

CANADA / JUDGMENT

R. v. Badyal

2020 BCCA 127

COURT

British Columbia Court of Appeal

DECIDED

8 May 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 127 R. v. Badyal

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Badyal,

2020 BCCA 127

Date: 20200508

Docket: CA44735

Between:

Regina

Respondent

And

Maninder Singh Badyal

Appellant

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Dickson

On appeal from: An order of the Provincial Court of British Columbia, dated
June 8, 2017(R. v. Badyal, Surrey Docket 214210-1).

Counsel for the Appellant:

R.C.C. Peck, Q.C.

M. Shah

Counsel for the Respondent:

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

December 10, 2018

Place and Date of Judgment:

Vancouver, British Columbia

May 8, 2020

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Dickson

Summary:

The accused chiropractor was charged with a single count of fraud over \$5,000 in respect of fees charged to ICBC for services that he allegedly did not provide. The billings were in respect of thirteen patients. The judge found that fraud was established in respect of eleven. On appeal, the issues are whether the judge inappropriately relied on prior consistent statements, whether she erred in her use of "similar fact" evidence, and whether she placed a burden of proof on the defence. Held: Appeal allowed, new trial ordered. The judge was entitled to use prior consistent statements to rebut the defence theory that patients had, through passage of time, forgotten about routine treatment that they received. She made only limited and appropriate use of the statements. The similar fact evidence was admissible, as it was all directly relevant to the charge. The judge was required to satisfy herself that, in using it to bolster her assessment of the reliability of a witness, its probative value exceeded potential prejudicial effect. She did so, and her findings are entitled to deference. Several statements in the judge's reasons, however, suggest that she required the accused to conclusively establish a defence. The judge's failure to explain why the evidence concerning a computer billing system did not serve to raise a reasonable doubt is particularly troubling. In light of these indications that the judge failed to properly leave the burden of proof on the Crown, a new trial must be ordered.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] Dr. Badyal was convicted of a single count of fraud over \$5,000 (Criminal Code, R.S.C. 1985, c. C-46, s. 380(1)(a)) in respect of billings to the Insurance Corporation of British Columbia ("ICBC") for chiropractic services. The trial judge found that, in respect of eleven patients, Dr. Badyal charged ICBC a lump sum for three or more chiropractic visits, though he provided treatment to each on only a single occasion.
- [2] Three issues arise on this appeal. First, Dr. Badyal contends that the judge made inappropriate use of witnesses' prior consistent statements in assessing their reliability. Second, he says that the trial judge incorrectly applied the principles that govern the reception and use of similar fact evidence. Finally, he says that the judge did not consistently observe the principle that the Crown bears the burden of proof in a criminal case and applied an overly stringent standard in scrutinizing defence evidence.

Overview of the Case

- [3] The charge in this case arose out of payments made to Dr. Badyal by ICBC under its lump sum payment model (the "Lump Sum Program"). Under the Lump Sum Program, individuals injured in automobile accidents could sign up for chiropractic treatment without being referred by an adjuster or physician. A chiropractor who treated patients under the Lump Sum Program was required to provide them with at least three chiropractic treatments over a span of two or more weeks. ICBC paid the chiropractor directly, eliminating the need for patients to pay for the services and then seek reimbursement. For each patient treated under the Lump Sum Program, ICBC paid the chiropractor \$800. In addition, if the chiropractor provided a discharge report when treatment was complete, ICBC would pay an additional \$100. If a chiropractor provided less than three treatments to a patient, ICBC would pay only \$150 for the chiropractic services.
- [4] Dr. Badyal operated his chiropractic practice in Surrey, in a clinic where physiotherapists and massage therapists also practiced. The Crown's position was that, between June 2014 and January 2015, Dr. Badyal charged ICBC for three or more visits under the Lump Sum Program in respect of thirteen patients that he saw only for an initial assessment.
- [5] The thirteen patients gave evidence at the trial. The trial judge found the evidence of two of them insufficiently reliable to form the basis for a conviction, and she relied only on the evidence of the remaining eleven patients. I will, in this judgment, deal only with the eleven patients whose evidence was relied on by the judge.
- [6] Each of the eleven patients was injured in a motor vehicle accident, and was referred to the clinic by their physician for the purpose of obtaining physiotherapy or massage therapy. Despite the fact that the patients did not attend at the clinic seeking chiropractic treatment, they were directed to Dr. Badyal. He had the patients sign both an ICBC Treatment Confirmation and Consent Form and a Canadian Chiropractic Protective Association Informed Consent to Treatment Form. The ICBC form included an election to take part in the Lump Sum Program.

- [7] The patients all indicated that they did not realize that the form they signed included an election to enroll in the Lump Sum Program. They all denied seeing Dr. Badyal for treatment except during their initial visit. Indeed, six of the patients denied receiving any treatment from Dr. Badyal, though they acknowledged that he did ask questions and make an initial assessment when they first met with him. The Crown accepted that the taking of a patient history and the making of an assessment constituted treatment, and the judge proceeded on that basis.
- [8] On the basis of each witness's evidence, the judge was satisfied that ten had been treated by Dr. Badyal on only a single occasion.
- [9] The eleventh patient, G.C. was unique in certain respects. He had been involved in two motor vehicle accidents, and Dr. Badyal purported to treat him separately for the injuries suffered in those accidents. There were, therefore, two separate claims in respect of G.C.
- [10] G.C. was also the only patient who testified that he wanted to receive chiropractic treatment when he signed the forms that Dr. Badyal provided to him. His evidence on the issue, however, reflected some confusion. He evidently did not differentiate between physiotherapy and chiropractic treatment, and he claimed that he received "chiropractic" treatment from a person who was, in fact, a physiotherapist, not a chiropractor.
- [11] Given G.C.'s confusion, the judge did not consider his account, by itself, to be entirely reliable. However, she did ultimately accept it as accurate, on the basis of its overall similarity to the experiences of the other patients.
- [12] Dr. Badyal testified that he met with and assessed each of the patients on their initial visits. He said that he explained the consent forms to them in some detail. He claimed that he treated each patient on at least three occasions, and provided clinical notes consistent with his testimony. He suggested that the patients were confused or had forgotten the therapy sessions that they attended.
- [13] The judge was not persuaded that Dr. Badyal's evidence was true, and also found that it did not raise a reasonable doubt in her mind as to his guilt. As she was convinced beyond a reasonable doubt that Dr. Badyal had committed fraud in his billings for the eleven patients, she convicted him.

Prior Consistent Statements

- [14] Each of the patients who testified at the trial had been interviewed by ICBC investigators within a few months of their treatment. The quality of the interviews was an important issue at trial, as counsel for the defence suggested that ICBC investigators had drawn out evidence through leading questions, and that the interviews had tainted the evidence of the witnesses.
- [15] In the course of cross-examination, the defence put a number of interview transcripts to witnesses to demonstrate the shortcomings of the process. At the end of the trial, the Crown and the defence agreed that all of the transcripts of the interviews should be admitted into

evidence for the purpose of allowing the judge to assess the suggestion that the interviews tainted the evidence, and also to allow the judge to fully consider the context of the portions of the interviews put to witnesses in cross-examination. Defence counsel emphasized that he was not conceding that the answers given in the interviews should be considered for the truth of what was said.

[16] In her reasons for judgment, the judge referred, on two occasions, to the consistency between information patients provided to interviewers and their testimony at trial. First, in respect of two patients (a mother and daughter), she said:

[50] On [the evidence of A.A. and of her daughter], I find it is highly unlikely that Dr. Badyal performed any treatment on either [of them] on November 6 and 13th. I have reached this conclusion on the basis that they both acknowledge they had their appointments scheduled together, neither recalls seeing Dr. Badyal for treatment on the November dates, their evidence is consistent with their earlier statement to [the investigator], and [the daughter] said she recorded their appointments in her telephone and no record of the November 6 and 13th appointments were noted therein.

[Emphasis added.]

[17] Second, in respect of J.S., she said:

[73] I find it is highly unlikely that Dr. Badyal performed any treatment on [J.S.] on August 2nd and 23rd. I have reached this conclusion on the basis that overall, [J.S.] was a convincing witness because he had a significant recollection of the details of his meeting with Dr. Badyal on the first day, demonstrated a careful manner, had a specific reason for not attending the Clinic after his last physiotherapy appointment at the Clinic and was consistent with his report to [the investigator] just three months after he attended the Clinic that he only met with Dr. Badyal on the one occasion.

[Emphasis added.]

[18] While the consistency between the interviews and testimony at trial had not been a pervasive theme in her reasons (having been referred to only on the two occasions noted above), the judge did return to it in the final paragraph of the judgment:

[203] Given the above and the consistencies between the patients' interviews with the ICBC investigators (which were conducted within months of the treatments), and their evidence at trial, combined with my findings with respect to their reliability, and on the basis of the whole of the evidence before me, which has been extensive, I find that Dr. Badyal is guilty of the one count of defrauding ICBC between June 24, 2014 to January 22, 2015, in excess of \$5,000.00.

[Emphasis added.]

- [19] Dr. Badyal argues that this use of the interview statements violates the principle that prior consistent statements are generally inadmissible at trial. This Court reviewed the principle in some detail in *R. v. Gill*, 2018 BCCA 275:
- [65] The general rule excluding prior consistent statements, along with its exceptions, applies to out-of-court statements that are consistent with the declarant's in-court testimony: *R. v. Béland*, [1987] 2 S.C.R. 398 at para. 11. Prior consistent statements are presumptively inadmissible for two reasons: (a) they lack probative value and (b) they constitute inadmissible hearsay when adduced for the truth of their contents: *R. v. Stirling*, [2008] 1 S.C.R. 272, 2008 SCC 10 at para. 5; *Dinardo* [*R. v. Dinardo*, 2008 SCC 24] at para. 36. Prior consistent statements lack probative value because "the fact that someone said the same thing on a prior occasion to what he/she has said in court is, generally speaking, not probative of whether the witness is offering truthful testimony in court": *R. v. Khan*, 2017 ONCA 114 at para. 25, leave to appeal ref'd [2017] S.C.C.A. No. 139.
- [67] In his influential and frequently-cited article, "The Perils and Potential of Prior Consistent Statements: Let's Get It Right" (2013), 17 *Can. Crim. L. Rev.* 181, Justice Paciocco conceptualizes prior consistent statements as consisting of two components or blocks: a hearsay block, which is only added to the scales if the statement is admissible for the truth of its contents, and a declaration block, which establishes only that the statement was made in a particular context. This analysis was noted with apparent approval in *Khan* at para. 26 and *M.C.* [*R. v. M.C.*, 2014 ONCA 611] at para. 59. As discussed in *Khan* at para. 26, if the declaration part of the statement is admissible under an exception to the prior consistent statement rule, it "is proof that a statement was made, and allows a trier of fact to derive appropriate inferences from the fact and context in which the statement was made".
- [68] When prior consistent statements are admitted pursuant to an exception to the general exclusionary rule, their use is limited in accordance with the rationale underlying the rule itself. The trier of fact must never use a prior consistent statement to support the "prohibited inference" that a witness is more likely to be telling the truth because he or she repeated the same thing more than once: *Stirling* at para. 7; *Khan* at para. 41. In addition, the trier of fact must avoid treating an admissible prior consistent statement as a form of self-corroboration of a witness's in-court testimony: *Dinardo* at para. 40; *Khan* at para. 41.
- [20] In this case, there was no suggestion by the defence that the patients who testified had fabricated their evidence or were being consciously untruthful. There were few issues going to their credibility. It was, however, suggested that some of the witnesses were confused about the treatment they had received, and that all had forgotten that they had attended the clinic for treatment by Dr. Badyal after their initial consultation with him. The reliability of their evidence was, therefore, in issue.

- [21] The judge, in referring to the prior consistent statements, then, was not using them to bolster the credibility of the witnesses. Rather, she was using the statements to test the defence theory that witnesses had forgotten that they had received treatment. She considered that patients were much less likely to have forgotten about their treatment at the time of their interviews (which occurred within months of the treatment) than at the time of trial (which was years later).
- [22] In the article referred to in Gill, Justice Paciocco notes, at p. 214, that the exclusionary rule can be overly restrictive in cases where prior consistent statements might help to resolve issues around memory problems:

The general assumption that prior consistent statements generally lack probative value is demonstrably wrong. It is true that making a prior consistent statement tells us nothing about the credibility of the claim; a witness can tell the same lie repeatedly. Yet the believability of evidence is a function not just of credibility - the resolve of the witness to try to tell the truth. It is also about reliability - the ability of the honest witness to offer accurate evidence. Honest witnesses can be wrong because they have not observed events correctly, because they misremember what they observed, or because they have not accurately communicated what they saw. While it may be true that repetition is not evidence of honesty, the fact that a witness made a prior consistent statement closer in time to the event can support relevant inferences that the testimony is unlikely to be the product of memory problems. The existing law of prior consistent statement has thrown the baby out with the bathwater. Concern that decision-makers may misuse prior consistent statements by inferring illogically that repetition is evidence of credibility has been allowed to overbear any contribution prior consistent statements may make in rationally supporting credibility. Exclusion has been adopted as the measure of choice when, again, a prohibited inference against inferring that repetition enhances credibility would have done.

- [23] Justice Paciocco does not suggest that Canadian law has reached the point where the exclusionary principle is being completely rethought. The exclusionary rule remains. It is important to recognize, however, that it is subject to principled exceptions that conform to its rationale.
- [24] One well-established exception is that a prior consistent statement may be used to rebut allegations of recent fabrication. That exception was discussed by Cory J. speaking for the majority in *R. v. Evans*, [1993] 2 S.C.R. 629 at 643:

Ordinarily, a witness [is not permitted to] repeat, in court, her own earlier statements. Generally, the narration by a witness of her previous declarations made to others outside of the court should be excluded because of its general lack of probative value and because such a repetition is, as a rule, self-serving. However, they may be admitted in support of the credibility of a witness in situations where that witness's evidence is challenged as being a recent fabrication or contrivance. See *R. v. Campbell* (1977), 38 C.C.C. (2d) 6 (Ont. C.A.), at p. 18, per Martin J.A., and *R. v. Béland*, [1987] 2 S.C.R. 398, at p. 409.

Further, it has been held that there need not be, in cross-examination, any express allegation of recent fabrication for the prior statements to be admissible. It is sufficient if, in light of the circumstances of the case and the conduct of the trial, the apparent position of the opposing party is that there has been a prior contrivance. In those situations, fairness and ordinary common sense require that the jury receive a balanced picture of the whole of the witness's conduct throughout the police investigation. To demonstrate that the evidence of the witness is not a recent fabrication it may be essential to introduce on re-examination a prior statement which shows the consistency of the witness' testimony. See *R. v. Simpson*, [1988] 1 S.C.R. 3, at p. 25.

- [25] Where there is an allegation of recent fabrication, the fact that the witness's evidence pre-dated any motivation to fabricate a story is important. In such cases, reference to a prior consistent statement is allowed for the limited purpose of rebutting an allegation that the witness's story has been altered as a result of more recent events or motivations. As noted in *R. v. Khan*, 2017 ONCA 114:
- [28] [W]here a prior consistent statement is admitted to rebut an allegation of recent fabrication, it is admitted solely to provide a direct response to the suggestion that the witness concocted allegations after a triggering event. The statement is not admitted for the truth of its contents, but only to show that the details were not added after the point in time suggested by opposing counsel.
- [26] I do not suggest that this appeal involves an allegation of recent fabrication per se. The situation, however, is analogous. The defence alleges that patients' evidence against the accused has been altered by the passage of time, because they have forgotten that they underwent treatment. Just as an allegation of recent fabrication may be rebutted by referring to a prior consistent statement, it seems to me that an allegation of recent obliteration of memory should also open up the possibility of examining prior statements.
- [27] The fact that a patient's denial that they were treated by Dr. Badyal pre-dated any probable loss of memory is probative. In my view, because the situation faced by the trial judge was so closely analogous to the situation where the defence makes allegations of recent fabrication, it was permissible for her to consider the prior consistent statements for the limited purpose of assessing the defence theory that the passage of time had resulted in the patients forgetting about their treatment.
- [28] The judge made no error of principle in noting that each witness's memory at trial was the same as when they were interviewed. The interviews were much closer in time to the events being discussed, and were properly used by the trial judge as a tool to assist her in evaluating the suggestion that the passage of time had resulted in the patients forgetting about the routine therapy that they had received. She did not place inordinate weight on the consistency; she used it only to enhance her assessment of the reliability of the witnesses' memories. Further, she did not treat the prior statements as if they constituted independent corroboration of the witness's testimony.

- [29] The judge's limited use of the prior statements was consistent with the rationale for the rule. The judge's limited use of the statements was, therefore, not objectionable. I would not accede to this ground of appeal.

Similar Fact Evidence

- [30] The Crown's theory of the case was that the patients were systematically directed to Dr. Badyal, and that he did an initial assessment, and had them sign forms enrolling them in the Lump Sum Program despite the fact that they did not intend to undergo chiropractic treatment. The various witnesses each testified as to their own experiences with Dr. Badyal, which included a number of similarities.
- [31] The reasons of the trial judge reflect the fact that, from the outset, the predominant issue at trial was how the "similar fact principle" applies in a case such as the present one, where a single count is charged, and where all evidence is directed at that single count.
- [32] An archetypal case involving similar fact evidence is one in which the Crown tenders evidence that is extrinsic to the crime that is charged, in order to show that the accused has a propensity or disposition to commit a crime of that nature. In such a case, similar fact evidence is presumptively inadmissible. Lord Herschell expressed the exclusionary principle in *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57 (P.C. from N.S.W.), in these terms, at 65:

It is undoubtedly not competent for the prosecution to adduce evidence tending to [show] that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

- [33] In *R. v. Handy*, 2002 SCC 56, Binnie J. for a unanimous court, explained that two types of prejudice may result from the admission of similar fact evidence:
- [31] [E]vidence of misconduct beyond what is alleged in the indictment which does no more than blacken [the accused's] character is inadmissible. Nobody is charged with having a "general" disposition or propensity for theft or violence or whatever. The exclusion thus generally prohibits character evidence to be used as circumstantial proof of conduct, i.e., to allow an inference from the "similar facts" that the accused has the propensity or disposition to do the type of acts charged and is therefore guilty of the offence. The danger is that the jury might be confused by the multiplicity of incidents and put more weight than is logically justified on the [similar fact witness's] testimony ("reasoning prejudice") or by convicting based on bad personhood ("moral prejudice"): Great Britain Law Commission, Consultation Paper No. 141, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996), at § 7.2.

[34] Courts have recognized a "narrow exception" to the general rule of inadmissibility. In Handy, at para. 41, Binnie J. cited with approval the following passage from the dissenting judgment of Sopinka J. in R. v. B.(C.R.), [1990] 1 S.C.R. 717 at 751:

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

[Emphasis added by Binnie J. in Handy.]

[35] At para. 52 of Handy, Justice Binnie also cited from the majority judgment of McLachlin J. (as she then was) in B.(C.R.) (at 732):

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

[36] Justice Binnie referred to R. v. Arp, [1998] 3 S.C.R. 339, and then summarized the rule as to admissibility of similar fact evidence:

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

[37] He emphasized that the weighing of probative value against prejudicial effect had to be performed in respect of a particular issue:

[73] The requirement to identify the material issue "in question" (i.e., the purpose for which the similar fact evidence is proffered) does not detract from the probative value/prejudice balance, but is in fact essential to it. Probative value cannot be assessed in the abstract. The utility of the evidence lies precisely in its ability to advance or refute a live issue pending before the trier of fact.

[38] Once the particular issue has been identified, the trial judge must consider the cogency of the similar fact evidence, as well as its possible prejudicial effects. At para. 82, Binnie J. provides examples of considerations that might have a bearing in evaluating the cogency of similar fact evidence:

- (1) proximity in time of the similar acts;
- (2) extent to which the other acts are similar in detail to the charged conduct;
- (3) number of occurrences of the similar acts;

- (4) circumstances surrounding or relating to the similar acts;
- (5) any distinctive feature(s) unifying the incidents;
- (6) intervening events;
- (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.

[Citations omitted.]

[39] At para. 83, he provides examples of considerations that might have a bearing in evaluating the prejudice that might be occasioned through the admission of similar fact evidence:

[83] [F]actors which have been found helpful in assessing prejudice include the inflammatory nature of the similar acts and whether the Crown can prove its point with less prejudicial evidence. In addition, as stated, the court was required to take into account the potential distraction of the trier of fact from its proper focus on the facts charged, and the potential for undue time consumption. These were collectively described earlier as moral prejudice and reasoning prejudice.

[Citation omitted.]

[40] The trial judge in this case referred to these two types of prejudice. She considered that "moral prejudice" was not a significant concern, because the similar acts were part of the offence charged. She accepted, however, that "reasoning prejudice" could apply in this case. In the end, she decided that the principles applicable to similar fact evidence would assist her:

[13] Both counsel agree that a similar fact evidence [analysis] should be applied in this circumstance. While I have questions about whether the policy premise of the exclusionary rule is engaged in a single count charge where all of the evidence is focused on such a specific set of circumstances, nonetheless I accept that a similar fact [analysis] provides a useful tool to test reliability. I note, however, that as the evidence sought to be admitted as similar fact evidence is specific to the charge rather than to events outside the scope of the charge, the probative value of the evidence, if it is determined to be reliable, is compelling, and must be considered in assessing whether the Crown has met its burden of proof.

[41] The question of whether a similar fact evidence analysis was appropriate to this case requires some consideration.

[42] The evidence of Dr. Badyal's patients was direct evidence on the single count of fraud that was before the court. The evidence of each witness was, therefore, relevant and admissible. There was no basis for excluding the evidence of any of the patients.

[43] That said, it is important to recognize that this case would have been an archetypal case of similar fact evidence if, instead of facing a single charge in respect of the fraudulent scheme, Dr. Badyal had been charged with one count of fraud under \$5,000 in respect of

each patient. In such a situation, the evidence of each patient would be directly relevant and admissible only in respect of the count relating to that patient. On any given count, the Crown would not have been entitled to rely on similar fact evidence, except in accordance with the principles set out in Handy.

- [44] The fact that a single count is charged in respect of a fraudulent scheme rather than separate charges in respect of each alleged fraudulent transaction does not, in principle, reduce the possibility that an accused will suffer moral prejudice or reasoning prejudice from the consideration of similar fact evidence. The court must, therefore, give consideration to the principles governing the admission of similar fact evidence. While those principles will not, in a case like the present one, serve to render evidence inadmissible, they can limit the use that may be made of it.
- [45] In particular, the court will normally begin by evaluating the evidence in relation to each alleged fraudulent transaction on its own merits. Having done so, the court may then consider whether, under the principles governing the admissibility of similar fact evidence, evidence directed at one transaction may be considered in relation to another.
- [46] I do not completely agree with the judge's conclusion that "moral prejudice" cannot be a factor where similar fact evidence all relates to a single count in an indictment. Particularly where the crime is one that evokes moral outrage, evidence that more than one act may have occurred is potentially inflammatory, and moral prejudice may well be a factor. I do accept, however, that in this case, the nature of the crime was such as to limit the possibility of moral prejudice to the accused.
- [47] I note, as well, the fact that a trial is taking place before a judge alone will tend to reduce the possibility of both reasoning prejudice and moral prejudice, particularly where the issue is not the admissibility of evidence, but rather its use. This issue was discussed by van Rensburg J.A., speaking for a unanimous court in *R. v. J.H.*, 2018 ONCA 245:
- [23] Prejudice in the similar fact context involves the two distinct concepts of reasoning prejudice and moral prejudice: *R. v. T.B.*, 2009 ONCA 177, 243 C.C.C. (3d) 158, at para. 26. This was a non-jury case where the similar fact evidence related to the counts in the information and the evidence was already before the court. As noted by this court in *T.B.*, at para. 27, there is little risk of reasoning prejudice in a judge-alone case, as the trial judge is presumed to know the law and the proper and improper use of evidence.
- [24] Further, the risk that the appellant would be convicted solely on the basis of his general bad behaviour (moral prejudice) is also not a significant concern in a judge-alone trial: *T.B.*, at para. 33. See also: *R. v. MacCormack*, 2009 ONCA 72, 241 C.C.C. (3d) 516, at paras. 56, 68 and 69. And, both moral and reasoning prejudice are significantly reduced in a "count-to-count" similar fact application, as the evidence is admissible independent of its status as similar fact.

- [48] While these factors did not obviate the need for the judge to assess the potential prejudice to the accused through the use of similar fact evidence, it did mean that her primary concern was to assess the cogency of the similar fact evidence in the context of the matter in issue, and to ensure that she did not use the evidence in a way that prejudiced Dr. Badyal.
- [49] The judge's approach to similar fact evidence began with a discussion of the general principles governing the admission of similar fact evidence, and identified the particular issue to which similar fact evidence was directed: that of whether Dr. Badyal saw each patient on more than a single occasion.
- [50] The judge then undertook an initial consideration of counsel's arguments, and noted certain similarities in the circumstances of the various alleged fraudulent transactions. She remarked that the transactions alleged in the fraudulent scheme occurred within a relatively short period (June 2014 to January 2015), but it is not clear that she considered that to be an important factor in this case.
- [51] The judge did consider that there were significant similarities in the evidence given by the eleven witnesses. In each case, the patients did not attend the clinic for the purpose of receiving chiropractic treatment. They were directed to Dr. Badyal, who performed a fairly brief initial assessment, and had the patients complete forms consenting to treatment and enrolling them in the Lump Sum Program. In each case, the patient said that they did not understand that they were signing up for chiropractic treatment and in each case, they claimed not to have seen Dr. Badyal for subsequent appointments. While in some cases, there was some therapy given on the first visit, all denied that they received specific therapies that were described in Dr. Badyal's notes.
- [52] The judge also noted that the treatment plans that Dr. Badyal set out for each patient in his initial report to ICBC were identical, and that, in all but two cases, Dr. Badyal purported to treat the patients on only three occasions -- the minimum required to qualify for the Lump Sum Program[1]. She also noted that the clinical notes that Dr. Badyal presented as evidence of the second and third visits of each of the patients were remarkably similar.
- [53] The judge rejected the possibility that there had been a coincidence of the witnesses being confused or having forgotten that they had received treatment:
- [181] Given the similarities , I find that the facts in this case tend towards the spectrum described in *R. v. Arp* in which differences and variables are reduced and therefore, the objective improbability of coincidence increases.
- [54] That observation appears at the conclusion of a section of the judgment headed "Can the evidence of one or more of the patients be used to bolster the evidence of one or more remaining patients, or must the evidence of each patient be assessed on its own merits?" While the judge did not expressly say so, I read para. 181 of the judgment as a finding that the probative value of the similar fact evidence exceeded the potential prejudicial effect on the issue of whether the patients had attended more than one session with Dr. Badyal. It

was, a finding, therefore, that the similar fact evidence could be used in evaluating the evidence of the witnesses.

- [55] It does not appear, however, that the judge made broad use of the similar fact evidence in determining the outcome of the case. As I read the judgment, the extent to which she made use of that evidence is in the following paragraph:
- [200] While the memories of all the witnesses are compromised by a number of factors, including: the passage of time, the insignificance of some of the details of their interactions, the repetitive nature of the treatments, and the patients' limited understanding of the treatment procedures, I find that I am satisfied that the evidence that the patient witnesses did not see Dr. Badyal for the second and third treatment billed is reliable. In particular, I accept the evidence of [the judge here names ten of the witnesses] on this point. I further accept that to the extent the evidence of [G.C.] is less conclusive on this point; I accept that his experiences at the Clinic are sufficiently similar that I can conclude that he too did not see Dr. Badyal for the second and third treatments of each plan of treatment.
- [56] It appears to me, therefore, that the only use of similar fact evidence was in evaluating the reliability of the evidence of G.C. As the charge would have been made out even without the transactions relating to G.C., the conviction would stand even if the use of the similar fact evidence in determining G.C.'s reliability had been improper.
- [57] I am not, however, convinced that the judge made any error in the use of the similar fact evidence. In general, this Court will defer to a trial judge's assessment of whether the probative value of similar fact evidence exceeds its potential prejudicial effect: *R. v. Buna*, 2009 BCCA 536 at para. 53; *R. v. Burman*, 2015 BCCA 519 at para. 63; see also *R. v. Wilkinson*, 2017 ONCA 756 at para. 27.
- [58] Dr. Badyal points out that, in addition to the similarities in the evidence given by the various patients, there were also differences. I am not persuaded that the judge ignored those differences, nor am I convinced that the differences were so material as to make the judge's assessment of the evidence unreasonable.
- [59] Dr. Badyal also suggests that the interview techniques used by the investigators tainted the witnesses' evidence. The judge fully considered that argument, however, and was not persuaded that the questioning served to call the reliability or veracity of the witnesses' evidence into question. That finding was open to her on the evidence.
- [60] The judge also considered whether the witnesses' evidence was the product of "collusion" or had been influenced by accounts heard from other individuals. She found that the evidence did not suggest any collusion. Most of the witnesses did not know or have contact with the others. Further, most did not know, when they were interviewed, that the issue was a criminal one, and thought the issue was simply one of billing errors. Apart from one witness (whose evidence was not relied on by the trial judge), the witnesses did not have a negative

view of Dr. Badyal, and were not predisposed against him. The contact that existed between witnesses was, in fact, minimal, except in the case of two patients who were mother and daughter. In the circumstances, the judge's finding that collusion or inadvertent cross-influence did not affect the reliability of the evidence was a reasonable one.

[61] Dr. Badyal also suggests that the number of incidents at issue in this case did not meet the threshold required to make coincidence improbable, as Dr. Badyal clearly treated many other patients during the period. I am not persuaded that this argument serves to undermine the judge's analysis. She found that the number of incidents served to make it improbable that the witnesses' evidence (particularly that of G.C.) is explained by forgetfulness or confusion.

[62] In short, I am far from persuaded that the judge's determination was unreasonable, or was affected by an error of principle or misapprehension of evidence. I would not give effect to the similar fact evidence arguments put forward on appeal.

Did the Judge Err by Reversing the Burden of Proof?

[63] Dr. Badyal's final ground of appeal concerns the burden and standard of proof. While the factum treats this as a single ground of appeal, Dr. Badyal makes two rather different arguments.

Different Standards of Scrutiny

[64] First, he says that the judge applied different standards of scrutiny to the Crown and defence evidence. He contends that the judge was more forgiving of frailties and deficiencies in the prosecution evidence than in his own.

[65] In *R. v. Howe* (2005), 192 C.C.C.(3d) 480 (Ont. C.A.), Doherty J.A., for the court, noted:

[59] This argument or some variation on it is common on appeals from conviction in judge alone trials where the evidence pits the word of the complainant against the denial of the accused and the result turns on the trial judge's credibility assessments. This is a difficult argument to make successfully. It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.

- [66] The cases where such an argument has been successful tend to be cases in which there are competing versions of an event, with serious issues of credibility on both sides. In *Howe*, the trial judge found parts of the evidence of the complainant and of the accused to have been fabricated. He failed to factor the complainant's falsehoods into his evaluation of her overall testimony. The court held that that constituted reversible error.
- [67] Similarly, in *R. v. Rhayel*, 2015 ONCA 377, the court found that the trial judge had given insufficient consideration to deliberate falsehoods in the complainant's testimony, while finding that the accused's falsehoods were of great significance.
- [68] In the case before us, the trial judge was concerned with quite different issues in respect of the prosecution witnesses and Dr. Badyal. There was no serious suggestion that the prosecution witnesses were fabricating evidence, or that they bore any ill-will toward Dr. Badyal. The judge was, for the most part, evaluating their capacity to understand and to remember the treatment they had received. The issue in respect of Dr. Badyal, on the other hand, was whether he had committed fraud. The judge was evaluating his credibility, not simply his capacity to remember. It is not practical, in the circumstances, to meaningfully compare the standards of scrutiny applied to the evidence of the different witnesses.
- [69] The usual deference to the trial judge's fact-finding is applicable in this case. Short of raising a reasonable apprehension of bias on the part of the trial judge (an allegation that has not been advanced, and for which there is no basis in the record), I do not see how Dr. Badyal can succeed in his argument that the trial judge applied unequal or unfair standards to his evidence in comparison to that of Crown witnesses. The judge was, it appears, unimpressed with Dr. Badyal's testimony, but it was within her purview to assess its veracity. Equally, it was for her to assess the reliability of the Crown witnesses. I am not convinced that the judge applied inappropriate standards in assessing either the reliability of the prosecution witnesses or the veracity of Dr. Badyal's evidence.

Placing the Burden of Proof on the Accused

- [70] The second argument advanced by Dr. Badyal on the final ground of appeal has much more force. He says that the reasons for judgment show that the judge did not consistently give effect to the principle that the burden of proof always remains on the Crown to prove guilt beyond a reasonable doubt.
- [71] Of course, it is not suggested that the judge was unaware of such a fundamental tenet of the criminal law. Indeed, she was clearly cognizant of the fact that the Crown was required to prove the offence beyond a reasonable doubt. She correctly cited the leading cases of *R. v. Avetysan*, 2000 SCC 56 and *R. v. W.(D.)*, [1991] 1 S.C.R. 742.
- [72] Dr. Badyal contends, however, that in certain instances, the judge's reasons indicate that she was of the view that Dr. Badyal was required to conclusively prove his defence, or provide an explanation for suspicions raised by the Crown evidence.

- [73] The burden of proof does not apply individually to each item of evidence, but rather to the case as a whole: *R. v. Morin*, [1988] 2 S.C.R. 345. A comment that a single piece of evidence is "not conclusive", therefore, does not necessarily indicate a reversal of the onus of proof on the charge. It may, instead, simply represent a conclusion that the Crown evidence continues to have force despite an attempt by the defence to refute it. On the other hand, a clear indication in the judgment that the trial judge placed a burden on the accused to prove his case will constitute a reversible error.
- [74] Dr. Badyal cites several instances in the reasons for judgment where he contends that the trial judge imposed a burden of proof on him. Some of the examples provided by Dr. Badyal, when examined in context, are equivocal. For example, there was an issue as to the importance of clinical notes tendered by Dr. Badyal stating that a particular patient complained that her "shoulders felt heavy" on a particular date. Dr. Badyal's counsel noted that another practitioner's later clinical notes also referred to the patient making such a complaint. He suggested that the later clinical note was powerful evidence that Dr. Badyal had seen the patient on the date in question. The judge disagreed, noting that there was also an earlier note, in the patient's chiropractic history, that included a similar complaint. The judge concluded "I do not find that [the reference in Dr. Badyal's clinical notes] is conclusive of whether [the patient] had treatments on November 6th and 13th". As Dr. Badyal points out, there was no onus on him to provide "conclusive evidence". The issue for the judge was whether she was left with a reasonable doubt as to whether Dr. Badyal saw the patient on the date in question.
- [75] In considering this example, however, context is important. The judge believed the evidence of the patient, which was that she did not have an appointment on the dates in question. She did not believe Dr. Badyal, and concluded that the clinical note was a fabrication. Dr. Badyal contended that it could not have been a fabrication because of the reference to "shoulders feeling heavy". The judge, while using the phrase "conclusive evidence", appears to have meant no more than that the reference to "shoulders feeling heavy" was simply insignificant, and did not have the conclusive effect that Dr. Badyal contended that it had.
- [76] Of greater concern, however, is the judge's treatment of the computer billing records. The evidence of Dr. Badyal was that he did not have access to the computer program's billing module, and that billing was the responsibility of the clinic's manager, Ms. Solski. Ms. Solski stated that she would input billing data only when she personally observed a patient going into a practitioner's examination room.
- [77] Dr. Badyal's patient charts occasionally had dates mis-recorded. The billing data, however always contained the correct dates. Dr. Badyal suggested that this was evidence that the clinical notes on the patient charts were not fabricated ex post facto to cover the billing records. If they had been, the dates would have matched the billing records.

- [78] The judge rejected that argument, stating at para. 191 that she did "not accept that the only conclusion [she] could draw from the evidence [was] that Dr. Badyal in fact performed the treatment on the date recorded in the computer". The test applied by the trial judge was not the correct one. The question for her was whether the billing data evidence gave rise to reasonable doubt as to whether the appointments took place. There was no onus on Dr. Badyal to demonstrate that the only conclusion that could be drawn from the evidence was that the treatment was performed.
- [79] The judge had a number of concerns with Ms. Solski's evidence, particularly with respect to how or why patients were initially directed to Dr. Badyal. She did not, however, indicate any basis for rejecting the evidence that Ms. Solski entered billing information. Indeed, the evidence was unequivocally to the effect that Ms. Solski was responsible for entering the billing information, and that she did so on the dates of the alleged appointments.
- [80] The judge provided only limited analysis of the computer billing issues. The judge did not make any finding that Ms. Solski knowingly assisted in the fraud, or that she was implicated in it.
- [81] In fact, the judge appears to have considered that Ms. Solski had the responsibility of explaining the discrepancy between Dr. Badyal's evidence and that of the patients. She found that Ms. Solski did not succeed in doing so:
- [194] I find that Ms. Solsky's evidence does not assist in understanding how it is that thirteen patients say that they were not treated by Dr. Badyal on the second and third dates.
- [82] In my view, this was a serious misapprehension of the role of the witness, and had the effect of placing a burden on the accused to prove his innocence rather than simply raise a reasonable doubt.
- [83] In saying this, I wish to reiterate that other portions of the judgment do appear to correctly set out the burden of proof. Given the importance of the evidence in respect of the billing practices at the clinic, however, and of Ms. Solski's role, it was critical that the judge apply the burden of proof correctly in respect of that aspect of the case.
- [84] The judge's apparent reversal of the burden of proof on that issue is a reversible error.

Conclusion

- [85] In the circumstances, I would allow the appeal and order a new trial.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Dickson"

- [1] The situations in those two cases were unusual. In one case, the patient agreed that she saw Dr. Badyal on a second occasion (which Dr. Badyal indicates was a fourth occasion), when he filled in for her physiotherapist, who was absent from the clinic that day. In the other case, the patient says that, after she had spoken to the investigator, she decided to return to the clinic to seek chiropractic treatment from Dr. Badyal, and was seen on two occasions (which Dr. Badyal recorded as her fourth and fifth appointments). Again, she denies being treated by Dr. Badyal on the dates he alleges she received her second and third sessions.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/01/2020BCCA0127.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-badyal-2020>

Prepared on 27 October 2026 · Esheria