July 16, 2008

Bowen v Ryan

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Evidence Code section 1101; Character evidence; Custom and habit; Section 352

Defendant is a dentist. His practice included treatment of patients that are "difficult-to-treat." Plaintiff claimed defendant choked him and shoved him against a wall during a dental appointment. Plaintiff called 13 witnesses at trial that testified about different unrelated incidents in which they were allegedly hit, restrained or mistreated by defendant. The trial ended with a 9-3 special verdict awarding plaintiff $90,000.

On appeal, defendant claimed error in the trial court's admission of the evidence of unrelated incidents. Defendant had been practicing for 28 years and had treated more than 35,000 patients. The vast majority were children. Plaintiff alleged assault, battery, and professional negligence.

Plaintiff testified to one version of events. Defendant and his dental assistant testified to another. A dental office employee corroborated some of plaintiff's story. Much of the testimony at trial related to appropriate techniques to modify behavior used by pediatric dentists. Plaintiff offered expert testimony to explain proper behavior modification and argued defendant did not use these methods appropriately.

Before trial, plaintiff disclosed he intended to call numerous witnesses to describe defendant's treatment of other children. Defendant sought to exclude this evidence as improper character evidence under section 1101 of the Evidence Code. The trial court denied the motion, finding the evidence was relevant to demonstrate a common plan or design.

At trial, 13 witnesses were called, testifying to a total of 9 different incidents. Many of the witnesses testified they reported defendant to the dental board or law enforcement. Defendant offered witnesses of his own, each of whom testified as to proper care. The jury deliberated for several days, ultimately returning a verdict on negligence, dental battery, and battery. The jury did not return a verdict on malice.

Evidence code section 1101 provides that evidence of a person's character or a trait of their character is inadmissible when offered to prove his or her conduct on a specified occasion. **The Justices of the Third DCA explained that character evidence is excluded in a civil case because (1) it is of slight probative value and may be very prejudicial, (2) it tends to distract the trier of fact from the main question of what actually happened and allows the trier of fact to reward the good man and to punish the bad man because of their respective characters, and (3) may result in confusion of issues.**

Thus, evidence that a person is a competent or skilled professional (or the inverse) whether proven by reputation, opinion or specific acts, is not admissible to prove the defendant was negligent on a particular occasion. (*Hinson v Clairemont Community Hospital* (1990) 218 Cal.App.3d 11110) **A trial centers on a specific incident, not the defendant's general behavior.**

Plaintiff claimed, and the trial court agreed, that testimony of other patients was admissible under section 1101(b) to establish that defendant acted pursuant to a common plan or design. To show common design or plan, evidence must demonstrate not merely a similarity in results, but a concurrence of common features that the various acts are naturally explained as caused by a general plan. (*People v Ewoldt* (1994) 7 Cal. 4th 380)

The Appellate Court found the evidence here did not demonstrate the existence of a common plan. None of the witnesses described ***similar*** treatment. Plaintiff contended all of the prior events showed inappropriate physical responses to difficult patients. The Justices said this description was ***too broad*** to

describe a plan. The ***acts varied*** unlike a typical common plan case.

Additionally, defendant testified to treating over 35,000 patients in his lengthy career. Testimony about nine incidents is *highly selective* and cannot be considered representative. This evidence demonstrated, at best, a character trait, precisely the type of evidence **excluded by section 1101**.

Plaintiff also contended the challenged evidence was admissible to attack defendant's credibility under 1101(c). In the trial, however, plaintiff never sought to admit the evidence for that purpose and it was not admitted under such a theory. Plaintiff also argued the prior acts were admissible under Evidence code 1105 to show defendant acted in accordance with his usual **custom and habit**. The Justices rejected this argument as well.

Custom or habit involves a consistent, semi-automatic response to a repeated situation. (*People v Memro* (1985) 38 Cal.3d 658) Here defendant's conduct occurred in different circumstances toward nine of some 35,000 or more patients. This does not qualify as a custom or habit. The evidence here did not relate to custom or habit; it was instead *plain and simple character evidence*, and therefore inadmissible.

Finally, the court noted that even if the evidence was somehow proper under section 1101, it was an abuse of discretion for the trial court to admit the testimony under section 352. Some of the incidents occurred as many as 11 years earlier, involved different circumstances and different conduct. None of the prior incidents involved the type of dental treatment administered on the day in question. The evidence was time consuming and led to a series of mini-trials over each incident. It deflected the jury's attention from the central issues, namely, defendant's treatment of this plaintiff and the credibility of the various witnesses to the event.

The probative value of the other acts evidence was slight but it had great potential for prejudice, confusion, and consumption of time. The evidence tended to evoke an emotional bias against defendant that clouded the relevant issues in the case. (See *People v Karis* (1988) 46 Cal.3d 612) The trial court abused its discretion under Evidence code section 352 by admitting this evidence. The error requires reversal because it is reasonably probable that if the acts had not been admitted the jury would have returned a different verdict.

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