

#### 4.38. *Molineux*: Evidence of Crimes and Wrongs

**(1) Evidence of crimes, wrongs, or other acts committed by a person is not admissible to prove that the person acted in conformity therewith on a particular occasion or had a propensity to engage in a wrongful act or acts. This evidence may be admissible when it is more probative than prejudicial to prove, for example:**

**motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or conduct that is inextricably interwoven with the charged acts; or to provide necessary background information or explanation; or to complete the narrative of the subject event or matter.**

**(2) In a criminal proceeding, where the defendant interposes a defense, the People on rebuttal may prove the defendant's commission of other crimes or wrongs when such crimes or wrongs are relevant and probative to disprove the defense.**

#### Note

**Subdivision (1).** This rule sets forth what is generally known as the *Molineux* rule, after the seminal case of *People v Molineux* (168 NY 264 [1901]).

The first sentence sets forth the general rule, applicable in both civil and criminal proceedings, that when evidence of other crimes, wrongs or acts committed by a person is offered for the purpose of raising an inference that the person is likely to have committed the crime charged or the act in issue, the evidence is inadmissible. (*Molineux*, 168 NY at 291-293; *People v Morris*, 21 NY3d 588, 594 [2013] [“(E)vidence of uncharged crimes is inadmissible where its purpose is only to show a defendant’s bad character or propensity towards crime”]; *People v Bradley*, 20 NY3d 128, 135 [2012] [“Without some better developed theory of relevance,” evidence of a stabbing incident more than 10 years before defendant fatally stabbed her estranged boyfriend was “resonant solely for what (it) seemed to disclose about defendant’s violent propensity and the manner of its expression”]; *Matter of Brandon*, 55 NY2d 206, 210-211 [1982] [“A general rule of evidence, applicable in both civil and criminal cases, is that it is improper to

prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion”]; *People v Vargas*, 88 NY2d 856 [1996] [Where only the credibility of the complainant and the credibility of the defendant were at issue on whether there was a forcible or consensual sex act, evidence of the defendant having engaged in sexual misconduct with others was impermissible evidence of propensity, not probative evidence of intent].)

As explained in *People v Frumusa* (29 NY3d 364, 369 [2017]):

“The *Molineux* rule “is based on policy and not on logic.” “It may be logical to conclude from a defendant’s prior crimes that he is inclined to act criminally, but such evidence “is excluded for policy reasons because it may induce the jury to base a finding of guilt on collateral matters or to convict a defendant because of his past” ’ ” (citations omitted).

The second sentence sets forth exceptions to the exclusionary rule recognized by the Court of Appeals. The exceptions relate to circumstances where the evidence of other crimes, wrongs, or acts is offered for a non-conformity purpose that is relevant in the proceeding. These exceptions are available in both civil and criminal proceedings. (See *Matter of Brandon*, 55 NY2d at 210-211; *Mazella v Beals*, 27 NY3d 694, 709-710 [2016].)

In *Molineux*, the Court listed examples of uncharged crimes that may be relevant to show (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or (5) identity of the defendant (168 NY at 293). This enumeration is “merely illustrative” (*People v Vails*, 43 NY2d 364, 368 [1977]) and not intended to be “exhaustive” of the possible range of relevancy (*People v Santarelli*, 49 NY2d 241, 248 [1980]). The Court has continued to add to this enumeration. (See *People v Stanard*, 32 NY2d 143, 146 [1973] [“background evidence”]; *People v Cook*, 42 NY2d 204, 208 [1977] [“ ‘to complete the narrative’ ”]; *People v Vails*, 43 NY2d 364, 368 [1977].)

Even when evidence of other crimes, wrongs, or acts is admissible for such a non-conformity purpose, the court must weigh the evidence’s probative value against its prejudicial impact before admitting the evidence and may exclude the evidence in its discretion. (See Guide to NY Evid rule 4.07; *People v Alvino*, 71 NY2d 233, 241-242 [1987]; *People v Ventimiglia*, 52 NY2d 350, 360 [1981].)

In *People v Robinson* (68 NY2d 541, 544-545 [1986]), the Court of Appeals held the People must show by clear and convincing evidence that the defendant committed the other crimes in order to admit evidence under the identity exception.

In its discretion, a trial court may conduct an inquiry or hearing, outside the presence of the jury, to determine admissibility, and in particular whether there is sufficient evidence of the *Molineux* exception. A defendant in a criminal

prosecution is entitled to pretrial discovery of any misconduct and criminal acts of the defendant which the prosecution intends to use at trial as “substantive proof” of any material issue in the case. (CPL 245.20[3].)

Preliminary evidence of a *Molineux* exception may be admitted pursuant to rule 4.05 of the Guide to New York Evidence (Conditional Relevance [Evidence Offered “Subject to Connection”]). (See *People v Small*, 12 NY3d 732, 733 [2009] [mid-trial grant of the People’s application to introduce *Molineux* evidence to rebut the defendant’s defense was proper]; *People v Ventimiglia*, 52 NY2d 350, 362 [1981] [prior to trial or the testimony of the *Molineux* witness “the prosecutor should ask for a ruling out of the presence of the jury at which the evidence to be produced can be detailed to the court, either as an offer of proof by counsel or, preferably, by presenting the live testimony of the witness”].) Nothing precludes a court from itself requiring a party to advise the court, orally or in writing, of a prospective trial application to admit *Molineux* evidence and conducting any necessary and appropriate proceeding to determine the matter.

It should be noted that in certain instances, a prior criminal conviction or conduct may be required proof of a criminal charge.

In instances where a prior criminal conviction must be proved, statutory law may permit a defendant to admit the prior criminal conviction outside the presence of the jury in order to preclude the People from offering proof of that conviction at trial (CPL 200.60, 200.63). The principles of *Molineux* set forth in this rule may, however, yet permit the People to prove the conviction (*People v Anderson*, 114 AD3d 1083, 1086 [3d Dept 2014]).

In a conspiracy case, an overt act must be alleged and proved to have been committed in furtherance of the conspiracy (Penal Law § 105.20). That overt act may constitute an uncharged crime. And, the Court of Appeals has held that an “indictment for conspiracy need not allege every overt act . . . If the indictment provides sufficient detail about the scope and nature of the conspiracy and the major overt acts committed in furtherance of it, then evidence may be offered at trial of related [non-enumerated] overt acts” (*People v Ribowsky*, 77 NY2d 284, 292-293 [1991] [citations omitted]), even if those overt acts include uncharged crimes (*People v Portis*, 129 AD3d 1300, 1302 [3d Dept 2015]; *People v Snagg*, 35 AD3d 1287, 1288 [4th Dept 2006]; *People v Morales*, 309 AD2d 1065 [3d Dept 2003]; *People v McKnight*, 281 AD2d 293 [1st Dept 2001]). While such overt acts are not subject to exclusion pursuant to the *Molineux* rule, their admissibility, as with all forms of evidence, may be subject to rule 1.07 of the Guide to New York Evidence (Exclusion of Relevant Evidence). It may therefore be advisable and the better practice (as it is for *Molineux* evidence) for a court to require that it be informed before the commencement of trial of any unenumerated overt acts the People intend to prove.

**Subdivision (2).** The rule in this subdivision is derived from several Court of Appeals decisions which permit evidence of a defendant's commission of other crimes or wrongs to rebut a defense raised by the defendant. (*See e.g. People v Israel*, 26 NY3d 236, 242-243 [2015] [rebuttal of extreme emotional distress disturbance]; *People v Santarelli*, 49 NY2d 241, 248 [1980] [rebuttal of insanity defense]; *People v Calvano*, 30 NY2d 199 [1972] [rebuttal of entrapment defense].)

Notably, in *People v Valentin* (29 NY3d 150 [2017]) where the defendant did not present evidence of an agency defense, but rather interposed the defense based on the People's evidence, the People were entitled to prove the defendant's prior conviction for a drug sale on the issue of his intent to sell.