolution of this issue is often done for convenience at the end of the trial. To rely on the outcome of adjudication to conclude that an admissibility requirement was satisfied is to proceed backwards, and in an unprincipled way. This is not just a formalistic objection. The risk of tainting is a reliability concern. It is circular, in my view, to conclude that similar fact evidence is reliable enough to admit if a trial judge ultimately believes it to be reliable, or for a judge to reason, “I am satisfied that this evidence is not tainted because I believe it”. Why have a rule of admissibility if it can be taken to have been satisfied where a trial judge ultimately accepts that evidence to be true? The relevant law does not operate that way. Similar fact evidence is presumptively inadmissible, and it is not to be considered unless and until its preconditions have been satisfied.
- [103] To be clear, in deciding whether the Crown has rebutted an air of reality to the possibility of tainting, the trial judge must assess the credibility and reliability of any affirmative evidence given by complainants about their exposure to sources of tainting and the information they learned. They may also consider explicit denials by a complainant about having intentionally colluded to give false evidence. But in my view, a trial judge cannot rely on direct denials by a complainant that their evidence has been tainted as a basis for finding that it has not been tainted. This is because a witness whose account has been unintentionally or unconsciously tainted is, by definition, unaware their memory has been affected. Logically, a denial of unintentional tainting lacks any probative value.
- [104] In summary on the instant point, a trial judge cannot engage in the circular enterprise of deciding whether they believe similar fact evidence in order to determine whether they can use it as similar fact evidence. It is therefore not open to us to infer that the trial judge must have found the risk of tainting to have been disproved because she ultimately chose to believe the similar fact witnesses.
- [105] Third, and relatedly, all that the verdicts of the trial judge relating to the five similar fact evidence complainants confirm is that the trial judge believed their core allegations beyond a reasonable doubt. Those verdicts do not confirm that she believed every detail of their accounts beyond a reasonable doubt, yet details can be the source of the problematic inadvertent tainting.
- [106] In my view, the trial judge’s admissibility analysis was defective. I am persuaded that the trial judge committed a reversible error relating to Count 5, involving C.W.
- b. The Conviction Pertaining to S.H. (Count 19) [107] In convicting Dr. Ateyah of Count 19 pertaining to S.H., the trial judge was convinced beyond a reasonable doubt that (1) Dr. Ateyah inappropriately inserted and removed his finger into S.H.’s vagina approximately

nine times during a pap test, akin to masturbation; and (2) that Dr. Ateyah inappropriately conducted a breast examination. With respect to the first allegation, the trial judge accepted S.H.'s evidence as truthful and only relied on similar fact evidence in the alternative. With respect to the second allegation, the trial judge relied on the cross-count evidence of two complainants, C.G. and E.G., to support her finding that Dr. Ateyah conducted an inappropriate breast examination on S.H. while she was sitting up. There is no material allegation of tainting relating to E.G.'s evidence. I am, however, persuaded that the trial judge erred in relying on C.G.'s evidence in supporting the conviction on Count 19.

- [108] C.G. saw news reports on television about Dr. Ateyah and visited the CPSO website. She testified that her mother, a nurse, also learned information from the CPSO about allegations against Dr. Ateyah and passed on what she found. C.G. learned that Dr. Ateyah was accused of inappropriateness towards women of a sexual nature. She testified that her purpose in visiting the CPSO website was "to understand that what he had did to me was wrong". She agreed she was looking to see if other women had similar experiences with Dr. Ateyah and that she was interested in the details about the CPSO's investigation into him. Like K.S. and L.H., C.G. repeated throughout her testimony that she could not remember what she saw on the CPSO website. The defence submitted at trial that the CPSO website gave rise for a potential for tainting since C.G. was aware of allegations of sexual inappropriateness based on the information she acknowledges she saw.
- [109] Given the evidence relating to what the CPSO website likely contained as I described above, it is entirely possible that C.G. was exposed to information that may have tainted her recollection. Given her testimony that she could not remember what she read on the CPSO website, coupled with the absence of specific details about what the website contained, the Crown was hampered in showing, on a balance of probabilities, that tainting had not occurred, and it lacked any other evidence capable of discharging that burden. The trial judge erred in finding otherwise.
- [110] Based on the exposure of C.G. to the CPSO website and the state of evidence relating to it, and for substantially the same reasons I provided above with respect to the count involving C.W., I am therefore persuaded that the trial judge erred in relying on C.G.'s evidence to support a finding of guilt relating to S.H.'s allegation of an inappropriate breast examination. Since Count 19 also included a distinct sexual assault allegation relating to the inappropriate pap test that the trial judge accepted as truthful without relying on similar fact evidence, Count 19 can stand on this basis alone, but the sentence imposed for that count may require adjustment, which I will discuss below.
3. The Risk of Concocted Supportive Allegations [111] Dr. Ateyah asked the trial judge to find that the Crown had not rebutted the prospect that individual complainants, having learned that others were making allegations against him, may have concocted their allegations to support these complainants. In my view, this is not an allegation that imposed a burden on the Crown or triggered the rules now under consideration. Claiming that a witness may have unilaterally concocted an allegation to support other complainants is not an allegation of

collusion, since collusion involves the agreement between two or more persons to falsify evidence. Nor is this an allegation of unintentional or inadvertent tainting. It is, instead, an allegation that a witness may have lied for a motive. That is a straightforward issue of credibility. The Crown's burden in overcoming this kind of claim does not require it to rebut this risk, such as it is, as a precondition to admissibility of cross-count similar fact evidence. The Crown's relevant burden is simply to persuade the trial judge at the end of the day that the complainant in question is telling the truth. I see no error in the way the trial judge handled this issue.

4. Collusion and Tainting and the Credibility Evaluation [112] Where there is an air of reality to collusion, even if the Crown's similar fact evidence application succeeds, the risk of collusion can reduce the weight the similar fact evidence is ultimately given: *R. v. Sararas*, 2022 ONCA 58, 160 O.R. (3d) 321, at para. 100; *R. v. Dueck*, 2011 SKCA 45, 88 C.R. (6th) 150, at para. 56. I accept that this remains true when deciding whether to accept the testimony of witnesses whose accounts could be tainted: *Shearing*, at para. 44; *F.(J.)*, at paras. 77, 86. Dr. Ateyah, who relied heavily on the risk of tainting in challenging the testimony given by the complainants, argues that the trial judge erred by failing to consider the impact of tainting when deciding that she believed the evidence they provided. I am not persuaded that the trial judge, who is presumed to know the law, failed to consider the risk of tainting she identified when making credibility determinations. Indeed, she addressed the risk of collusion or tainting explicitly in discussing her reasoning relating to several of the complainants. I would therefore reject this ground of appeal.

VII. CONCLUSION [113] I would allow the appeal in part by setting aside the conviction on Count 5. I would set aside the sentence imposed on Count 5 of six months in jail to be served consecutively. I would order a new trial on this count.

[114] I would dismiss the appeal on all other counts. I would do so with respect to Count 19 pursuant to s. 686(1)(b)(i) of the Criminal Code, R.S.C., 1985, c. C-46, since the sexual assault allegation does not particularize the offence, and a conviction on that count remains supported by the trial judge's finding on sexual assault (1), as described above in para. 107 of my reasons.

[115] There can be no doubt that the trial judge considered both sexual assault (1) and (2) when sentencing Dr. Ateyah on Count 19. Therefore, this may be a case where the sentence for that count should be varied, pursuant to s. 686(3)(b) of the Criminal Code. In my view, we cannot resolve whether to alter the sentence by inferring what the trial judge would have done had she not relied on the sexual touching during the breast examination. If she erred in identifying the basis for conviction, her sentencing decision is not entitled to deference. The question is not what sentence she would have imposed, but what sentence is fit. I would invite further submissions on whether the sentence should be adjusted.

"David M. Paciocco J.A."

van Rensburg J.A.:

Introduction

- [116] I have read my colleague's reasons. With respect, I do not agree that Dr. Ateyah's appeal of his conviction for having sexually assaulted C.W. (count 5) should be allowed, or that submissions should be received with respect to the potential adjustment of his sentence for the sexual assault against S.H. (count 19). For the reasons that follow, I would dismiss the appeal in its entirety.
- [117] I begin by stating that I agree with my colleague's proposed disposition of the first three grounds of appeal. That is, I agree that the trial judge did not commit any reversible errors (a) by concluding that there was no danger of prejudice in using the evidence of complainants across counts; (b) in using evidence on counts on which Dr. Ateyah was acquitted as similar fact evidence; and (c) in finding sufficient similarity to support her "universal ruling".[13]
- [118] With respect to the fourth ground of appeal, (d) – whether the trial judge erred by discounting the risk that each account was not independent but rather tainted by other allegations or the product of collusion between complainants – I agree with my colleague's conclusions on what he has identified as issues 1 (intentional collusion), 3 (the risk of concocted supportive allegations), and 4 (collusion and tainting and the credibility evaluation). I do not however agree with my colleague's analysis and treatment of issue 2, concerning "unintentional or inadvertent tainting".
- [119] In my opinion, the trial judge did not commit any reversible error in her treatment of the "unintentional or inadvertent tainting" issue. She did not err in concluding that the evidence of the complainants could be used across counts as similar fact evidence, notwithstanding that there was an air of reality to the allegation that their evidence was inadvertently tainted by exposure to online information, in particular what was on the CPSO website. There was no gap in the evidence and no obligation on the Crown to put into evidence information from the CPSO website to disprove tainting. The trial judge concluded, correctly in my view, that the Crown had discharged its burden to disprove tainting on a balance of probabilities because, based on her assessment of the evidence, none of the complainants had been exposed to any details of Dr. Ateyah's alleged sexual offences, other than that there were inappropriate pelvic examinations.
- [120] It is not only appropriate but necessary to read the trial judge's reasons as a whole, in the context of the live issues at trial, in order to understand how the issue of tainting was developed at trial and addressed by the trial judge. With respect to the disposition of this appeal, based on the trial judge's evaluation of the evidence of J.H.(1), K.S., L.H., M.R. and E.B. (the complainants whose testimony was used as similar fact evidence in respect of the conviction relating to C.W.) and E.G. and C.G. (the complainants whose testimony was used as similar fact evidence to find that Dr. Ateyah had sexually assaulted S.H. by touching her

breasts), there is no error that would warrant interfering with Dr. Ateyah's conviction in respect of the sexual assault on C.W. or his sentence for having sexually assaulted S.H.

- [121] I will begin my reasons by setting out some legal principles that are applicable to my analysis. I will then turn to the points of disagreement with my colleague's reasons and my discussion of the similar fact evidence/tainting issue. I will conclude by explaining why, even if there were a reversible error in the trial judge's reliance on similar fact evidence to find that Dr. Ateyah sexually assaulted S.H. by touching her breasts, there is no reason to interfere with his sentence for having sexually assaulted this complainant.

Applicable Legal Principles

- [122] Similar fact rulings are entitled to substantial deference on appeal. Appellate interference is warranted only if the ruling is "unreasonable or is undermined by a legal error or a misapprehension of material evidence": *R. v. Wilkinson*, 2017 ONCA 756, 356 C.C.C. (3d) 314, at para. 27, citing *R. v. James* (2006), 84 O.R. (3d) 227 (C.A.), at para. 33. In assessing whether there was a reversible error, an appellate court should "examine a trial judge's reasons as a whole and refrain from parsing their 'individual linguistic components', as such an invasive approach would 'undermine the trial judge's responsibility for weighing all of the evidence'": *R. v. Kruk*, 2024 SCC 7, 489 D.L.R. (4th) 385, at para. 84. Further, the reasons must be considered in light of the evidence and submissions at trial: *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 69.
- [123] The determination of the probative value of proposed similar fact evidence requires an evaluation of the issue or issues in the trial to which the similar fact evidence is said to relate (*R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 69); whether the accounts are sufficiently similar (*Handy*, at paras. 76-84); whether the similar fact evidence is "reasonably capable of belief" (*Handy*, at para. 134); and the potential for collusion or tainting (*Handy*, at paras. 104-113).
- [124] In both judge-alone and jury trials, where there is a cross-count similar fact evidence application, the issue is not whether the evidence will be heard at all, but its use: *R. v. Tsigirlash*, 2019 ONCA 650, at para. 38. Typically, the use of evidence across counts will be determined only after the prospective similar fact witnesses have testified, when the trial judge, having heard the evidence, can determine whether there is "cogent" evidence of similar acts and can balance its probative value and prejudicial effect in the proceeding: see, e.g. *R. v. Polemidiotis*, 2024 ONCA 905, 174 O.R. (3d) 359. This includes, where collusion or tainting is alleged, considering whether the allegation has an air of reality and, if so, whether the Crown has established on a balance of probabilities that the similarities in the complainants' evidence are not the product of collusion or tainting: see, e.g. *R. v. U.C.*, 2009 ONCA 367, 248 O.A.C. 341. As such, the determination of the Crown's similar fact evidence application will take place at the conclusion of the Crown's case or, as here, at the end of the entire case, and following submissions addressing both the Crown's similar fact evidence application and the merits of the case.

- [125] In this case, although the trial judge set out her ruling on the Crown's similar fact evidence application in the middle of her reasons, and before turning to the disposition of the individual charges, her decision about the use that could be made of the evidence required her to have assessed the credibility and reliability of the complainants, including their testimony about their exposure to sources of tainting, the information they learned, and ultimately whether their evidence was tainted. As such, the trial judge's analysis of the evidence of each complainant which appeared later in her reasons necessarily informed her decision on the Crown's similar fact evidence application.
- [126] Further, tainting was a live issue in this case both in respect of the Crown's similar fact evidence application and, to a much greater extent, in the defence's challenge to the reliability of the evidence of almost all complainants. Inadvertent tainting of the complainants' accounts was a central prong of the defence. The defence argued that, by the time most of the complainants came forward to the police, there was a great deal of information about Dr. Ateyah's alleged sexual offences in the media, including on social media and the CPSO website. As inadvertent tainting arises from a complainant's knowledge of the details of other complaints, not simply from the knowledge that other persons have complained, almost all of the complainants were questioned about the nature and extent of the information they had seen and heard about before coming forward with their own complaints.
- [127] In assessing the "tainting" ground of appeal, and whether the trial judge made reversible errors, it is important to keep in mind the way in which the tainting issue was advanced by the defence. In their closing submissions, defence counsel proceeded first with a review of the testimony of the witnesses, challenging the credibility and reliability of the individual complainants, and in some cases submitting that their accounts were tainted or the product of collusion. This was followed by more general submissions on the Crown's similar fact evidence application. In these circumstances, having regard to the trial judge's findings in respect of the evidence of the various complainants is not "proceeding backwards" or an attempt to "cure" a defective ruling. While the trial judge undertook two distinct tasks when she determined the use that could be made of the complainants' evidence and when she adjudicated the charges, she necessarily was engaged in an evaluation of all of the evidence when performing both tasks. It is for this reason that it is important to read and consider her reasons as a whole.

Discussion

A. The Tainting Issue [128] While I agree with my colleague's description of the general principles applicable to allegations of collusion and/or inadvertent tainting in the context of a similar fact evidence application, I do not agree that the Crown failed to meet its burden to disprove tainting by not leading evidence about the content of the CPSO website. This argument, which was not advanced in the court below, should not succeed on appeal.

[129] Nor do I accept that the trial judge erred in her “universal ruling” respecting her treatment of inadvertent tainting, or at all. The trial judge’s reasons with respect to inadvertent tainting and its effect on the evidence of the individual complainants, and by extension the use of their evidence for similar fact purposes, were responsive to how the issues were argued before her and reveal no error. And, specifically in relation to the use of similar fact evidence in Dr. Ateyah’s convictions for sexually assaulting C.W. and S.H., there was no error.

1. The Crown Was Not Required to Put Forward Evidence of What Was on the CPSO Website in Order to Discharge its Burden [130] The trial judge concluded that there was an air of reality to tainting because of the amount and type of information available in the media and through the CPSO website. The source documents were not put into the record, although evidence about the sources, the information they contained, and what was read or heard about was elicited in the course of the complainants’ testimony.

[131] The Crown’s onus is not to disprove that there could have been collusion or tainting, or that the alleged source of collusion or tainting was not such that tainting could have occurred; it is to prove, on a balance of probabilities, that the similar fact evidence was not the product of tainting: Handy, at paras. 106, 112; R. v. Lo, 2020 ONCA 622, 152 O.R. (3d) 609, at para. 113; R. v. Burnie, 2013 ONCA 112, 294 C.C.C. (3d) 387, at para. 37. It is for the Crown to decide how to discharge its burden; there is no obligation on the Crown to tender evidence of the various sources of potential collusion or tainting.

[132] This court’s decision in R. v. Norris, 2020 ONCA 847, 398 C.C.C. (3d) 1 is instructive. Like the present case, Norris involved a trial by judge alone of sexual assault charges involving multiple complainants. One of the grounds of appeal was that the trial judge erred in allowing for the cross-count application of similar fact evidence. The appellant argued, among other things, that the trial judge erred when, after finding an air of reality to the allegation of collusion, he accepted that the Crown had met its burden to disprove collusion on a balance of probabilities, notwithstanding that the Crown had failed to call as a witness one of the alleged colluders, G.J. The appellant argued that, in the absence of G.J.’s evidence, the trial Crown necessarily fell short of disproving collusion and that it was therefore not open to the trial judge to find that there had been no collusion.

[133] Fairburn A.C.J.O., for a unanimous court, rejected this chain of reasoning, concluding that the Crown’s burden was discharged when the trial judge accepted the complainants’ evidence that they had not colluded:

I reject the proposition that the only way that the Crown could disprove collusion was by calling G.J. as a witness. It is important to remember that contact does not amount to concoction or collaboration. While G.J. may have had some contact with the witnesses, there was no evidence that they had concocted their stories or collaborated in developing their complaints. Indeed, there was evidence coming from each of the complainants that they did not collude with G.J. The trial judge accepted the complainants’ evidence as entirely credible. It was open to him to do so.

Moreover, while the Crown held the burden of establishing that there was no collusion, this did not mean that the Crown was required to elicit the testimony of every person who may have had relevant evidence to give on the point. To the contrary, in an exercise of clear prosecutorial discretion, it is for the Crown to decide how to meet its burden. If the Crown fails to meet its burden of proof, this is because the court is not satisfied to the requisite degree of proof, not because a witness list was not exhaustive or as extensive as it could have been. In this case, based upon the evidence heard, the trial judge was satisfied to the requisite degree of proof that there was no collusion. [citations omitted]

(Norris, at paras. 35-36)

[134] Similarly, in the present case, the trial Crown, anticipating the issue of potential tainting, questioned the complainants about their interactions in person and online with other complainants, and about their exposure to information about Dr. Ateyah's sexual assaults. The defence also thoroughly cross-examined most of the complainants on possible sources of tainting, including social media, news reports and the CPSO website. All of the complainants who were challenged testified that they had either not accessed the sources of information which could contain details of the offences, or that they had learned only generic information, such as the fact that the appellant had been charged and that he had certain restrictions on his practice. Specifically, with respect to information on the CPSO website, although C.W. testified that details of her complaint to the CPSO were available online, none of the individual complainants recalled seeing any details of her complaint on the website. Indeed, complainants who were questioned on this issue denied having learned of specific allegations from any source, other than that Dr. Ateyah had conducted improper pelvic examinations.

[135] The issue with respect to tainting was not whether the CPSO website (and other sources) contained details capable of distorting the various complainants' evidence; rather, it was whether the complainants' evidence was "independent", rather than the product of collusion or inadvertent tainting. The determination of this issue required consideration of the evidence of the various complainants about what they were exposed to – the information they learned and its level of detail – and ultimately the reliability of their individual accounts. As Nordheimer J.A. stated in *R. v. C.G.*, 2021 ONCA 809, 158 O.R. (3d) 721, at para. 32, "[t]he key point is that, unlike advertent collusion which corrupts the evidence of all participants, where inadvertent collusion has occurred, a close examination is required to determine what impact that innocent sharing of information may have had on the evidence of each of the witnesses who is a party to the exchange."

2. The Trial Judge's Treatment of Collusion and Tainting in Her "Universal Ruling" Reveals No Error [136] Under the heading "Collusion or Tainting", the trial judge first noted that "the media reports did not include the specifics of the allegations, just that Dr. Ateyah was charged with sexually assaulting numerous female patients in his Schomberg clinic." The absence of details in the media reports was acknowledged by defence counsel and is not seriously challenged on appeal. The trial judge then observed that evidence as to what

specific information or details were on the CPSO website had not been introduced at trial, and that some of the complainants agreed that they had gone to the website and read about the allegations. This was also true. The trial judge then reasonably concluded that “[a]t its highest, the evidence that had the potential for tainting was that there were inappropriate pelvic exams on his female patients by Dr. Ateyah with no specific details provided.”

- [137] While the trial judge did not, at this point in her reasons, set out the evidence for this conclusion, it was a finding consistent with the evidence that she heard and later summarized: none of the individual complainants recalled having learned of the specific details of any other complaints on the CPSO website or elsewhere.
- [138] In making this statement, the trial judge did not, as my colleague suggests, misapprehend the evidence, nor was her finding that specific details were not provided “speculative”. The record reflects that the trial judge grappled with the implications of the contents of the media reports and the CPSO website not having been entered into evidence. This occurred during closing submissions, when defence counsel, in making submissions about E.B.’s evidence, argued that her testimony and the evidence of other complainants had been tainted by information that was “out there” on social media, in news reports, and on the CPSO website. Defence counsel readily acknowledged that the media reports did not contain details of specific allegations but pointed to the fact that C.W. had testified that details of her complaint were on the CPSO website, and that some of the complainants acknowledged having accessed that source. The trial judge responded that what was on the CPSO website was not before her (noting “maybe that was deliberate”), and that the evidence did not contain “a set of allegations that was publicly available on the website” that she could compare to consider “the submission that the complainants’ memory of the event could have been tainted by having seen something very similar or the same on the website”. The trial judge also observed that it was not for her to speculate on the contents of documents that had not been put before her, and that in any event none of the complainants recalled having seen any documents containing details of the alleged assaults other than inappropriate pelvic examinations.
- [139] In my view, the trial judge’s approach to the threshold issue of tainting reveals no error. She was entitled to find, as she did, that the only evidence with the potential for tainting was that there were inappropriate pelvic exams. This was not a finding, as my colleague suggests, that the CPSO website itself contained only general information; rather it was her reasonable conclusion on the evidence that there were no specific details to which the complainants were exposed that could have tainted their evidence and affected the independence of their accounts.
3. The Similar Fact Evidence Relied on by the Trial Judge Was Not Tainted [140] My colleague concludes that Dr. Ateyah’s conviction in respect of C.W. and his sentence respecting S.H. reflect error because the five similar fact complainants whose evidence was relied on in respect of C.W. (J.H.(1), K.S., L.H., M.R. and E.B.) and one in respect of S.H. (C.G.) could have been exposed to details of the complaints of C.W. and “Patient B” that may have tainted their

evidence. While my colleague, in support of this conclusion, has provided his own detailed review of the evidence of these complainants about potential sources of tainting, what follows is a summary of their evidence on the question of tainting, how it was addressed at trial, and the trial judge's evaluation.^[14] In my view, what is important is not that there was a "risk" or "possibility" of inadvertent tainting that was raised with some of the complainants, but that in each case, the trial judge, after considering the defence challenges, accepted the evidence of the complainants whose evidence was used as similar fact evidence, including their "core" allegations.

- ^[141] J.H.(1) denied that she had ever conducted an internet search to get any details of the complaints against Dr. Ateyah or that she had ever accessed the CPSO website. She specifically denied that her testimony was affected by any information that she had received from others. During closing submissions, defence counsel challenged J.H.(1)'s evidence that she was an independent, untainted witness, asserting that she was lying. The trial judge found J.H.(1) to be a forthright and honest witness. She accepted her evidence that she had attended Dr. Ateyah's office with a complaint of depression and that he had instructed her to lie down, stuck his hand or hands down her pants, felt around in her groin, and pressed down on her pubic hair, telling her that he was feeling her ovaries.
- ^[142] K.S. testified that, on visiting the CPSO website, she learned that Dr. Ateyah had a discipline history, and that he was bound by certain practice conditions. She denied having clicked on any links, including any link to the notice of hearing which the defence asserted set out the particulars of the complaint against Dr. Ateyah. In addressing K.S.'s evidence, the trial judge noted the defence acknowledgment that her evidence had no "glaring flaws" and recalled K.S.'s evidence that she had visited the CPSO website but did not learn details of the allegations made by other women. The trial judge found K.S. to be a credible and reliable witness and accepted her evidence that when she went to see Dr. Ateyah for a migraine he told her to lie on the bed, he undid her pants, and then touched her vaginal area while mentioning "something about her ovaries".
- ^[143] L.H. testified that she was aware of Dr. Ateyah's history with the CPSO, and that she had reviewed information about other complaints on the CPSO website, but that she did not recall reading any of the details of these complaints. The trial judge noted the defence submission that L.H.'s evidence may have been tainted by accessing information about other allegations online and recalled L.H.'s denial that she had learned any specific details of other allegations online. In accepting L.H.'s evidence that, at an appointment for "pink eye", Dr. Ateyah had asked her to lie down, undid her pants, and touched the area around her vagina, the trial judge referred to L.H.'s evidence that she had told her friend the day of the appointment what had happened. The trial judge concluded that "[t]herefore the suggestion that her memory [was] tainted by information she may have learned later [was] not substantiated."

- [144] M.R. testified that she had come across a PDF document linked to the CPSO website that informed her another woman had made an allegation of an inappropriate pelvic exam. Under cross-examination, she denied that there were any details in that document, such as whether Dr. Ateyah had reached into clothing, or whether the complainant's pelvic region was exposed. She denied reading anything about improper breast exams or allegations of improper texting or electronic communications. In assessing M.R.'s evidence, the trial judge referred to the defence acknowledgment that it had no "glaring flaws". The trial judge accepted M.R.'s evidence as truthful. The evidence included her account of what she had seen (and not seen) on the CPSO website, and her evidence that during an examination for back pain, Dr. Ateyah had told her he wanted to do a pelvic examination, reached under the sheet, moved her underwear to the side, and felt the entrance of her vagina.
- [145] E.B. testified that her wife had visited a "medical website" and informed her of the allegations of Patients "A" and "B" on that website, but her recollection was that "it didn't go into detail". Defence counsel submitted that they were not suggesting that whatever was on the CPSO website would match what E.B. was saying, for example, that there was anything "out there" about a chaperone leaving and Dr. Ateyah doing an ungloved internal examination or massaging of the pelvic area. The trial judge found E.B.'s evidence to be truthful. She accepted E.B.'s evidence that Dr. Ateyah had inserted a finger into her vagina in the absence of a chaperone without explanation in the context of an intimate medical examination and that he had also, at the same or a different appointment, massaged her vagina.
- [146] C.G. testified that when she saw a sign posted in Dr. Ateyah's office she knew there was a CPSO investigation. She said she looked at the CPSO website, but did not see much, only inappropriateness toward women. She testified that she did not remember trying to get details, that she did not remember seeing anything about Patients "A" and "B", and that she did not know Dr. Ateyah had been disciplined or have an understanding of the details of the CPSO investigation. Defence counsel submitted to the trial judge that C.G. had seen something on the CPSO website about inappropriateness, but "nothing specific". The trial judge accepted C.G.'s evidence as truthful. This included that Dr. Ateyah had, on one occasion, told her to lower her pants and underwear and lie down on the examination table and that he had inserted his finger repeatedly into her vagina, and that, on another occasion, he had conducted a breast exam by asking her to lift up her shirt and bra while she was seated on the exam table without privacy to change into a gown.
- [147] Contrary to my colleague's conclusion, there was no absence of evidence on the issue of tainting and there was in fact evidence that met the Crown's burden to prove on a balance of probabilities that the evidence of the complainants that was relied on as similar fact evidence in respect of Dr. Ateyah's conviction for having sexually assaulted C.W. and the finding that he sexually assaulted S.H. by touching her breasts, was not tainted.

[148] It is also worth noting that the “core allegations” which the trial judge accepted in respect of Dr. Ateyah’s sexual assaults on these complainants were in fact the specific details that were relied on as similar facts. The similar fact evidence that was relied on for the conviction in respect of C.W. was that Dr. Ateyah had asked patients, who had not presented for gynecological reasons, to undo their pants, and then put his hand over or under their underwear (or both) and pressed on their vaginas. The similar fact evidence relied on for the finding of sexual assault through breast touching in relation to S.H. was that Dr. Ateyah conducted breast exams while patients were sitting up and he had them open or lift up their tops before touching their breasts inappropriately.

[149] For these reasons, I conclude that there was no error in the trial judge’s use, as similar fact evidence, of the evidence of J.H.(1), K.S., L.H., M.R. and E.B. in convicting Dr. Ateyah of the sexual assault relating to C.W. and the evidence of C.G. in finding that Dr. Ateyah had sexually assaulted S.H. by touching her breasts.

B. There is No Reason to Reconsider Dr. Ateyah’s Sentence in Respect of His Conviction for Sexually Assaulting S.H. [150] Finally, even if my colleague were correct in concluding that the trial judge, in convicting Dr. Ateyah of sexually assaulting S.H., was not entitled to rely on the similar fact evidence of both C.G. and E.G., this would affect only the finding that the appellant had committed a sexual assault on S.H. by touching her breast. Setting aside the finding that the appellant touched S.H.’s breast could not reasonably affect Dr. Ateyah’s sentence.

[151] In her reasons for sentence, the trial judge determined the appropriate consecutive custodial sentences for the various offences to arrive at a total global sentence of 18 years. This included 18 months for having sexually assaulted S.H. Applying the principle of totality, the trial judge reduced the global sentence to nine years and then reduced the individual consecutive sentences accordingly. This resulted in a sentence of nine months for Dr. Ateyah’s sexual assault of S.H.

[152] The trial judge appears to have imposed a sentence of nine months for each sexual assault conviction where Dr. Ateyah conducted an internal vaginal examination or otherwise inserted his fingers into the complainant’s vagina. These were the sexual assaults on C.G., S.T., T.R., E.G., E.B. J.H.(2), and S.H.[15] In the cases of E.G., C.G. and S.H. there was also inappropriate breast touching. By contrast, Dr. Ateyah received lesser sentences for offences involving no vaginal penetration. He received six months for the sexual assaults on C.W., J.H.(1) and K.S. and 4.5 months for the sexual assaults on L.H. and M.R. Given the fact that the trial judge imposed sentences of nine months for each of the sexual assaults involving vaginal penetration, whether or not there was also breast touching, I am satisfied that Dr. Ateyah’s sentence would have been the same even without the finding that he had inappropriately touched S.H.’s breast.

[153] Accordingly, even if the trial judge ought not to have relied on the similar fact evidence to find that the appellant touched S.H.'s breast, there would be no reason to interfere with the global sentence of nine years and, specifically, the sentence of nine months in respect of the penetrative vaginal touching of S.H.

Conclusion

[154] For these reasons, I would dismiss the appeal in its entirety.

Released: April 21, 2026 "K.M.v.R."

"K. van Rensburg J.A."

"I agree. D.A. Wilson J.A."

- [1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] One conviction was stayed pursuant to *Kienapple v. R.*, [1975] 1 S.C.R. 729, leaving a total of 16 convicted counts. Dr. Ateyah was also acquitted of seven counts involving two other patients, A.Z. and S.F.
- [3] This ruling was provided in the trial judge's reasons for decision, which also explained the verdicts she arrived at. I will say more about the trial judge's description of the material issues below.
- [4] Dr. Ateyah addressed issues B and C under a single ground of appeal, but I have identified them as separate issues as they require distinct analyses.
- [5] Dr. Ateyah did argue that the trial judge erred in making her similar fact evidence ruling by accepting unreliable evidence provided by S.F., but as I explain below, the trial judge did not rely on S.F.'s evidence in her ruling.
- [6] For example, in *R. v. Robinson*, 2017 ONCA 645, 352 C.C.C. (3d) 503, the similar fact evidence test was applied where dissimilar incidents of prior domestic abuse against the accused's partner were used to support the Crown's motive theory that the accused killed another person out of jealousy relating to his intimate partner. In *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716, evidence of prior thefts the accused was involved in was admissible after application of the similar fact evidence test in a murder trial to establish the motive for the alleged killing. Similarity is not always required.
- [7] Under "Order Sought" Dr. Ateyah requested that the Crown's similar fact evidence application be dismissed "except for cross-count admissibility of the distinctive clusters of conduct referenced above".
- [8] For example, in the written submissions trial counsel argued, "In this case there was evidence of, or at least opportunity for, tainting of the accounts. All but one of the complainants [...] have been exposed to and potentially tainted by information from various

sources [...]. Consequently, the onus is on the Crown to disprove that the accounts of the complainants were the product of tainting on a balance of probabilities". In oral submissions trial counsel said with respect to one of the distinctive clusters they had conceded, "I can see that those are distinctive similarities and they tend to preclude the possibility of coincidence. If they are, in fact, not the product of, or influence by tainting, just because it's such a, a, a unique thing for an internal to be on the stomach or on the side. And, so it may well be that those are sufficiently distinctive and similar, that as a cluster, they could be similar act in relation to each other" (emphasis added).

- [9] Dr. Ateyah did concede that, as the first known person to make a formal complaint (in this case, to the CPSO), the evidence of C.W. was not the product of collusion or tainting. The trial judge addressed this acknowledgement not in her admissibility ruling, but in her ultimate assessment of the allegation C.W. made. None of the issues on appeal are affected by this concession.
- [10] She said so explicitly with respect to the evidence of all the remaining complainants, other than M.R. The trial judge's reasoning relating to M.R. necessarily implies that she convicted without reliance on the similar fact evidence, as she noted that Dr. Ateyah agreed M.R.'s testimony had "no 'glaring flaws'", the trial judge explicitly said she accepted M.R.'s testimony as "truthful", and the trial judge explained how she would have used cross-count reasoning on one of the counts, had she needed to do so. Appropriately, in his factum on appeal, Dr. Ateyah accepted that with respect to both counts involving M.R., the trial judge "found the allegations proven beyond a reasonable doubt" without the similar fact evidence.
- [11] I leave aside, for the moment, the count involving the complainant A.Z. Dr. Ateyah argued that the trial judge misapprehended her evidence, which did not disclose a concocted reason for the allegedly unnecessary breast exam. I will address this issue in fn. 12 below.
- [12] Dr. Ateyah argued the trial judge materially misapprehended the testimony of A.Z. in finding that she fell within this pattern because her evidence did not disclose a medical pretence for performing the impugned breast examination. I accept that it is controversial whether an alleged "concoction" can be derived from her evidence given her lack of memory about the circumstances and discussion leading up to the exam she received. I need not resolve this issue because, as I explain below, the trial judge did not ultimately rely upon A.Z.'s testimony as similar fact evidence.
- [13] Although my colleague identifies two problems with the trial judge's reasoning in respect of this issue, he ultimately concludes that these were not overriding errors, and he upholds the trial judge's finding that the similar fact evidence had sufficient similarity to support her "universal ruling". I agree with this assessment.
- [14] My colleague does not express any concern about the trial judge's use of E.G.'s evidence as similar fact evidence. Accordingly, I will not address her evidence.

[15] In respect of another case of penetrative vaginal touching, the appellant received a sentence of 18 months for the sexual exploitation of A.R. who was 17 years old at the time of the offence.

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