

## **Winfred D. v Michelin North America**

8/7/08

### Evidence Code section 352; Impeachment; Credibility

Plaintiff was in the business of transporting produce from markets in Los Angeles to several establishments in Las Vegas. He rented a cargo van for that purpose. On August 23, 2004, while transporting produce to Las Vegas, the right rear tire delaminated, causing a vehicle rollover. Plaintiff sustained a severe brain injury.

Plaintiff sued the tire manufacturer, alleging defects and breach of warranty. Defendants contended the plaintiff caused the accident by overloading the vehicle with produce. At trial, over objection, the trial court allowed the defendant to introduce evidence that, while plaintiff was married to his first wife, he had an affair with, and later married, his business partner's wife; he then had two wives; plaintiff falsely told his second wife that he had divorced his first wife. Plaintiff eventually divorced his second wife, and he thereafter had an affair with a third woman, with whom he had two children.

The trial court *reasoned* that this evidence was relevant to plaintiff's credibility and the cause of the accident. The jury returned a defense verdict. The questions on appeal were whether the evidence of plaintiff's private life should have been admitted and, if not, whether it prejudiced the case.

In discovery, a neuropsychiatrist testified plaintiff had demonstrable loss of brain tissue and experienced difficulties with cognition in every sphere. He had problems moving, speaking, thinking, perceiving, having emotions and controlling his body. Plaintiff's retained neurosurgeon described his memory, speech function and ability to calculate as comparable to a normal fourth grader.

Before trial, plaintiff filed a *motion in limine* under [Evidence Code section 352](#) to exclude evidence of his extramarital activities. Defendant contended that plaintiff's failure to answer questions about his second marriage, his subsequent affair and his illegitimate sons tended to disprove that he had memory problems, and instead, proved he was a liar. The trial court **denied the motion** to exclude this history.

In opening statement, plaintiff's counsel described his client's employment history which involved several different jobs. Counsel stated plaintiff was living the [American Dream](#), trying his hand at different businesses, before finding success. The next morning, following continuing argument before the court, defense counsel told the jury about the extramarital history. The defense argued reference to the American Dream "**opened the door**" to the subject. The trial court agreed, noting, "it goes to credibility, among other things." The court also told plaintiff's counsel the comment was, "an appeal to **sympathy**."

Plaintiff's tire expert explained that defendant's tire was defective because it did not contain a "nylon cap ply." Defendant's expert testified the van was overloaded thus causing the tire failure and rollover. Plaintiff's son testified to facts that contradicted the overload theory. Defendant asked questions on cross-examination implying that with two families to support, the plaintiff had a [motive](#) to bring more produce on the trip to increase his revenue.

Defendant also sought to read portions of plaintiff's deposition regarding his extramarital activities and his memory regarding these facts. Plaintiff's counsel argued the evidence was [not relevant](#) to proving plaintiff overloaded the van, and there was no other evidence of plaintiff's financial condition or his expenses, making the evidence [attenuated and overly prejudicial](#). The trial court found there was a reasonable inference of ongoing support, and thus, plaintiff was trying to maximize profits. The testimony from the deposition was then read to the jury.

After two days of deliberations, the jury found for defendant 12-0 as to manufacturing defect and 9-3 on breach of warranty. Plaintiff appealed.

The Second DCA noted that ordinarily, [evidence of marital infidelity would be inadmissible on grounds](#)

that it lacks relevance and amounts to a “smear” upon the witness’s character and its inflammatory nature far outweighs any probative value. On the other hand, an extramarital affair may be admissible if it has a connection to a substantive issue and goes to motive. (*U.S. v Larson* (9<sup>th</sup> Cir. 2007) 495 F. 3d 1094)

Here the substantive issue was whether plaintiff’s accident was caused by a tire defect or breach of warranty or by overloading the van. Defendant contended and the trial court found as follows: (1) Plaintiff’s opening statement “opened the door” to the evidence; (2) the evidence was admissible on the issue of plaintiff’s credibility; (3) the evidence showed the brain injury was not as serious as claimed; and (4) the evidence permitted an inference plaintiff overloaded the van.

**Opening Statement:** Although many Federal courts hold that raising a subject in opening will allow admission of evidence on the same subject, many states hold to the contrary. In California, an opening statement is not evidence and most error can be cured by admonition to the jury to disregard improper matters. (*Rufo v Simpson* (2001) 86 Cal. App. 4<sup>th</sup> 573) The Appellate Justices indicated they failed to see how the use of the term “the American Dream” was inappropriate or played on the jury’s emotions.

Further, they did not believe the opening statement permitted the Defendant to discuss plaintiff’s private reasons for traveling to Las Vegas. The opening statement focused on business pursuits and did not include the same subject on which defendant sought to introduce evidence— his extramarital conduct. The trial court erred in rejecting the Evidence Code section 352 argument by plaintiff.

**Credibility:** The Justices stated that because the evidence has no tendency to prove or disprove any disputed fact concerning the cause of plaintiff’s accident, its use is necessarily limited to impeachment. (*Mendez v Superior Court* (1988) 206 Cal.App.3d 557) Just as evidence of a woman’s unchaste behavior is no longer admissible on the issue of credibility unless it tends to show bias, such as a relationship with a party or witness, neither is evidence of a man’s sexual conduct. A witness may have a strong reason to lie about intimate relationships, such that they may not be cross examined upon that collateral matter for the purpose of eliciting something to be contradicted. (*People v Lavergne*(1971) 4 Cal. 3d 735) Because the denial itself is irrelevant and prejudicial and thus inadmissible, it was improper to ask plaintiff about his extramarital activities.

In short, **the existence of irrelevant testimony by a witness does not permit its introduction by an adversary just so the adversary can then offer contradictory evidence to impeach the witness.** (*People v Steele* (2002) 27 Cal. 4<sup>th</sup> 1230).

**Plaintiff’s Brain Injury:** Defendant argued the evidence was allowed to prove Plaintiff’s memory was not as poor as he claimed. The Second DCA disagreed. In a personal injury case where a plaintiff has a partial loss of memory due to brain damage, the defendant cannot ask the plaintiff what he recalls about illicit aspects of his private life that have no bearing on the cause of the accident or bias and are irrelevant and prejudicial.

It is one thing to impeach a witness with respect to mistaken or knowingly false answers that are relevant to substantive issues but something else entirely to “test” the witness’s memory on private or intimate subjects. The issue of memory here is essentially medical in nature. The defendant elected not to call its retained neuropsychiatrist concerning Plaintiff’s memory and that might have been an appropriate way to impeach the plaintiff when he could not remember certain facts.

Plaintiff’s expert testified he was not faking his memory problems. Defendant offered no contrary evidence. The impeachment evidence allowed the jury to speculate that plaintiff was lying. The evidence was not appropriate on the issue of credibility, absent a connection showing bias, and should not have been admitted.

**Plaintiff’s Motive:** Lastly, Defendant argues the evidence shows Plaintiff’s motive to overload the van, because, “he has two families to support.” In the case, though, Defendant did not present any evidence of the Plaintiff’s financial condition. The Justices then noted, “A rich man’s greed is as much a motive to steal as a poor man’s poverty. Proof of either, without more, is likely to amount to a great deal of unfair

prejudice with little probative value.” (*People v Carillo* (2004) 119 Cal.App.4th 94)

**Prejudicial Effect:** No judgment shall be set aside, or new trial granted unless the court shall be of the opinion that the error has resulted in a miscarriage of justice. A miscarriage of justice occurs when it appears reasonably probable that were it not for the error a result more favorable to the appellant could have been obtained. (*Taylor v Varga* (1995) 37 Cal.App.4th 750)

Here, the 9-3 vote on breach of warranty demonstrates the closeness of the case. The Justices found the Defendant’s use of the evidence likely tainted the entire verdict. Were it not for the trial court’s incorrect rulings a result more favorable to plaintiff could have been obtained. The party seeking the disclosure of evidence of extramarital affairs must shoulder the heavy burden of showing the evidence serves a “compelling interest” in facilitating the ascertainment of truth in connection with legal proceedings. (*Morales v Superior Court* (1979) 99 Cal.App.3d 283)

The judgment is reversed.