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PREJUDICE vs. PROBATIVE VALUE, *PHILADELPHIA* STYLE

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Rule 403 of the Federal Rules of Evidence provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice."[1] Rule 403 cuts across all of the other rules of evidence and is one of the most frequently invoked rules during trials. Teaching the various concepts that come into play in applying this rule poses several challenges, and many students have substantial difficulty in understanding what constitutes "unfair prejudice."

For the first class on Rule 403, I assign some practical problems from the textbook[2] and the case of *Old Chief v. United States*.[3] To get things started, I sometimes show students a series of photographs that might be offered to illustrate the testimony of a forensic pathologist in a murder case. This provides a relatively straightforward opportunity to assess the probative value of the pictures in establishing, for example, the cause or manner of death, or whether the murder was premeditated or committed with extreme atrocity and cruelty, and to weigh that against the risk of prejudice that might result from an emotional response to gruesome images.[4] This is also a good time to introduce the idea that Rule 403 decisions are within the discretion of the trial judge and are seldom reversed on appeal.[5]

It is much more instructive to show students actual photographs than to rely on the descriptions of photographs in appellate court opinions. At trial a prosecutor cannot adequately explain how the pathologist came to the conclusion that a gun was fired from within two feet of the deceased without showing a photograph of the entrance wound and the stippling on the skin

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1. FED. R. EVID. 403.

2. GEORGE FISHER, EVIDENCE (2002).

3. 519 U.S. 172 (1997).

4. For an illustrative collection of cases, see PAUL J. LIACOS, MARK S. BRODIN & MICHAEL AVERY, HANDBOOK OF MASSACHUSETTS EVIDENCE § 11.6 (7th ed. 1999).

5. Most of the casebooks that I have reviewed include an appellate case where a conviction was reversed because photographs were more prejudicial than probative. In reality, however, such decisions are rare and it is necessary to advise students that if the defense lawyer cannot convince the trial judge to exclude such photographs, the chances of winning the issue on appeal are remote.

surface. It is no less difficult for a professor to talk about the probative value of such a photo without showing it. Similarly, it is impossible to convey the risk of prejudice inherent in viewing autopsy photos (or their potential probative value) without actually showing them in the classroom. Because these images will be disturbing to many students, I warn them in the preceding class that such pictures are coming.

After a discussion of the photographs, I then show a brief scene from the movie *Philadelphia*[6] in order to introduce greater complexity and to more fully explore the nuanced questions that arise under Rule 403. In the film, Andrew Beckett (played by Tom Hanks) is a lawyer with AIDS who sues his former law firm for discriminating against him because of his illness. One of the plaintiff's claims is that he was discharged because the partners believed that his physical appearance and what it implied were not good for the firm's image.

In one of the film's central courtroom scenes, Andrew is on the witness stand undergoing cross-examination by the firm's lawyer, Belinda Conine, played by Mary Steenburgen.[7] She seeks to illustrate the implausibility of Beckett's claims by means of a courtroom demonstration. She has Andrew repeat his claim that at the time he was discharged he had lesions on his face that were visible to the people he worked with. He confirms that it was his opinion that when his partners became aware of the lesions, they leapt to the conclusion that he had AIDS and fired him.

Mary Steenburgen then asks, "Do you have any lesions on your face at this time?" He replies (gesturing), "One, here, by my ear." She then walks to the edge of the witness box with a large mirror in her hand. She asks whether he can see the lesion on his face in her mirror from three feet away. The scene is shot over the witness's shoulder, looking at Mary Steenburgen's face. As she turns the mirror in her hand, Andrew's face comes into focus in the mirror and we see the both of them side by side. He looks quizzically at the mirror and then says haltingly, "Well, at the time I was fired I had four lesions and they were much bigger." She quickly prompts, "Could you answer the question please." After a few seconds (during which dramatic music underscores his plight), he answers, "No, no I can't." She repeats, "No," then concludes, "No more questions, your Honor."

6. PHILADELPHIA (TriStar Pictures 1993) (directed by Jonathan Demme). Tom Hanks won an Oscar for Best Actor in a leading role. The scene described here occurs approximately one hour and thirty-five minutes into the film. I am indebted to Prof. George Fisher from Stanford Law School for originally suggesting this film clip. Adopters of Prof. Fisher's book receive a very useful videotape of a variety of film clips from several movies for illustrating different rules of evidence.

7. Except for the protagonist Andrew Beckett, I will refer to the characters by naming the actors who played them.

Accompanied by more dramatic music, the judge announces that he thinks it would be a good time to break for the day and reconvene in the morning.[8] Andrew Beckett's lawyer is Joe Miller, played by Denzel Washington. He does not want to see the trial recessed on this sorry note and asks the judge for five minutes for re-direct. The judge asks the witness whether he can go on. Beckett is downcast, with his head in his hand. "Three minutes," suggests the plaintiff's lawyer. "Yes . . . yes," says Beckett, surrendering with a wave of his hand.

Denzel Washington is immediately out of his seat, bounding to the defense table to ask if he can borrow Mary Steenburgen's mirror. She gives it up and Beckett's lawyer charges toward the witness box.

"Andrew," he asks, "do you have any lesions on any part of your body at this time that resemble the lesions you had on your face at the time that you were fired?" "Yes," says Andrew, haltingly, "on my tor . . . torso." Denzel nods, "On your torso. If it please the Court, I would like to ask Andrew to remove his shirt so that, you know, everyone here could get an accurate idea of what we're talking about."

"Objection," from the defense lawyer. "Your Honor, it would unfairly influence the jury."[9]

Denzel replies, "Your Honor, if Andrew was forced to use a wheelchair due to his illness, would the defense ask him to park it outside because it would unfairly influence the jury? C'mon, we're talking about AIDS, we're talking about lesions, let's see what we're talking about."

The camera pans to the judge, deep in thought. He rules, "I'll allow it. Mr. Beckett, would you please remove your shirt?"

The camera returns to Andrew and the music comes back up. Breathing with difficulty, he begins to pull on his necktie. The camera shifts to the law firm partners in the front row. One mutters, "My God, what a nightmare." The next reassures him, "He asked for it."

Andrew now has moved his tie aside and is beginning to unbutton his shirt. The jurors appear transfixed by what they are watching, as is my audience of students. After several seconds of difficulty with the buttons, Andrew parts his shirt to reveal several large brown lesions on his chest, which we observe in the mirror held by his lawyer.

The lawyer asks, "Andrew, can you see the lesions on your chest in this mirror?" "Yes," says Andrew. "Thank you," says Denzel, almost in a whisper. Andrew stares defiantly out into the courtroom.

8. The successful cross-examiner returns to her seat and whispers to her colleague, in a resigned tone of voice suggesting that her job requires her to do something distasteful, but necessary, "I hate this case."

9. This I treat as an awkwardly worded invocation of Rule 403.

I begin the discussion by inviting the students to imagine how "cool" it would be, if they were in real trouble and needed a great lawyer, to have Denzel handle the case. I then point out that no matter how well they learn the rules of evidence, they will never be able to convince a judge to let them play the dramatic music during the key portions of their client's testimony.[10]

We then turn to the legal analysis. The first question I throw out is whether the judge should have sustained Mary Steenburgen's objection to the demonstration. Sometimes this leads immediately into a discussion of whether it was "prejudicial." Fairly quickly, however, someone always comments that it only seems fair to allow Andrew's lawyer to show the lesions on his chest because the defense lawyer "started it." This is an opportunity to talk briefly about the practical issues that motivate decisions by judges in "the real world." My experience trying cases[11] suggests that the vast majority of judges would overrule Mary Steenburgen's objection on the "fight fire with fire" theory.[12] This is particularly true here, where defense counsel was engaged in a tactical gambit that, as we shall see, was itself fundamentally misleading.

To eliminate that relatively uncomplicated way of resolving the problem, I then hypothesize that the plaintiff's lawyer had asked Andrew to remove his shirt and demonstrate the lesions during the direct examination. I ask whether that would have been objectionable and several students invariably, and quickly, opine that it would have been "prejudicial." I encourage the students to explain what they mean by "prejudicial."

It is best to let the discussion continue for some time before the teacher intervenes again. Several students will describe the prejudice as resulting from the fact that the demonstration has had a devastating impact on the jury. Over and over again students will make the mistake of thinking that evidence, which damages the party against whom it is offered, is prejudicial. It is difficult to overcome the very common misconception held by students who are just beginning to study evidence that evidence is prejudicial when it is powerful and strikes a hard blow. Many students will suffer from this misunderstanding

10. Although the music is a Hollywood touch, when we later discuss whether the plaintiff should have been required to show a photograph rather than removing his shirt in the courtroom, the issue of to what extent drama is permissible becomes important.

11. Before beginning to teach at Suffolk, the Author was a trial lawyer for twenty-eight years, handling for the most part civil rights and criminal defense cases.

12. *See, e.g.*, Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 177, n.2 (1988) (Rehnquist, J., dissenting) (soundness of admitting evidence to which otherwise there would be a valid objection on the ground that the objecting party has "open[ed] the door" and the opponent is merely "fighting fire with fire" "depends on the specific situation in which it is used and calls for an exercise of judicial discretion"); Bearint *ex rel.* Bearint v. Dorel Juvenile Group, 389 F.3d 1339, 1349 (11th Cir. 2004) (recognizing the doctrine, also known as "curative admissibility," and noting that "the extent to which otherwise inadmissible evidence is permitted must correspond to the unfair prejudice created").

through several classes and a small minority, unfortunately, all the way through the final exam.

I ask the students for a more detailed answer—what is it that has such a strong impact on the jury in this case? To conduct a proper analysis under Rule 403 one has to be able to articulate specifically what constitutes both the risk of prejudice and probative value of the evidence. This is difficult for students who have had no experience in marshalling evidence to prove a proposition in a courtroom.

In this case there are a variety of emotions that may be stirred by Andrew's removal of his shirt. The lesions themselves are disturbing and some jurors may be horrified by them. When the jurors look directly at this physical symptom of Andrew's disease the gravity of his situation becomes palpable in a way that nothing else in the trial had evoked. It is hard not to imagine that their hearts go out to him.

Andrew is dying and his difficulty undoing his buttons and opening his shirt, on top of his difficulty in speaking, dramatizes the gradual deterioration of his physical condition. The demonstration of his limitations takes the jurors deeper into the reality of his condition. That the jurors share this everyday task that is difficult for Andrew encourages them to identify and sympathize with him more than they would on the basis of mere oral testimony about his illness.

Moreover, the courtroom is a formal setting. The participants in the trial are in business dress. The fact that Andrew has been forced to partially undress in the courtroom is humiliating and his bare chest is shocking.

This complex situation provides an excellent opportunity to distinguish between evidence that is damaging to the opponent and evidence that creates a "danger of unfair prejudice." The Advisory Committee's Note defines "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[13] The students must unravel which of the emotional responses to the demonstration create a danger of unfair prejudice in this sense. This is very difficult given their inexperience.

Eventually, however, the discussion reveals that arguably the sympathy jurors will feel toward the plaintiff as he struggles with his buttons and is forced to partially disrobe in the courtroom creates an appeal to emotion that is not relevant to the issues in the employment case and hence constitutes unfair prejudice. A demonstration of a plaintiff's limitations would be relevant in a personal injury case against the tortfeasor who caused the injuries. But Andrew Beckett has not claimed that the law firm caused his medical condition or aggravated it. He is suing for compensation for the loss of his job, not his health. And if the hypothetical question involves a demonstration during the plaintiff's case in chief, the defendant law firm has not caused the disrobing.

13. FED. R. EVID. 403 Advisory Committee's Note.

The jurors' emotions in response to viewing the lesions, however, are another matter. The plaintiff's theory is that the partners of the law firm were disturbed by the lesions on his face and that his discharge was due to the firm's concern about the emotional impact the lesions might have on clients. The potential for an emotional response to the lesions is a relevant fact in the case. Thus it might be argued that showing the lesions to the jury does not create an unfair risk of prejudice, but merely exposes the jurors on an emotional level to a relevant fact. This, of course, is an argument that has some limits. Judges would hardly permit a plaintiff to stage a traumatic accident or assault in the courtroom in order to allow jurors to experience emotional suffering. But it is important for students to understand that evidence is not necessarily unfairly prejudicial just because it evokes an emotional response.

By this point in the class discussion someone is likely to have pointed out that it was not necessary for Andrew to bare his chest in the courtroom for the jury to see what the lesions looked like. Plaintiff could have introduced in evidence a photograph of the lesions he had while working at the firm. If no such photo exists, he could take a contemporary picture of the lesions on his chest and introduce that. Someone in the class usually asks whether the court could require plaintiff to use a photograph rather than to expose his body. This provides a good opportunity to step away from the film briefly for some discussion of *Old Chief v. United State*s.

In *Old Chief*, a principal question Justice Souter addresses is whether the Rule 403 balancing should be conducted while looking at an item of evidence in isolation, or whether a court should make the decision in the full evidentiary context of the case.[14] In the latter case, a court could take into account available substitutes for the evidence to which objection had been made.[15] For reasons which Justice Souter discusses at length, the Court adopts the latter approach.

Applying Justice Souter's *Old Chief* analysis to the option of substituting a photograph for the baring of Andrew's chest in the courtroom requires the students to make a careful examination of the issues. First, there is the question of whether the photograph has the same probative value as the live display of the lesions. In this regard, one must consider that ordinarily a party is entitled to choose what evidence best proves his case and, in Justice Souter's words, "tells a colorful story with descriptive richness."[16] The students debate whether the relatively antiseptic photograph really has the same probative value, given the nature of the plaintiff's allegations, as the live display. They want to know how far one can really go in a courtroom to tell a story in a dramatic fashion. The potential of what trial lawyers might do to engage the

14. Old Chief v. United States, 519 U.S. 175, 180 (1997).
15. *Id.* at 182–83.
16. *Id.* at 187.

jurors is fascinating. There is, of course, no bright line answer for these questions.

If the court were to conclude that the photo has equivalent probative value with the display, and offers less of a risk of unfair prejudice (which seems fairly clear), then the court should discount the probative value of the live display and exclude it if its discounted probative value is substantially outweighed by the risk of unfair prejudice.[17] Again there are difficult questions which can be debated. How much of a discount is appropriate and how actually does one measure probative value and the risk of prejudice to weigh them against each other? These, of course, are discretionary judgments that the trial court must make, and this means there will be very few reversals of such decisions on appeal. The discussion, however, of how the trial judge should rule is an opportunity for students to get a feel for how lawyers use different types of evidence to influence jurors and to think about how jurors might actually react to the alternative methods of proof in this case.

Finally, I return to the case as the film presented it and raise the question of whether what Mary Steenburgen did should have been allowed if Andrew's lawyer had objected. The point here is that what the defense lawyer did was arguably unfair and misleading because there was no evidence that the circumstances of the courtroom demonstration were substantially similar to the actual facts of the case.[18] In fact, the only evidence on point suggests that the opposite is true, because Andrew testified that there were more lesions on his face at the time he was fired and they were "much bigger." The judge would have to make a determination as to whether the differences between the lesions at the time Andrew was fired and the one that existed at trial were significant enough to exclude the demonstration, or whether the differences, once explained, only went to the weight of the evidence.

The discussion of the film, as suggested above, does not completely resolve the students' confusion and uncertainties about prejudice and probative value. It does, however, provide an interesting and enjoyable vehicle for introducing some of the principal issues that arise under Rule 403. Moreover, it provides an opportunity to discuss theoretical issues in the context of how trial lawyers actually work in the courtroom. Given that most law students have little or no experience in courtrooms, film clips such as this can be an important tool in teaching the rules of evidence.

17. *Id.* at 183.

18. *See, e.g.*, Randall v. Warnaco, Inc., 677 F.2d 1226, 1233–34 (8th Cir. 1982) (citations omitted) ("A court may properly admit experimental evidence if the tests were conducted under conditions substantially similar to the actual conditions. Admissibility, however, does not depend on perfect identity between actual and experimental conditions. Ordinarily, dissimilarities affect the weight of the evidence, not its admissibility.").