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Federal Rules of Evidence
Chapter 5. Relevancy and Its Limits

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Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
B. The Balancing Test

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§ 5214.2 “Probative value”—As Applied in the Courts

We shall pass over the debates about the merits of direct vs. circumstantial evidence and begin with the former. [1] “Direct evidence”, strictly speaking, is limited to evidence that requires no inference to make it relevant, save the four “testimonial assumptions” in the case of testimonial direct evidence. [2] For reasons we will now sketch, true “direct evidence” must have the highest possible probative value and therefore cannot be “substantially” outweighed by any of the possible harms. To put it more starkly, the trial judge has no discretion under Rule 403 to exclude true “direct evidence.” But as we shall see, judges will confront true “direct evidence” much less often than the reader might suppose.

Testimonial direct evidence

Suppose in a prosecution for assault with a deadly weapon, the victim testifies “Ted Jones (the defendant) hit me in the face with his fist.” This is testimonial “direct evidence”; to use it to prove defendant's guilt, the jury need only find that defendant perceived the fist hit his face, that he recalls that perception accurately, that he states that recollection truly, and he does not have a peculiar vocabulary in which “fist” refers to what everyone else would call a “feather”.

Because under our system, only the jury can constitutionally decide issues of credibility, the writers agree that the judge cannot exclude the testimony of a witness because he does not believe it; the judge must weigh its probative value on the assumption that the jury will believe it. [3] Most appellate courts enforce this limit on the trial judge's power under Rule 403. [4] However, one can find cases in which courts overlook this fundamental point. [5] We assume readers of this treatise will not make that mistake. [6]

Can hearsay evidence be “direct”?

Hearsay evidence also turns on the four testimonial assumptions; does this mean the judge must treat it like testimonial “direct” evidence. [7] Where the issue is whether or not the witness made the statement, the jury gets to decide for the reasons discussed above. [8] But on the question of the probative value of hearsay, courts have taken varying positions depending on the circumstances. [9] But it seems clear that the appellate courts will leave the decision to the trial judge. [10] Unlike testimonial “direct” evidence, the trial judge can use Rule 403 to exclude hearsay evidence. [11]

Non-testimonial “direct” evidence; a.k.a. “autoptic proference”

Wigmore created a category he called “autoptic proference” that consisted of objects that he supposed proved a consequential fact without any inference. [12] Morgan pointed out that it would take a truly exceptional state of facts to make the condition of an object at the moment it was shown to the jury a consequential fact. [13] Suppose, for example, a murder prosecution in which the prosecution wheels in the victim's corpse to prove that the victim was dead. First, the prosecution would have to authenticate the body as that of the victim—a kind of relevance to be decided by the jury under Rule 104(b). [14] Second, the

jury in a murder case does not decide as a “consequential fact” whether the victim is dead at the time of trial but whether he died as a result of the acts of the defendant. [15]

If we change the hypothetical to a suit on a life insurance policy, we reach the same result. The jury must decide, not whether the insured is now dead, but whether he died while the policy was in effect. If the policy lapsed shortly after the insured, the attorney for the beneficiary might argue that the jury could use the corpse to prove the time of death. But this would make the corpse circumstantial, not direct evidence of the time of death. Worse yet, the judge would have to decide whether the corpse satisfied “the epistemic condition”; that is, whether the body has some perceptible quality that reveals directly to the senses of the jury the time of the insured's death. [16] Wigmore wanted judges to “solve” this problem by ignoring it [17] —not an attractive option for an intellectually honest judge.

We departed on this little excursus, not to show our cleverness in devising impractical examples, but to persuade the reader that in ordinary trials the judge and jury will see little truly “direct” evidence. In a simple robbery prosecution, the testimony of an eye-witness to the crime will be direct only as to the acts of the perpetrator; his intent cannot be perceived, but must be inferred from his acts and words. Nor can the witness “see” the identity of the perpetrator; she can only testify to her opinion that the man seated next to defense counsel is Ted Jones, the man who committed the robbery.

We turn now to the application of Rule 403 to objects—so-called “real proof.”

Real proof

The offer of objects as evidence presents the judge with some distinctive problems in the application of Rule 403. [18]

First, when the party offers an object so that the jurors can see one or more of its qualities to draw an inference from those qualities to some consequential fact [19], the jurors must have the capacity to perceive those qualities—what has been called “the epistemic condition.” [20] Can the judge take perceptibility into account into account in assessing probative value under Rule 403—or must she treat this like the credibility of a witness in testimonial proof? [21]

On the one hand, the ability of the jurors to see the quality of an object does not seem like an element of its “probative value.” [22] On the other hand, we see little difficulty in a ruling that something the jury cannot perceive “proves nothing.” [23] Nothing in the policy of Rule 403 seems to preclude the judge from considering perceptibility in assessing probative value. [24]

We see difficulty only in cases where the proponent claims that the quality has a degree of perceptibility, but is not completely perceptible. [25] But the difficulty we see in measuring degrees of perceptibility seems to us no different than measuring the degree of prejudice; in both cases we lack units of measurement. If require the judge to measure “prejudice” without a yardstick, why not perceptibility? In any event, appellate courts seem to grasp the problem even if they never heard of the “epistemic condition.” [26]

Real proof and the “need” for evidence

The second problem we alluded to above arises from the fact that a proponent always has an alternative to introducing an object; that is, calling a witness to describe it. [27] Courts will find this option attractive when the object bears both probative value and prejudice [28]; the witness can be asked to describe the probative features but omit those that would prejudice the opponent. Rule 403 tells the judge nothing about the role of alternative measures in balancing; but we can find the answer by an indirect route. [29]

We begin with this statement from the Advisory Committee: under Rule 403 a court can balance “the probative value of *and the need for* evidence against the harm likely to arise from its admission.” [30] The writers find the intent clear. [31] So we must try to figure out how to get the intent out of the note and into the rule. [32]

We see several ways to do this. We go to the dictionary and finding that “value” has many meanings, we conclude that its use creates an ambiguity. In its use in Rule 403, “value” might carry the mathematical or ethical sense as the intrinsic worth of an item of evidence in proof of the consequential fact. [33] But we think it makes more sense to use “value” as an economist would—in the relative sense of determined by supply and demand. We can easily find many cases that use “probative value” this way. [34] This meaning seems implicit in harms such as “waste of time” and “cumulative evidence.” [35] We might also say that prejudice becomes “unfair” when the proponent could prove the same point with less prejudicial evidence but for the fact that this seems like a kind of “double-counting.” [36]

Some might read the Advisory Committee's not to say that courts should use “need”, not when they balance, but in the post-balancing exercise of discretion.[37] We think it would be a mistake to read the Note this way. For one thing, courts have not read the predecessor provisions this way.[38] Moreover, appellate courts can only develop criteria for applying need if the trial court does it openly during the balancing test, rather then internally during its exercise of discretion.[39] Lawyers need such criteria in planning the presentation of evidence at trial—particularly for items of evidence requiring logistics such as so-called “demonstrative evidence.”[40]

Probative value of circumstantial evidence

Appellate courts analyze probative worth most frequently in cases of circumstantial evidence.[41] Appellate judges have much experience in their collective memory in determining the probative worth of evidence, both in the pre-rules assessments of the weight and sufficiency of evidence and in reviewing discretionary exclusion.[42] But beyond some stereotyped issues like “flight”[43] or “gory photos,”[44] appellate judges cannot seem to agree on generalizations about the probative worth of circumstantial evidence.

We suspect the cause of this miasma lies in the way lawyers argue or the way appellate judges decide Rule 403 issues.[45] Consider this case:[46] the defense offers evidence that the prosecution's key witness habitually used cocaine in order to show that his ability to perceive and recollect were clouded with snow.[47] In a preliminary fact hearing, the witness conceded he had had a cocaine habit, but claimed he had stopped snorting a couple years earlier and that his perception and recollection of the events was clear.[48] The appellate court approved the trial court's exclusion of the evidence of cocaine use under Rule 403 on the grounds that the probative value of the evidence was “slight” and thus outweighed by the dangers of prejudice and confusion of issues.[49]

It appears to us that the “generalization” that emerges from this case is: a witness can destroy the value of impeaching evidence by denying it.[50] This seems to violate the common law and constitutional rules that the credibility of the witnesses must be decided by the jury, not by the trial judge.[51] The trial judge did not, we hasten to add, purport to decide the credibility of the witness, but only the admissibility of impeaching evidence.[52] We question, not the appellate court's conclusion—only it's failure to generalize about the probative worth of the evidence.[53]

We think two factors emerge most prominently when cases and commentators analyze the probative worth of circumstantial evidence.[54] The trial judge should first consider the strength of the immediate inference.[55] To do this, the judge must first identify the major premise in the relevance syllogism.[56] For example, the major premise of propensity evidence offered against the defendant in a prosecution for child sexual abuse under Evidence Rule 414 is: “a person who has a propensity to sexually abuse children is likely to do so.”[57] To satisfy Rule 401, “any tendency” to prove the consequential fact makes the evidence relevant; but to apply Rule 403, the judge must measure the strength of the major premise more precisely.[58]

Consider, for example, the case of Bedell v. Williams, a suit for malpractice.[59] The defense offered evidence that the patient continued to deteriorate after leaving defendant's care to prove that the cause of her declining health was not defendant's care; the appellate court had little problem finding the evidence relevant for that purpose. But to apply Rule 403, the trial judge would have to ask: “how often does health decline after negligent care and how often does it decline without negligent care?” In theory, the burden is on the party invoking Rule 403 to prove the answer to that question[60]—unless the court could judicially notice the answer. But because appellate courts give the trial judge only vague guidance,[61] in practice the trial judge can only “guess-timate” the answer. Federal appellate courts do not give trial judges usable generalizations on how to measure the probability of major premises; instead, they give only vague *ipse dixits* on probative worth in particular cases.[62] State courts don't do much better.[63]

If the trial judge somehow gets through the first step[64] in measuring probative worth, she then confronts the second; the strength of each intermediate inferences[65] and the number of them between the immediate inference and the consequential fact the evidence is offered to prove.[66] The court can have difficulty deciding just exactly how many inferential steps to take

between the immediate inference and the consequential fact. An unusually conscientious California appellate court took only two steps to get from defendant's statement that he could get back stolen property in 24 hours to the consequential fact that he had some role in the theft: first, from the statement we can infer he had access to it; second, from his access we can infer he had some role in the theft.[67] But another judge could arrive at the same destination in three completely different steps: first, he knows where the stolen property is; second, that he can get to that place; and third, that anyone else who controls access to that place will allow him to take the drugs.[68]

Little wonder then, that appellate courts seem reluctant to work their way through the required analysis.[69] Instead both federal[70] and state courts[71] simply announce that the evidence has probative worth. Courts seldom do much better in analyzing low probative worth.[72] For example, a federal appellate court held that a new suicide warning on defendant's drug after plaintiff's decedent's suicide had no probative value to show that the drug company knew of the suicide before decedent's death.[73] But this ignores the “last straw” argument; that is, the company knew about the suicide problem but hoped it would go away until decedent's death convinced the company bosses they could not afford to dawdle any longer. We leave it to the reader to decide if the other low probative worth opinions do a better job.[74]

Judges sometimes engage in “double counting”; that is, applying the same factor in more than one place in the Rule 403 equation. For example, in applying the California Evidence Code's equivalent of Rule 403, one appellate court announced in excluding evidence offered by a criminal defendant in support of a “Perry Mason defense” that evidence “which simply affords a possible ground of suspicion against a third person is generally excluded as unduly prejudicial.”[75] The court thus counts the evidence against the defense on one side of the balance and for the prosecution on the other.[76]

The reader may object that circumstantial evidence rarely proceed in the linear fashion that our elementary discussion might suggest.[77] We agree; circumstantial evidence requires an interaction between the proffered evidence and the other proof in ways that defy the use of any simple mathematical formula for calculating probative worth.[78] Indeed, the calculations of the jurors probably run in both directions[79]; that is, as the evidence of guilt accumulates, the jurors will tend to discount evidence that points to guilt, thus increasing the probative worth of evidence of guilt. But the Advisory Committee stuck courts with a simple-minded linear analysis with its “ropes and chains” of circumstantial evidence; so trial and appellate court judges must muddle through with what they have.[80]

Probative worth of illogical evidence

To this point, we have assumed that the “logic” of Rule 403 was “deductive.” But we can see two competing forms of logic courts might use.[81] The first, familiar to devotees of detective fiction, logicians call “abductive logic”[82]; that is, the judge uses the jig-saw puzzle metaphor, assessing probative worth by how well the new piece of evidence fits the other pieces already on the board. The second is so-called “narrative relevance”[83] that asks how well the evidence provides a narrative that conforms to some “schema” the jury may hold about how a particular event normally occurs.[84]

The Advisory Committee opened the door to other forms of logic when it deleted the word “disputed” from the predecessors of Rule 403 to admit what it called “background facts.”[85] The Supreme Court walked through that door when it sanctified “narrative relevance in the well-known *Old Chief* case.[86] Both state[87] and federal courts[88] have tried their hand at “narrative relevance.” But no court seems to have found a method for measuring the probative worth of such narratives. Whether or not the narrative tells a “coherent story” does not seem to work.[89] Perhaps in some cases the judge can try to assess the degree to which the story matches the “schema” the jurors will likely apply to such stories.[90]

Though we have found no cases, in “abductive reasoning” probative worth will turn on how well this “piece” fits the “puzzle.”

Footnotes

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1

Debates

Wigmore, The Science of Judicial Proof, §§ 320–321 (3d ed.1937).

2

“Direct” defined

See § 5162.1.

3

Jury will believe

Mueller & Kirkpatrick, Federal Evidence, p. 480 (2d ed.1994); 7 Krate-Dore', Iowa Practice: Evidence, p. 199 (2012-2013); Lawson, The Kentucky Evidence Law Handbook, p. 58 (3d ed.1993) (judge must assess probative value assuming truth); 1 McClain, Maryland Evidence: State and Federal, p. 553 (2d ed. 2001) (or reliability); 1 Cleckley, Handbook on Evidence for West Virginia Lawyers, p. 238 (3d ed.1994); Ehrhardt, Florida Evidence, p. 200 (2012); 12 Miller, Indiana Practice: Indiana Evidence § 403.101, p. 280 (2d ed.1995) (must assume jury will believe).

See also

Imwinkelreid, The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403, 41 Vand.L.Rev. 879, 886 (1988) (collecting cases); Comment, Prop.N.Y.Evid.Code § 403 (rule “does not permit exclusion of evidence because the court does not find it credible”).

But see

Gold, Limiting Judicial Discretion to Exclude Prejudicial Evidence, 18 U.C.D.L.Rev. 59 (1984) (criticizing this position).

4

Courts enforce

See, e.g., U.S. v. Evans, 728 F.3d 953, 963 (9th Cir. 2013) (error for judge to exclude evidence because he thinks testimony of prosecution witnesses more credible than an official document; analyzing cases and collecting authorities); U.S. v. Gatto, 924 F.2d 491, 500 (3d Cir. 1991) (testimony of eyewitness to murder had so much probative value it could not be outweighed by any prejudice from hypnosis or suggestive police questioning); Western Industries, Inc. v. Newcor Canada Ltd., 739 F.2d 1198, 1202 (7th Cir. 1984) (judge does not have power under Rule 403 to screen out witnesses simply because he thinks their testimony does not deserve much weight); Ballou v. Henri Studios, Inc., 656 F.2d 1147, 1153 (5th Cir. 1981) (trial court must assess probative value of testimony assuming its truth; Rule 403 does not empower the judge to exclude evidence because he does not find it credible); U.S. v. Thompson, 615 F.2d 329, 333 (5th Cir. 1980) (same); Bowden v. McKenna, 600 F.2d 282, 285 (1st Cir. 1979) (“probative value” under Rule 403 means the value of testimony if it is believed, not the degree to which the court finds it believable).

State cases

Ex parte Brown, 74 So. 3d 1039, 1049 (Ala. 2011) (child's testimony about murder seven years in the past when she was four-years-old not prejudicial or likely to mislead the jury; reliability of child's memory a question for the jury).

But see

The SCO Group, Inc. v. Novell, Inc., 439 Fed. Appx. 688, 695 (10th Cir. 2011) (proper to forbid cross-examination of witnesses who lacked personal knowledge of the subject).

5

Courts overlook

U.S. v. Hatfield, 466 Fed. Appx. 775, 778 (11th Cir. 2012) (apparently excluding defense witness for lack of credibility); U.S. v. Bedonie, 913 F.2d 782, 801 (10th Cir. 1990) (overlooking this point); U.S. v. Ramirez, 871 F.2d 582, 584 (6th Cir. 1989) (dictum: court could use Rule 403 to exclude drug users' testimony); Douglas v. State, 151 P.3d 495, 500 (Alaska Ct. App. 2006) (court could use Rule 403 to bar defense testimony about victim's false accusations); People v. Brown, 111 Cal. App. 3d 523, 168 Cal. Rptr. 806 (2d Dist. 1980) (court could use Cal.Evid.Code § 352 to exclude evidence based on testimony of defendant that the judge does not believe).

6

Mistake

In addition to the constitutional argument in the text, if the judge did have power to make credibility determinations she could hardly do this without hearing all the testimony of the witness plus any impeaching and rebuttal evidence; Rule 403, on the other hand, presupposes that the judge can do the balancing quickly at the time the evidence is proffered.

7

Hearsay “direct”?

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