

5. THE PREJUDICE RULE

1. Introduction

a. Rule 403 is known to all lawyers as the "prejudice" rule. It says that relevant evidence may be excluded if its probative value is substantially outweighed by any of three effects that detract from a fair trial

- 1) unfair prejudice
- 2) confusing the issues or misleading the jury
- 3) undue delay, wasting time, or needlessly presenting cumulative evidence.

In order for a danger to "substantially" outweigh probative value, the probative value must be pretty small, i.e., be of little or no relevance to begin with. You can't exclude evidence that a child was molested as unfairly prejudicial if the defendant is on trial for that act. You can't argue that calling five witnesses to describe the same thing is a waste of time if they are describing the event itself.

b. Determining "probative value" is at the discretion of the judge. In general, it is determined by the factors we discussed last class, such as:

- 1) How logically related is the evidence to the key disputes?
- 2) How important is the issue to the resolution of the case?
- 3) How necessary is the evidence (i.e., how much other evidence with lower prejudicial effect has already been introduced or will be introduced?)
- 4) Remoteness (how far removed in space and time from the people, places, and events being litigated)

c. Rule 403 is most often invoked to object that evidence is too "prejudicial" to be admitted. Determining "prejudicial effect" of the evidence is also at the discretion of the judge. In general, it means;

- 1) The extent to which information arouses the emotions of the jury such as sympathy, bias, or hostility, thereby interfering with their ability to reach an impartial verdict.
- 2) Whether the emotional impact is fair or unfair. Emotionalism is fair if it's part of the case, and unfair if it is outside the facts of the case. For example, evidence of child abuse is always emotional, but whether it is unfairly emotional depends on the case. If the defendant is charged with child abuse, the emotional impact is an inherent part of the trial. But, if the defendant is charged with burglary, getting the jury all riled up about child abuse is unfair.
- 3) Whether the evidence involves some subject likely to get church-going folks all upset, such as sex, drugs and rock and roll.
- 4) Whether the information will come as a shock to the jury or they already know about it.
- 5) Whether less prejudicial evidence is available.

d. Rule 403 mentions two other dangers that warrant the exclusion of minimally probative evidence:

1) "Confusing the issues or misleading the jury" arises when evidence is relevant to two or more issues, one of which is relevant and the other is not. We worry that the jury may become confused as to what the issues are, and may return a bad verdict because of it. For example: If a plaintiff sues two defendants and one settles, it will be the judge's job at the end of trial to reduce the verdict by the amount already paid, so introducing evidence that a co-defendant admitted fault and paid damages would confuse the issues that are properly before the jury.

2) "Waste of time" is also a potential ground for exclusion. This rule is rarely invoked by attorneys, but gives a judge discretion to cut off relevant testimony that has become boring and protracted, e. g., if a crime were committed in front of a law school class, and the prosecution subpoenaed all 120 students, after about 15 have testified, the judge is likely to run out of patience.

e. Making an objection specific: Because there are three reasons why relevant evidence could be excluded under Rule 403, a proper objection must be specific as to which of the three dangers you are invoking.

f. The judge then is charged with the impossible task of weighing apples against oranges to decide if the prejudice "substantially" outweighs probative value, and if so the judge "may" or may not exclude it. There is a lot of uncertainty and the judge can rule pretty much any way he or she wants to. The same evidence may be too prejudicial in one case but not another. For example, evidence that a white defendant was a racist who belonged to a white supremacy group would be excluded in most cases, but admitted if relevant to prove his motive for killing an African-American man.

2. Typical recurring issues under the prejudice rule.

A. Gang Membership. Evidence of gang membership or gang activity is highly prejudicial and therefore presumptively violates Rule 403 unless it clearly has significant probative value on a contested issue. Gang membership may be relevant to prove the motive for gang violence or to impeach a witness for bias for the defendant if he is in the same gang, or against the defendant if in a different gang.

B. Weapons and Drugs Possessed By Defendant at Time of Arrest. Weapons or drugs found in the defendant's possession (home or car) at the time of arrest that were not used in the crime are generally inadmissible. To be admissible, they must be relevant to a contested issue other than a description of the arrest. Thus, testimony that when the police arrested the defendant for robbery, they found 4 guns in the trunk of his car would not be admissible unless relevant to some

contested issue, e.g., if the victim said he had been robbed by an armed man who had pulled a gun out of the trunk of his car.

C. Drug Use, Possession and Addiction. Drug use or addiction by the victim, a witness, or the perpetrator of a crime is not generally admissible unless it can be shown to have adversely affected a witness's mental capacity to perceive or recall details of an event, it may be used to impeach.

D. Gruesome Photographs. Gruesomeness is not a reason to exclude evidence that is clearly relevant such as photographs of a victim's injuries, the body found at the crime scene, or the autopsy that show angle of bullets or cause of death.

E. Sympathetic photos of victims. Emotional photographs of victims before their death, especially if other family members are pictured, have little probative value and are generally too prejudicial to be admitted.

F. Mug shots. Mug shots and testimony that a victim identified the defendant from mug shots reveals that the defendant has an arrest record and is therefore not admissible unless it has substantial probative value on a contested issue. .

G. Results of prior related case. Because the circumstances and burdens of proof may be different, what happened at a prior trial on a related issue is inadmissible because it confuses the issues. Therefore, evidence that a defendant was charged or not charged, convicted or acquitted, of a traffic offense is inadmissible in a civil case arising out of a traffic accident. Similarly, the fact that a co-defendant was convicted or acquitted is a separate trial is inadmissible.

H. Failure to Wear Seatbelts. A plaintiff's failure to wear a seatbelt is likely to be misinterpreted by a jury as contributing to injuries, and is therefore inadmissible unless accompanied by expert testimony that the injuries would have been less severe if the seatbelt had been worn.

I. Wealth, Poverty and Worldly Condition of Parties. Evidence of the wealth, poverty, social standing, religion, family status, or unfortunate condition of the parties is normally inadmissible. Such evidence is presumed to appeal to sympathies and prejudices of the jury. However, evidence of a defendant's wealth may be admissible when punitive damages are at issue, so the jury can determine what amount would constitute reasonable punishment.

J. Pleadings, Search Warrants, and Other Legal Documents. Search warrants are not admissible in criminal cases unless the defense raises a genuine issue as to the validity of a search. Search warrants and probable cause affidavits are too prejudicial to be shown to the jury. Other legal documents such as pleadings and motions are also generally irrelevant and may not be introduced

or referred to. The defense attorney in a civil case may not ask the plaintiff on cross-examination (in an incredulous tone), “You’re really asking for \$2 million for a broken leg?”