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Applications of Character Evidence in Civil and Criminal Cases

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GRADUATION THESIS IN SENIOR LAW.

SUBJECT

THE APPLICATIONS OF CHARACTER EVIDENCE IN CIVIL AND CRIMINAL CASES.

Respectfully Submitted

by

GERALD S. CHARGIN.

1-9-2-9
The various rules of evidence which permit or exclude the introduction of one's character or reputation, as possessing probative value are all based upon a policy of the law, the aim of which is to safeguard the courts against the risks of erroneous verdicts. This policy assumes that truth in the long run will best be attained by the exclusion of certain kinds of evidence or if allowable, upon certain conditions imposed, in order to guide the deliberations of the judge or juries to just verdicts.

Most of the applications of character or as it is sometimes designated, moral evidence, which shall hereafter be mentioned and applied to concrete cases are a part of the Eliminative Rules of Evidence adopted by all jurisdictions as a part of the substantive law, for the purpose of shutting out certain kinds of evidence, which if not so excluded would result, as an almost necessary consequence, in the creation of three distinct and outstanding evils in the trial of issues. One of these evils that immediately suggests itself to the mind, upon the admission of certain evidence would be the Undue Prejudice created in the minds of a jury. A concrete example might well serve to bring out this point. For instance, the jurors upon hearing of an accused criminal's record, may find him guilty of the act of which he is charged without actually believing that he did it, due to the effect which such evidence has upon the ordinary mind, and consequently the juror would generally be guilty of this fallacious line of reasoning to-wit: "I shall vote his conviction for perchance he is not guilty of the present crime charged, he has certainly been guilty of others and ought therefore be punished", or the juror might convict merely because the accused seems to be a fit person to punish generally. In practice this is not the actual process
of reasoning, and if the same were called to the attention of a juror, he would in fact deny it, but instinctively and unconsciously, it is the logical result of the operation of a person's mind under such circumstances, and so the law very judiciously steps in and declares that such evidence shall not generally be admitted.

Another harm that might follow from the admission of such evidence is that it would result in an unfair surprise to a person in litigation. This policy of exclusion or elimination rests upon the danger shown by experience that an opponent may be overcome by false evidence merely for the lack of an opportunity before trial to prepare a refutation for the same, when in point of fact, refutation would be an easy matter. The mere surprise of itself is no consideration, but when a party to the action is surprised to find, for example, false evidence produced, it being a matter totally foreign to the case, it might be unfair to him to admit it, if he could not have known in advance, by the exercise of ordinary prudence and diligence, the nature and tenor of such false evidence.

A third evil consequence might also follow from the admissibility of certain brands of evidence, which if applied has for its direct operation the creation of confusing and collateral issues in the trial of a case. This manifest injustice is also guarded against by these eliminative rules. The policy of the law in this regard, rests upon the danger, as demonstrated by concrete cases that a collection or cumulation of complex and unproven details on collateral and foreign issues, may so distract the attention of the jurors that the real issues in a particular controversy will be lost sight of, and thereby prompt the jury to render their verdict by reason of some insignificant detail, which might have particularly impressed their minds, for some unknown reason, in complete derogation and disregard of the evidence actually presented pertinent to the main issues involved in the case. By way of illustration, let us consider an action for assault and battery. It would not be permitted on the part of
the defendant to relate the details prior to such assault to show
the motives and impulses of the parties that lead up to the affray.
It would not be permitted by evidence to consider the past relations
of the parties, covering all their dealings and happenings: their
character; and other particular events extending over a period of many
years; and the causes engendering their acrimonious attitude toward
each other. It is quite apparent to everyone how far they might go
afoul in this matter, if permitted. But no, the law asserts that
you cannot confuse the minds of the jurors, with trivial, unrelated,
immateriel details.

An additional reason immediately presents itself in the con-
sideration of this point. If multitudinous issues were permitted
to be raised by a policy permitting wide latitude in such invest-
igations, consider the effect it would have upon the administration
of justice. Long and tedious trials would be in order; a never-
ending line of witnesses would be called to testify upon the
entire history of an individual or controversy: the functions of
the government's judicial department would be greatly impaired
and its officer's time absorbed in useless and protracted litigation.
The policy of the law in its prohibitions against Undue Prejudice,
Unfair Surprise, and Confusion of Issues, will be seen predominating
in all the particular cases to be hereinafter discussed, concerning
the non-admissibility of evidence relating to character or reputation.

To begin with, let us consider the value of character evidence
as applied in criminal cases. It is a familiar rule of evidence
that it is improper, at the trial of a defendant, for a crime to
prove that he has committed other crimes having no connection with
the one under investigation, for the purpose of disparaging the
reputation of the accused in the minds of the jury. Acts of
immorality are not legally relevant, and should not be dragged into
the issues to prejudice the defendant, or to create a probability
of guilt. This is a very elementary rule of character evidence and
is sanctioned by practically all the judicial decisions throughout
the States of the Union, and also has been the prevailing weight of authority in England for many years. However in the very early history of England, and occasionally in this country, this rule had been disregarded, much to the detriment of those up before the bar of justice for various offenses. A person charged with a crime, though having a very bad past record, might at the time when he is being held, have reformed. Of itself, and standing alone, the proof of a past misdeed is no proof of the crime in question. This principle has been well established by the current judicial decisions of our courts, and as an illustration, is exemplified and settled beyond all doubt in a leading case: State vs Lagage,(57NH-245), also cited in Wignore's Cases on Evidence,(Second Ed.p.69), decided by a New Hampshire court in 1875, the same being cited by all Commentators, in judicial decisions and in the text-books, on that point. In this case, Lagage was indicted and convicted for the murder of Josie Langmaid, while on her way to school. The prosecution claimed the murder was committed in the attempted perpetration of rape upon the deceased; and in furtherance of this claim, the State had one Julienne Rousse testify that some four or five years previous the defendant had on one occasion in Canada committed rape upon her. To this evidence, the defendant's counsel objected, but to no avail. An appeal was taken from the verdict on the correctness of this ruling. The nisi prius court admitted the evidence for the purpose of showing the intent or motive in the crime, but the appellate court stated that in this case there was no question of motive or intent. Certainly the commission of a rape in Canada in 1871, would not show any motive for committing the same in New Hampshire in 1875, nor does it disclose any intent to do so. There was no logical connection between the commission of the former crime upon Julienne Rousse, and the murder of Josephine Langmaid as the law requires. The matter simply reduces itself to attacking the prisoner's reputation by proof of particular acts which the authorities clearly show to be inadmiss-
also liable. The court laid down the propositions which are now the law to-day, that it is not permissible for the prosecution to attack the character of the prisoner unless he first puts the same in issue; nor is it permissible to show in the defendant, a tendency or disposition to commit crime; neither is it permissible to offer in evidence other crimes, unless they are so connected by circumstances with the particular crime in issue, as that the proof of one fact with its circumstances has a direct bearing upon the issue in the trial.

The ruling laid down in the above case, as expressive of the weight of authority now prevalent in the United States and in England, has not always been followed by some European nations, whose laws are based upon a different system of jurisprudence than our own. On the contrary, all the courts in France, for example, have for many years, by uniform decision permitted a very wide discretion in the investigation of any and all acts of misconduct upon the part of the defendant, irrespective as to their remoteness to the crime in issue, for the purpose of determining character. The extent of such investigations can be realized quite readily by an instant case actually tried before a French Court. The facts in substance can be related thusly: A lady of high standing, Baroness de Valley, was found strangled in her apartment in Paris. She was rich and made a business of lending money at usurious rates. Robbery was the object of her murderers. A party of several young men, Kiesgen, Ferrand, Truel and others were charged with the murder. Kiesgen was the son of a prosperus merchant, and appeared to be well-dressed and well educated young man. He had no regular occupation and his father furnished him with pocket-money; the others were of not so respectable surroundings. The Presiding Judge Poupartin conducted the opening examination at the trial and the substance of his remarks were these:"None of you have a criminal record; but that is far from saying that you have a good record, You, Kiesgen; seem to have a mode of life not at all creditable. You frequent the low
saloons of the Latin Quarter, you were an habitué of the Harcourt Cafe. You have been getting all the money you could from women. Your mistress Jeanne Prevost, alias Margot, gave you 15 francs a day from her earnings as a prostitute. You are a panderer of the worst sort. In your cell at Mazas Prison you kept writing to her, asking her to send you cash. Unfortunately for you, she was at that time herself in St. Lazare Prison. "As for you Truell, alias Julien, alias Curlyhead, you are the son of a mechanical draftsman at Charleton. After having a job as an apprentice in a factory, you were discharged for a most brutal assault. After that you lived off your mother. Then you became an habitué like Kiesgen of the saloons and women of the Latin Quarter. You seem to have been one of a gang of bicycle thieves. In short after starting as an honest working man, you gave up that pursuit, and became an agent for houses of ill-fame. You see what you have been brought to by bad company." The judge also proceeded in the same manner with the other defendants, and after that the evidence was put in relating directly to the crime charged. The jury found three of the defendants guilty and they were sentenced to hard labor for life. (Albert Bataille "Causes Criminelles et Mondaines", 1896, p. 249). The jury no doubt was influenced in their verdict by the independent crimes of the defendant; for who could entertain an unprejudiced and impartial mind in the face of such iniquities. Besides the undue prejudice created by such extraneous admissions, it naturally leads to a confusion of the triable issues in the case; not to mention the unfair surprise to the defendants at the bar who certainly did not go prepared before such tribunal with the means with which to deny or palliate the accusations made by the court; and in an early case decided in England the injustice of such procedure was quite apparent to the presiding judge, Lord Holt, who put an end to the practice which had theretofore prevailed in England and which still prevails in France today. Thus at a trial before him (Lord Holt 1688) of one Harrison for the murder of one Dr. Glench, the
counsel for the prosecution, calling a witness attempted to prove a
delonious design of the prisoner three years before, but the learned
Judge indignantly exclaimed, "Hold! Hold! what are you doing now?
Are you going to arraign this man for his whole life? How can he
defend himself from the charges of which he has no notice; and how
many issues are to be raised to perplex me and the jury? Away,
away! that ought not to be; that is nothing to this matter."
Hence, one can readily see, by a review of the above two cases, that
the rule which now prevails is the most fair and just, to one charged
with a public offense.

In line with the principles laid down by the court in the
case of State vs. Lepage (Supra), the conduct of the defendant on
other occasions is sometimes relevant, where such conduct has no
other purpose in being reviewed, except to show the motive or intent
in doing the act complained of. In reference to a charge of uttering
counterfeit bills, coin, or forged instruments, it has long been the
settled practice to admit evidence of the uttering of similar counter-
feit money or forgeries to other persons about the same time, due
no doubt, in the difficulty to otherwise prove the offense. (People
v. Farell, 30 Cal. 316; People v. McGlade, 139 Cal. 66, Commonwealth
v. Stone, 4 Mass. 43). It is likewise the same rule in the case of
receiving stolen property, in order to show that the party receiving
the same had knowledge that they were stolen, the scienter being one
of the elements of the crime charged.

There has been considerable discussion whether in the charge
of obtaining goods or money under false pretenses, it is relevant
to show that the defendant has made other similar pretenses at other
times and places. Some courts have held such evidence to be ir-
relevant, yet by the weight of authority, such representations or
transactions are received, when they tend to show a common motive
or intent existing in the minds of the accused, or when the trans-
actions are so connected in point of time and so similar in their
relation, that the same motive may reasonably be imputed to all.
This same principle has been applied in prosecutions for robbery, larceny, extortions and other cases. (People vs. Fehrenbach, 102 Cal. 394); also where in a murder by a defendant of his wife's parents shortly after the killing of his wife, the former murders were admissible to show the same to be a part of a common plan to wipe out the entire family, and to rebut the claim that the deaths were caused through accidental means. (People vs. Craig, 111 Cal. 460). Poison schemes have also come within the rule announced in the above cases. However, many of these cases are exceptions and since their admissibility tends to prejudice the jurors against the accused, they should, (in the language of the learned Judge, in the case of People vs. Lane, 100 Cal. 379) be excluded, in order to give the defendant the benefit of the doubt when the evidence is so questionable that the presiding judge cannot clearly perceive the connection between them.

In those instances where evidence of character or reputation is admissible in criminal cases, it must be especially noted that the same can only be introduced by the defendant, himself by way of defense to the crime charged. Natural to expect, the testimony will go to his good character, for the purpose of inducing the jury to believe, from the improbability that a person of good character should have conducted himself as alleged, that there must be some mistake or misrepresentation in the evidence produced on the part of the prosecution. (8 Cal. Juris. 54). An offer of one's good character to rebut an inference of guilt, must, and does have some effect upon the minds of the jurors especially when the other evidence in the case bearing directly on the crime is circumstantial in its nature, since forsooth, it is not our best citizens in our communities that go about committing crimes. As soon however, as the defendant brings his character into the case by showing it off to his advantage, it then permits the prosecution to refute such evidence by proving that his character is otherwise.

This proof of bad character, after having been put in issue
by the defendant, must be limited to evidence derived from the
general reputation of the defendant existing in the community in
which he lives, and it must be further restricted only to the
particular trait of character involved in the offense. There is
some confusion as to the term character, and reputation, and they
are generally used interchangeably. The Code of the State also
refers to them in a loose manner. Character is that personal in-
herent attribute and manifestation of good morals and nobility of
action, and when attested to, or attributable to one by others, it
practically amounts to reputation. What is wanted in all these
instances, is the common opinion of one’s estimate and worth by
others upon which there is a general concurrence. Hence, a common
concurrence of opinion as to one’s character, in a narrowly re-
stricted circle of a particular class of people is inadmissible.
(People vs. Harris, 169 Cal.53). Any other proofs of good character
other than by reputation in the community is not permissible, and
following this rule, it has been quite generally held that one
cannot prove his character by means of his honorable discharge from
the army. (People vs. EcHman,72 Cal.582). When a witness testifies
for and on behalf of the defendant, he will not be permitted to testi-
fy to any particular acts or facts, for the purpose of having the
court or jury draw a conclusion of the defendant’s reputation, nor
shall a witness be permitted to describe the defendant’s character
or disposition from his own experiences with the defendant or from
personal observation.

Before a witness may testify to the general reputation of
another, it must be shown that he is sufficiently acquainted with
the people in such community, to render it likely for him to obtain
information as to what others know bearing upon such reputation.
(People vs. Pauli, 58 Cal. 594). Proof of good reputation may not
only be offered through witnesses who have heard the reputation of
the defendant discussed, but the same may also be furnished by the
testimony of witnesses, who in effect testify that they have not
heard one's reputation discussed, provided that they have been in
the community where they would have heard it spoken of, had it so
been discussed. This application is based upon the reason that
it must be presumed, that a character of a person is good, if the
people of a community in which he lives have not discussed it.
Were it not the rule most citizens would suffer in reputation
before a court of justice. Since according to a predominant
characteristic in mortal man's nature, it is only those of notorious
character, that receive sufficient attention from their fellow-
citizens, as would provoke discussion by them, and solely on account
of such notoriety.

The evidence concerning the general reputation of the defendant,
must be restricted to the particular trait of character attending
the particular crime. (People vs Josephs, 7Cal.127), and remote or
incidental traits cannot be considered. Different crimes involve
a distinct trait or element peculiar to that offense. If an accused
is being tried for perjury, the outstanding element of the crime
consists in a disregard for truth and probity. Hence the particular
trait, which may be inquired into, would be the defendant's general
reputation for veracity and integrity. In cases of larceny and em-
bezzlement; the substance of the acts consists in the wrongful taking
or withholding the property of another, and so the defendant's character
should be scrutinized as to his honesty and integrity. As to the un-
lawful killing of another with premeditation, it being a crime of
violence, the jury should consider the reputation of the defendant for
peace and quiet, however it is error to consider the defendant's
character for peace and quite, when he is being tried for involuntary
manslaughter, (People vs Thomas, 55Cal.App.306), since the crime generally
results without the presence of the "malus animus". In cases of robbery,
besides the investigation as to the defendant's character for peace and
quite, as it is generally perpetrated with the purpose of committing
a larceny, the defendant's particular reputation for honesty and
integrity is also material, provided however in all the above cases,
the defendant opens up the inquiry by his own testimony.

We now consider character and reputation in homicide cases pertaining to the deceased, for the purpose of determining the guilt of the alleged killer. It may be stated as an abstract proposition of law, that the character of the deceased may not be considered in determining the guilt of a defendant charged with homicide, since the taking of human life unlawfully is in no way excused or palliated by the bad character or reputation of the person slain, or by a showing that his life was of little value (People vs Lamar, 148 Cal. 564), but a few exceptions arise, when the plea of self defense is interposed, and when the evidence is conflicting and circumstantial as to who was the aggressor in the case, and the nature of the aggression. It being more probable that a man of violent and dangerous character and disposition would make an unprovoked and deadly assault than a quiet and peaceful man. This inquiry is also pertinent, when from all of the circumstances of the killing, it tends to show that the defendant acted in fear of the impending evil, by virtue of the bad character of the deceased (Franklin vs State, 29 Ala. 14) (Wigmore's Evidence, Second Ed. p.42). It is quite reasonable to assume that a person may use a greater amount of force to repel an attack against an adversary possessing a dangerous and turbulent disposition than a person of ordinary character, and that an affray or combat is more likely to be precipitated under such circumstances. The court in this case, Franklin vs State, (supra), states: "the character of the deceased for turbulence, violence, revengefulness, blood-shed and the like, where it qualifies and gives meaning and point to the conduct of the deceased should be proper evidence, for the conduct of a man of peaceable character and harmless deportment might pass by without exciting a reasonable apprehension of impending peril; while on the other hand, the same conduct, from a man of notoriously opposite character and habits, might reasonably produce a consciousness of the most imminent peril, and the conviction of the necessity of prompt defensive action. Whenever such
bad character on the part of the deceased thus illustrated the circumstances attending a homicide, and the circumstances so illustrated tend to produce a reasonable belief of imminent danger in the mind of the slayer, the character as mingled with the transaction is a part of it and is indispensable to its correct understanding. It has been held that it is not a material question as to whether the deceased was in fact a man of dangerous character, but it is his reputation as such, that constitutes the legitimate subject of inquiry, and the prosecution may not show that the deceased was not in fact a dangerous man, (People vs Hoffman 46 Cal.App.Dec.389).

There is some conflict among the decisions of the state courts, as to the admissibility of the deceased character when the same is not known to the defendant. In this state the following distinction is drawn. If it is attempted, on the part of the defendant to prove that he was justified in believing himself in imminent danger, his knowledge of such reputation is absolutely necessary, in order to show, by reason of such knowledge there was sufficient cause to excite him, to pursue the course of action as was indicated by the circumstances presented. If on the other hand, the defendant does not know of the reputation of the deceased for violence and turbulence at the time of the homicide, such reputation can only be introduced for the purpose, and is limited to the inquiry as to who was likely to be the assailant, when the facts circumstantial in their nature, and the evidence equivocal. And to this part of the inquiry, the defendant may explain and state the particular threats made by the deceased against him, even though the same were uncommunicated, (People vs Alivtre 55 Cal.263, People vs McCann, 44 Cal.App.Dec.82; People vs Arnold 15 Cal.476).

These uncommunicated threats are evidence of the mental attitude of the deceased toward the prisoner, touching upon the question as to who precipitated the affray; while evidence of communicated threats are intended to shed light upon the mental attitude of the prisoner toward the deceased when the homicide occurred, as bearing upon his justification in acting under the fear of the impending peril under which
he was placed. In concluding this point, however, it must be noted, that when a homicide is committed under circumstances where the issue of self defense does not exist, evidence of threats, on the part of the deceased, whether communicated or uncommunicated are absolutely immaterial and inadmissible, (People vs Taing 53 Cal.602, People vs Campbell,59 Cal.243, People vs Westlake 62Cal.303).

We shall now discuss character and reputation in its application to civil cases. It it is charged that a party has been guilty of an unlawful or immoral act, the fact that he is known to have many times committed similar acts would no doubt be a circumstance which would in ordinary affairs of life weigh heavily against him. In popular estimation few facts are more powerful in determining the merits of any claim than the character of the respective litigants; and yet it is the general rule of law that in civil actions, the character of the parties are irrelevant. For however just may be the inferences, which might in many cases be drawn as to the merits of the controversy from their character, such inferences or conclusions are too vague and unreliable for that degree of certainty which should prevail in judicial tribunals. If in cases involving contracts or torts, evidence were to be received, the result would be made more dependent on the popularity of the party than on the merits of the case. The testimony would consist largely of matters of opinion and be greatly affected by bias and favoritism, resulting in delay and expense to all, to say nothing of the injustice. In a leading case, Thompson vs Church,1 Root (Conn)312, it was attempted in a civil action for assault, to prove that the defendant was a quarrelsome man. The court said, "The general character of a party is not in issue, the business of the court is to try the case, and not the man"; and a very bad man, may have a very righteous cause. Hence we see that there is a greater amount of restriction in reference to character as applied in civil controversies, than there is in criminal cases. In the ordinary case of breach of contract, character is of no concern, except as to the credibility of a person, considered from the standpoint as a witness. In tort actions,
such as those based on negligence, it is irrelevant to prove that
the plaintiff or the defendant has on similar occasions been careful
or negligent, or that the reputation of one has theretofore been that
of a careful and prudent man.

Although in civil actions, evidence of character is not admissible
to sustain a cause of action or defeat a recovery, there are a class
of actions in which from the nature of the issue, evidence of character is
relevant, especially as to the measure of damages. Perhaps this doctrine
is most frequently illustrated in actions for slander and libel. Lord
Ellenborough long since tersely stated the doctrine which still
prevails: "Certainly a person of disparaged fame is not entitled to
the same measure of damages as one whose character is unblemished, and
it is competent to show that by evidence, (--- vs Moor, 105 English
Reprint 106), (Jones on Evidence, Third ed. p. 196).

In such cases however, the evidence must be confined to the
general reputation of the plaintiff, this being the same condition for
its introduction in criminal cases as well. This general reputation
cannot be brought to light by specific instances of misconduct. As it
has been announced, "character grows out of special acts but is not
proved by them". The weight of authority also favors the rule that such
reputation must be confined to the trait of character involved in
the action. Breach of Promise to Marry cases are, like slander and libel,
exceptions to the general character rule in civil cases, due to the
peculiar nature of these actions, and in such cases, the bad character
of the plaintiff is clearly in issue. If the plaintiff has been
guilty of immoral acts with another, and such fact is known to the
defendant, at the time of the contract, he may prove it as a defense.
This same rule is true of without the fault of the defendant the
plaintiff, by her subsequent indelicate conduct injures her reputation.
The measure of damages in such cases are commensurate with the
character of the person, since it is their character, which chiefly
determines the extent of the injury. In actions of Seduction and
Criminal Conversation, character is also relevant as the chief elements
of damage are the wounded sensibility of the injured party, and the loss of the society of the daughter, or wife. And the damage is manifestly less if the daughter or wife was a person of disparaged fame, than one possessing good reputation. In these cases, the woman's character for chastity is the trait in issue.

In civil actions involving fraud, it has been announced in some cases that the party who is charged with fraud, or other acts involving moral turpitude, may rebut the same by proof of good character. Greenleaf states, "Generally in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it" (Greenl. Ev. par. 54). However, this statement of the law seems contrary to the clear weight of authority. It is the best rule that each transaction should be ascertained by its own circumstances, and not by the character of the party.

In actions for damages for malicious prosecution, the defendant may show that he acted without malice, and in good faith. (Lamb vs Galland, 44 Cal. 609). The general reputation of the plaintiff may also be inquired into in mitigation of damages. There is authority, of great weight and respectability holding that in such actions the plaintiff may prove in the first instance his own good character, (Murphy vs Davids, 181 Cal. 706). This seems to be an exception to the rule that good character cannot be received until it is attacked. The above four or five varieties of actions already discussed, practically covers the field of exceptions wherein character is applied in civil actions.

I have attempted in the foregoing thesis to review and apply the principles of evidence as applicable to character in civil and criminal cases, as the same are defined by substantive code law; commentators; and judicial decisions, ignoring for the most part, character or reputation touching upon the qualifications and credibility of witnesses incidental to the trial of issues in such cases.