Permissible Prejudice

6.1.2018
Volume 44, Litigation, Number 4

It was a hushed courtroom as the lead witness began to detail step by step what had happened to her once she heard someone break into her apartment on the fateful night. “He approached me in the dark. I couldn’t really see his face, but he was wearing a grey hoodie and was maybe six feet tall and slight or thin. He grabbed me and turned me over and began stripping off my night clothes.” The silence in the courtroom was palpable.

Prosecutor: “What happened next?” “Objection, Your Honor.”

“Your grounds, counsel?” asked the startled judge, looking at the defense table.

Defense attorney: “It is not disputed that the witness was sexually assaulted. And, since we know that she never again got a look at the victim, the rest of the testimony is irrelevant. Worse, it is unfairly prejudicial, as it serves no purpose other than to inflame the jury.”

“Denied,” said the judge. “Proceed, counsel.”

Is the judge right? If there was no question the complainant was sexually assaulted, and the entire case turned on her identification of her attacker, isn’t everything she says after she is turned over of no materiality whatsoever? Wouldn’t its sole purpose, or at least effect, be to prejudice the jury? What’s wrong with the objection, and why permit the lurid testimony of the assault?

This scene was acted out not in an actual courtroom but in a mock trial, where the courtroom was packed with novice lawyers all now tittering over the failed objection and senior lawyers nodding knowingly that the objection had been overruled. Of course, there was the unsettling character of the objection in the midst of this most sensitive of examinations. But this was owing to the artificial circumstances of a trial advocacy lesson. In a real trial, the same objection could be made through a motion in limine. So lay aside any scruples about the specific circumstances of the objection and

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focus on its substance. Didn't the defense attorney have a point?

Witnesses Telling Their Stories

The answer, as most seasoned trial attorneys will tell you, comes in the form of the old adage that a witness, and particularly a complainant in a case such as this one, gets to tell her story. It may be that the evidence is not strictly relevant or material. But not to allow her to finish somehow deprives her of her day in court, her chance to say what was done to her, and the jury's chance to hear the overall character of the event in question.

What sense is there in this rule? Answers are readily available. After all, the jury needs some context. Facts do not exist in a vacuum, and it would be peculiar to have a sexual assault trial stop abruptly in mid-testimony. Also, there might be some element of the later events that the jury would find significant that the complainant, or even the prosecutors, do not. It is not inconceivable that the jury detects something about the defendant, sitting at the counsel table, that seems consistent or even inconsistent with events subsequently. We rely on the jury to use its ordinary sense in precisely this way, don't we? Call the testimony permissible prejudice.

But isn't the idea just a little too risky in this case, and indeed in many cases? It is for the judge to determine relevance and unfair prejudice, not the jury. The more likely outcome if the matter is left to the jury is that, particularly if the jury thinks it sees something about this defendant that seems consistent, it is *because* he's the defendant. Despite the presumption of innocence, juries tend to think a defendant would not be sitting in court if there were not some reason to believe he's the guilty party. So the decision to allow the complainant to proceed seems doubly fraught.

The answer might be that it doesn't *per se* prejudice the defendant because he would still be able to say it wasn't him. Defense counsel, if reasonably skillful, can underscore the absence of any identifying information. But by the same token, we should not be making defense counsel's burden *more* weighty by permitting the complainant to distract the jury with a lurid account of a sexual assault, when the real question is identification for a crime everyone admits was committed. On both grounds, then, the old adage seems to miss the mark here. It invites the jury to convict the defendant because he is the defendant and because it is shocked by the action that led to him being indicted in the first place. So much for the presumption of innocence. There is a presumption of guilt at work here, added to by the shock and horror of the wrong itself.

In effect, old adages may not measure up very well to the standards we want in our legal system. This is not to say that there are not cases, maybe the majority of cases, in which the complainant's need or right, or whatever it is, to tell her story should not be vindicated. Maybe there *is* something

about the context that *is* critical to the particular case. Old adages arise from long practice, and in most cases, it may not be so cut and dried that the additional testimony of the complainant is unnecessary or improper. The key seems to be to apply the rule in the particular circumstances, weighing the likelihood of unfair prejudice against the need for the jury to hear the full story.

The Problem of Juries

Jury trials depend on this fine balancing, a fact not too well appreciated in our modern times. Part of the reason is that we don't really know, let alone trust, the jury system anymore. What makes juries seem so nutty to foreigners, and now ordinary U.S. citizens as well, is that we have left the role of fact finding to ordinary citizens who are easily swayed by matters that do not really bear on the subject matter of the trial. Every trial lawyer has a story about a juror or jury influenced by the clothing worn by one of the lawyers or the "look" of the defendant, or even a fantasy or two. In a famous antitrust trial 40 years ago, it became clear from interviews with the jury that one of the jurors had fallen madly in love with defense counsel. And then led the charge for a very large plaintiff's verdict.

But if such irrelevant, extraneous factors tend to influence juries, all the more reason that we should be careful what the jury is exposed to in the evidence, that what is heard and seen is carefully scrutinized. We want to make sure that, for those factors we can control, everything is handled fairly. After all, maybe that love-struck juror was motivated to find against her imagined lover by the evidence and would have found for him if that evidence had gone the other way. What we need to be reminded of is that, for all its warts, the jury trial should never become a free-for-all. It's a highly regulated exercise.

Principal among the regulatory means are the rules of evidence. Based on centuries of experience, these allow the jury to hear only evidence deemed dependable. Juries don't hear everything, only what we have decided based on experience they *should* hear as probative, reliable. Thus, we do not permit a jury to hear evidence of "other crimes," precisely because we know that other crimes evidence may cause them to convict a defendant on the basis of what he did previously, not what he's charged with today. At the same time, the evidence becomes more reliable if those other crimes are directly related to the crime currently charged, by showing a modus operandi, for example, or a motive. In each instance, the court serves as guardian of the evidentiary record, separating out what is wheat and what chaff.

So, as everybody knows, the rule is that there is no rule against prejudicial material, only what's "unfairly" prejudicial. But this brings us back to square one. Was the further testimony on the sexual assault "unfairly" prejudicial? Tough question, it seems. Certainly, it is not one that should be answered by

resort to general rules that the "plaintiff gets to tell her story" or "we need the full context." In each instance, case by case, we need to evaluate what the jury should not hear and what it should.

The Problem of Judges

But perhaps you might say that juries are the whole problem here in the first place. Were it not for the fact that we were allowing ordinary citizens to decide guilt or innocence, rather than a judge who can separate that wheat from the chaff and ensure that no "unfair" prejudice has an impact on the decision. But stop for a minute. Are we so certain about judges, who are, after all, ordinary people too, just with a higher training in what they *should* pay attention to and what not? Do we really have such confidence that judges know how to separate their biases and unfair prejudice from the evidence?

Note that our confidence in the judiciary, warranted or not, allows us to do in the bench trial what we would never ever think of doing with a jury. Prejudice, including unfair prejudice, abounds. We just expect that the judge will know how not to rely on what's not genuinely probative. Indeed, it's even greater than that. We allow the judge to hear and decide what is admissible and what is "unfairly prejudicial" in the first place. And many, taking advantage of the relaxed regulatory circumstance of the bench trial, apply flaccid principles. Every trial lawyer shudders on hearing a judge say, "I will take it for what it's worth."

Should we have such confidence in judges? There are reasons to doubt it. Consider for a moment *Lawson v. Grubhub, Inc.* (No. 15-cv-05128-JSC (N.D. Cal.)), a case decided to great fanfare in February 2018. The issue in that case was whether Grubhub delivery drivers are not really independent contractors, as the company claimed, but Grubhub employees instead. This was a matter of enormous importance to Grubhub's business model, which counted on Grubhub's ability to avoid the extensive costs and inconvenience of paying its drivers as employees and providing them benefits of the kind an employee might command. It has emerged as a test case for many of the new hi-tech businesses, Uber being the best example, that want to treat those who deliver services as independent contractors.

These may be newish companies, but they are not by any means the first companies to be confronted with this circumstance. Extensive precedent set the factors to be considered in deciding that question, and the court in this case was quite methodical in assessing them all. And in deciding the issue, the magistrate judge dutifully reviewed those factors, determining which favored the employment conclusion and which not. In the end, as more factors favored the conclusion that the drivers were independent contractors, that was her conclusion. As of this writing, the matter is still sharply mooted.

There is something somewhat striking lurking in the magistrate judge's decision, however. During the trial of the matter, counsel for Grubhub put out extensive evidence that the particular plaintiff involved had set out to cheat the system Grubhub used to pay its drivers. This was a complex arrangement under which the driver signed up for deliveries within a certain time period, grabbing orders in a manner familiar to those who use an Uber app. In this case, the representative plaintiff had figured out how to game the system, as he pretended to be working when he really hadn't been, thereby being paid the minimum amount that Grubhub paid to those who were on call.

Grubhub's lawyers were certainly within their rights to put these facts in evidence. After all, the plaintiff claimed to represent the claims of others and had to be vetted as such. In addition, as the entire matter was being heard by the court, there was no reason not to put out that evidence. The court could "take it for what it's worth," disregarding it if there were no ultimate issue in the case that it bore on.

There wasn't. The magistrate's decision was based exclusively on how the evidence stacked up under the governing standards for independent contractors, none of which depended on the good intentions or good conduct of the representative plaintiff. But this should give a reader of the magistrate judge's opinion reason to pause. The only way one knows that Grubhub's lawyer did such a complete job in undermining the plaintiff's bona fides is that the magistrate judge's opinion quotes that evidence in detail, even while reaching an ultimate conclusion that made the evidence irrelevant. It is difficult not to conclude that this "permissible prejudice" assisted the outcome, perhaps influencing the magistrate judge to weigh the factors the way she did.

This is not to fault the magistrate judge. She seems to have reached a defensible conclusion. But the point should not be lost on a more general observer of the courts. Judges are not always so reliable in their exclusion from their thinking of even the most irrelevant and unfairly prejudicial evidence. Indeed, the common idea that judges are more reliable triers of fact than juries is open to considerable doubt. The jury system seems to present a double protection against prejudice, permissible or otherwise. First, the jury of ordinary citizens gets to turn their attention to evidence that is carefully regulated to ensure that the unfairly prejudicial does not creep in, assuming that old adages are not allowed to interfere. Then the judge can determine, from his own careful consideration of the same evidence, whether prejudice of one sort or another has allowed the trial to go off the rails.

In the current culture, we suffer from a double whammy of doubt. We seem no longer to take the jury trial as seriously as we might, allowing more prejudice to creep in, whether through the relaxation of the rules of evidence

or the application of old adages we don't really understand. And, having scuttled the good rules that necessarily bound the decision making of the jury, we now turn to judges to make decisions that we believe are less open to prejudicial decision making in the first place. Probably now, with the old adages running rampant, it is right to say that juries are no longer as reliable as they once were. But it remains to be seen whether turning the matter over to an "expert" judge is really certain to be a better choice.