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Criminal Law: Evidence of Prior Misconduct: Whitty v. State

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retreat into his home and there be free from unreasonable governmental intrusion."[60]

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Criminal Law: Evidence of Prior Misconduct: Whitty v. State: Thomas James Whitty was found guilty of indecent behavior with a 10-year-old girl.[1] According to the state's evidence, Whitty accosted a group of playing children and asked a 10-year-old girl to help him find a rabbit which he said he had lost. To help with the search the girl accompanied Whitty to a basement, where he took indecent liberties with the child.

During the trial, Whitty testified that he had, on the day previous to the day of the alleged crime, not been in the same neighborhood. He also denied ever asking any children to help him find a rabbit and specifically denied attempting to take indecent liberties with an 8-year-old girl, a playmate of the girl allegedly assaulted.

The 8-year-old girl, who was called as a rebuttal witness by the state, testified that Whitty had attempted to take indecent liberties with her by using a technique similar to that allegedly used the next evening. The prosecution initially had tried to introduce this evidence in its principal case, but the trial court admitted it only after the defendant, with the aid of several witnesses, had attempted to establish an alibi. Three times the judge alerted the jury that the testimony of the 8-year-old was not to be considered proof of guilt but was allowed only for the purpose of identifying the defendant in connection with the crime charged. It seems that the trial court considered the testimony allowable because the identity of the alleged attacker was at issue under the alibi defense, not because it impeached the credibility of the defendant.

GENERAL CHARACTER RULE

The general character rule can only be understood as a species of a larger rule, the rule on prior and collateral acts. Proof of such acts may only be admitted if the facts are relevant to the issues of the case and there is a logical similarity "between the condition giving rise to the fact offered and the circumstances surrounding the issue or fact to be proved."[2] The general character rule and its philosophical basis is well stated in *Paulson v. State*.[3]

> From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined

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[60] Silverman v. United States, *supra* note 21, at 511.
[1] Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967).
[2] 1 JONES, EVIDENCE §156 (5th ed. 1958).
[3] 118 Wis. 89, 98, 94 N.W. 771, 774 (1903).

> to the very offense charged, and that neither general bad character nor commission of other specific disconnected acts whether criminal or merely meretricious, could be proved against him. This was predicated on the fundamental principle of justice that the bad man no more than the good ought to be convicted of a crime not committed by him.

This long established rule is accepted in the vast majority of jurisdictions.[4] The evidence is not irrelevant, but there is no logical similarity between a man's disposition (the condition giving rise to the fact offered) and a particular alleged criminal act (the circumstances surrounding the issue or fact to be proved) and therefore it can be discerned that general character is a collateral fact which may not be admitted as evidence that on a particular occasion a man acted in accordance with his disposition. In other words, an evil man may have a good and even a glorious cause.[5]

EXCEPTIONS

The general character rule excluding evidence of prior misconduct has been subjected to a varying number of overlapping exceptions in Wisconsin and most other jurisdictions.[6] In Wisconsin, evidence is admissible which is particularly probative in showing six "well established" exceptions enumerated in *Whitty*.[7] They are:

1. Elements of the specific crime charged[8]
2. Intent[9]
3. Identity[10]
4. System of criminal activity[11]
5. Impeachment of credibility[12]
6. Character (when put in issue by the defendant)[13]

This list of exceptions (and similar lists) is sometimes considered to be a rule by itself rather that an enumeration of exceptions to the character rule.

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[4] 22A C.J.S. CRIMINAL LAW §682 (1961); 1 JONES, EVIDENCE §165 (5th ed. 1958); MCCORMICK, EVIDENCE §157 (1954); 1 WHARTON, CRIMINAL EVIDENCE §232 (12th ed. 1955); 1 WIGMORE, EVIDENCE §§193-194 (3d ed. 1940); UNDERHILL, CRIMINAL EVIDENCE §180 (4th ed. 1935).

[5] JONES, EVIDENCE §165 (5th ed. 1958).

[6] 22A C.J.S. CRIMINAL LAW §§683-689; 1 JONES, EVIDENCE §162 (5th ed. 1958); MCCORMICK, EVIDENCE §157 (1954); 1 WHARTON, CRIMINAL EVIDENCE §§233-244 (12th ed. 1955); These exceptions are statutory in a few jurisdictions: LA. REV. STAT. ANN. §§15:445, 15:446 (1950); MICH. STAT. ANN. §25.1050 (1954); OHIO REV. CODE ANN. §2945.59 (1954).

[7] 34 Wis.2d 278, 292, 149 N.W.2d 557, 563 (1967).

[8] Kluck v. State, 223 Wis. 381, 269 N.W. 683 (1937); State v. Meating, 202 Wis. 47, 231 N.W. 263 (1930).

[9] Herde v. State, 236 Wis. 408, 295 N.W. 684 (1941); State v. Lombardi, 8 Wis.2d 421, 99 N.W.2d 829 (1960); Wilcox v. State, 250 Wis. 312, 26 N.W.2d 547 (1947).

[10] Bridges v. State, 247 Wis. 350, 19 N.W.2d 529 (1945).

[11] Smith v. State, 195 Wis. 555, 218 N.W. 822 (1928); Dietz v. State, 149 Wis. 462, 136 N.W. 166 (1912).

[12] WIS. STAT. §885.19 (1965).

[13] 1 JONES, EVIDENCE §176 (5th ed. 1958); MCCORMICK, EVIDENCE §158 (1954).

The development of this list was traced in an article by Julius Stone.[14] He called the Wisconsin statement of the rule, and others like it, the "spurious rule," and called for a return to "the original rule."[15]

> Under this form of the rule, only evidence relevant merely to propensity was excluded. Hence admissibility depended upon the answer to one simple question. Is this evidence in any way relevant to a fact in issue otherwise than by merely showing propensity?[16]

Stone stated three objections to the Wisconsin rule.[17] His first objection was that it adds to the areas of possible disagreement. Previous to the *Whitty* case, a Wisconsin judge had to make these three determinations:[18]

1. What are the exceptions?
2. Are any involved in this case?
3. Is the evidence relevant to any such exception?

(As will be seen later, the *Whitty* case requires a fourth complex determination.) Stone's second objection was that relevant evidence which cannot be pigeonholed into the list of exceptions is not admissible. His third and perhaps most cogent objection was that the list itself becomes so interesting that the judge is in danger of becoming preoccupied with its use. Stone stated that "the spurious rule . . . has tempted the courts to dispense altogether with the test of relevance."[19] While many cases will be decided quite alike using either rule, it is clear that the use of the Wisconsin rule may lead to the exclusion of evidence (because it is not relevant to an exception) which would not be excluded under the original rule.[20]

Wisconsin Adopts the Balancing Test

The *Whitty* case made clear that the Wisconsin court is concerned about the weaknesses of its rule. The court was careful to point out, for instance, that the exceptions stated in *Paulson v. State* "were all based upon relevancy and probative value."[21] The court also pointed out that in *State v. Jackson* (which pre-dated the Stone article) the list of exceptions was not used carelessly.[22]

In what may be considered, perhaps, an attempt to further

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[14] Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988 (1938). A companion article is Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 Harv. L. Rev. 954 (1933).
[15] Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 51 Harv. L. Rev. 988, 1004 (1938).
[16] *Ibid.*
[17] *Id.* at 1005-1007.
[18] *Id.* at 1006.
[19] *Id.* at 1007.
[20] *Id.* at 1008-1022.
[21] Whitty v. State, 34 Wis.2d 278, 286, 149 N.W.2d 557, 563 (1967).
[22] Id. at 293, 149 N.W.2d at 564.

emphasize that a non-mechanical approach must be taken to the question, the Wisconsin court has adopted Rule 303 of the Model Code of Evidence.

> RULE 303. DISCRETION OF JUDGE TO EXCLUDE ADMISSIBLE EVIDENCE
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> (1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will
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> (a) necessitate undue consumption of time, or
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> (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or
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> (c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered.[23]

It would seem that this rule will be applied by trial judges as a fourth determination, thereby making even more complex an already confused process. Futhermore, although the balancing formula given to the trial judges in Rule 303 sounds quite simple, it, in reality, calls for the very utmost in judicial ability. The following six terms, despite valiant efforts,[24] are very difficult to define:

1. probative value
2. undue prejudice
3. confusing the issues
4. misleading the jury
5. unfairly surprise
6. substantial danger

It could be argued, for instance, that "undue prejudice" includes "confusing the issues," "misleading the jury," and "unfair surprise," as the Wisconsin court apparently holds.[25] Similarly, our court seems to define probative value as relevancy and necessity.[26] Despite the vagueness of the terminology, it is clear that Wisconsin trial judges are being made aware that serious consideration must be given to weighing the delicately balanced and conflicting considerations involved in admitting evidence of prior misconduct.[27] The fact that each trial judge has a unique responsibility is highlighted in the comments to Rule 303.

> The application of this Rule should depend so completely upon the circumstances of the particular case and be so entirely in the discretion of the trial judge that a decision in one case should not be used as a precedent in another.[28]

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[23] *Ibid.*

[24] Trautman, *Logical or Legal Relevancy—a Conflict in Theory*, 5 VAND. L. REV. 385 (1952).

[25] 34 Wis.2d 278, 295, 149 N.W.2d 557, 564 (1967).

[26] *Ibid.*

[27] See Swietlik and Henrickson, *Rule 303: The Keystone of the Code*, 1947 WIS. L. REV. 89, 92, where the authors said that the only alternative to Rule 303 would probably be a long, detailed, unwieldy substitute.

The Wisconsin court apparently did not adopt the comments following Rule 303. It would seem that the above paragraph amounts to much more than a comment and would deal a serious blow to the artificiality of the list system of determining relevancy.

WHITTY'S DEFENSES

The defense in the *Whitty* case mustered four objections to the admission of the 8-year-old girl's testimony.[29] The first argument for a new trial was that the evidence had confused the jury. The second argument was that the defense was unfairly surprised, and the third was that the probative value of the prior misconduct evidence was far outweighed by the danger that the jury would be prejudiced. All of these arguments may be effective under the newly adopted rule. The Wisconsin Supreme Court virtually ignored the first and third arguments, except for a simple statement denying their validity in this case.[30]

Since even the most careful instructions, thrice repeated, cannot clear up the confusion that a jury experiences in cases involving prior misconduct, the court's decision as to the first argument seems doubtful. Mr. Chief Justice Warren said recently:

> Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him.[31]

In a situation analogous to that in the *Whitty* case, *State ex rel. LaFollette* v. *Raskin,* the Wisconsin court recognized that a jury cannot fairly determine concurrently the issue of guilt and insanity when the defendant who "was subjected to a compulsory mental examination can show a disclosure of inculpatory statements, admissions or confessions in response to questions of the examining doctor."[32] Perhaps the confusion in cases involving evidence of prior misconduct could be eliminated by using the same technique used to solve the confessions problem: "a sequential order of proof based on a separation of the issues before the same jury in a continuous trial."[33] The court remarked that "the weight of modern authority calls for a mandatory two-stage trial rule where the trying of the enhanced punishment issue or other collateral issue will prejudice the determination of the issue of guilt."[34]

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[28] AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, 182 (1942).
[29] Brief for Plaintiff in Error at 24-33.
[30] 34 Wis.2d 278, 295, 149 N.W.2d 557, 564 (1967).
[31] Spencer v. State of Texas, 385 U.S. 554, 575 (1967).
[32] State *ex rel* LaFollette v. Raskin, 34 Wis.2d 607, 627, 150 N.W.2d 318, 328 (1967).
[33] *Id.* at 626, 150 N.W.2d at 328.
[34] *Id.* at 625, 150 N.W.2d at 327.

The third argument, the undue prejudice argument, requires another examination of the facts. When an 8-year-old girl and a 10-year-old girl both testify at a trial, it is logical to assume that an unusually emotion-laden situation is uncovered to the jury. Even when one sets aside the possibility that the alleged crimes were imagined (apparently a frequent occurence[35]), there is still the possibility that the 10-year-old's story made a lasting impression on the 8-year-old. On the other hand, there must be, even under the most ideal conditions, the admission of some prejudicial information.[36] When divorced from the stage and relegated to mere speculation, one can only hope that the trial judge, the only man in position to gauge the reaction of the jury to such an emotional scene, has assessed the situation accurately.

The defense's second argument, the surprise argument, was based on a recent Minnesota decision.[37] The Minnesota Supreme Court has taken a discovery-oriented stand on evidence of prior misconduct evidence. The new rule in Minnesota requires the state to furnish the defendant a written statement of the prior offense it intends to introduce. Before this is done the state must make a selection from a list of exceptions which is similar to the Wisconsin list. The Wisconsin Supreme Court, determined to view the problem as an evidence question, emphatically rejected this method. In doing so the court said:

> While this rule may eliminate the surprise on the part of an accused, it does little to eliminate any confusion of issues, misleading of the jury, or undue prejudice.[38]

What the court said, it seems, is that although the Minnesota court has made some improvement in the law this new improved state is still not perfect. The fact remains, however, that there has been some improvement and it has come through the injection of a method of civil procedure, which, as will be emphasized later, may provide some relief in the area of prior misconduct evidence.

The fourth defense argument was that evidence of other misconduct should not have been admitted unless the accused had been convicted of the previous offense. This argument was recently made by Mr. Justice Gordon in a concurring opinion in *State* v. *Reynolds*.[39] He stated:

> Actual conviction should be required before the prosecution is permitted to offer proof of previous occurrences. I

[35] Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212, 223 (1965).
[36] Note, 70 YALE L. J. 763, 765 (1961).
[37] State v. Spriegl, 272 Minn. 488, 139 N.W.2d 167 (1966); See 51 MINN. L. REV. 331 (1966).
[38] 34 Wis.2d 278, 297, 149 N.W.2d 557, 565 (1967).
[39] 28 Wis.2d 350, 137 N.W.2d 14 (1965).

> think our basic concept of presumed innocence makes the adoption of this rule a logical necessity. Innocent persons may become involved in a suspicious occurence; innocent persons are even sometimes charged or indicted.[40]

This solution, which has the virtue of precisely defining what criminal conduct may be admitted, has not been given an extensive test anywhere. Judging from the summary manner in which the Wisconsin Supreme Court handled the question,[41] it will be futile to bring up this argument in the forseeable future. It would seem that the Wisconsin court believes, probably correctly, that there are definite situations in which evidence of a prior occurence would be crucial to the case of the prosecution and not so prejudicial to the defendant to warrant its exclusion.

Relevancy

Perhaps the greatest weakness in the present Wisconsin rule is the determination of relevancy. Relevancy is the tendency of evidence to establish a material proposition. When using the Wisconsin process the question becomes whether the evidence tends to establish a selected exception to the general character rule. Both the trial court and the Wisconsin Supreme Court said that the 8-year-old's testimony was admissible to establish the identity, one of the best established exceptions in Wisconsin,[42] of the man who took indecent liberties with the 10-year-old. The evidence does not have to establish the exception to be admissible; it is the function of the jury to determine whether that has been accomplished.

Also, under the Wisconsin process one can always question whether the proper exception was chosen. It could be argued, for instance, that method of criminal activity and not identity should have been selected from the list of exceptions. The 8-year-old's testimony tends to establish that very similar methods were used on two consecutive nights in a specific neighborhood. Method of criminal activity could be called an identifying characteristic. Evidence tending to establish the method of criminal activity is also relevant to the identity of the alleged criminal.

It appears that what actually occurred in the *Whitty* case was the impeachment of the defendant's credibility. But was such a drastic measure necessary or even allowable? The Wisconsin statute allows only "convictions" to be proved to affect the credibility of a witness.[43] In addition, it is unfortunate, but the evidence may have

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[40] *Id.* at 364, 137 N.W.2d at 14. Stipulation of convictions may prevent the jury from receiving evidence or hearing comment upon the convictions. State v. Meyer, 258 Wis. 326, 46 N.W.2d 341 (1951).

[41] 34 Wis.2d 278, 294, 149 N.W.2d 557, 564 (1967).

[42] One commentator recently speculated that prior offenses may be introduced in Wisconsin only as probative of the defendant's identity. See 50 Marq. L. Rev.

been admitted simply because this was a prosecution for a sexual offense, and the tendency is to view all types of sex criminals alike. The common belief that there is a high rate of recidivism among sexual offenders[44] may be what has been prodding courts, in Wisconsin and generally, to quite liberally admit evidence in prior crimes cases involving sex criminals.[45] The rationale seems to be that if this man statistically is more likely to be a repeater, it is less prejudicial to introduce prior crimes evidence. This view, it would seem, is constitutionally repugnant and completely opposed to the comments to Rule 303 of the Model Code of Evidence which admonish that the application of the Rule should depend heavily upon the circumstances of the particular case.[46]

Using the original rule one would, of course, not have to choose from a list of exceptions. Ideally, "method of criminal activity" would be what Stone called a fact in issue and the 8-year-old's testimony would be admitted because it is relevant to a fact in issue, subject to the balancing test. It could be said, in other words, that the list of exceptions and combination of exceptions is infinitely long. This seems to be an attractive rule until it is mentioned that facts in issue under the present system of criminal justice in America, unlike America's better developed pleading-oriented system of civil procedure, are very difficult to determine. The list of exceptions to the character rule is infinite because there is an infinite number of fact situations involving evidence of prior misconduct.

CONCLUSION

It seems that not even the Wisconsin Supreme Court is satisfied with the *Whitty* decision. While it is true that an admirable improvement has been made on the previous Wisconsin law and American law generally, by adopting Rule 303 and thereby emphasizing the final delicate balancing process, the court practically admits that the modified procedure will not work, warning that "Evidence of prior crimes or occurences should be sparingly used by the prosecution and only when reasonably necessary."[47] It would seem likely that this afterthought by the court could lead to endless further decisions which would try to pinpoint the meaning of "sparingly" and "reasonably necessary," both dangerously ambiguous terms.

The Wisconsin Supreme Court, it seems, should adopt the original rule and thereby greatly reduce the importance of precedent in

133, 134 (1966). The inclusion of a list of exceptions in the *Whitty* case, accompanied by many citations, conclusively disproves this view.

[43] Wis. Stat. §885.19 (1965).

[44] Gregg, *supra* note 35, at 231.

[45] WHARTON, CRIMINAL EVIDENCE §242 (12th ed. 1955); 50 MINN. L. REV. 331 (1966).

[46] MODEL CODE, *supra* note 28.

[47] 34 Wis.2d 287, 297, 149 N.W.2d 557, 565 (1967).

cases involving evidence of prior misconduct and, ideally, should initiate a system, perhaps through a much increased use of pleadings, to accurately determine what facts are in issue.[48] If the court is not willing to destroy its elaborate four-step rule, it should at least emphasize that there are great dangers which require a thoughtful and unique solution to each case, including, perhaps, a great increase in the number of exceptions and less reliance on one specific exception in each case. For instance, in the *Whitty* case the trial judge could have used two exceptions, identity and system of criminal activity. Theoretically, if such greater flexibility was developed, the present rule could become as accurate as the original rule.

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[48] Carr & Lederman, 34 CAL. B. J. 23 (1959).