

PEARCE MICRO REVIEW
Evidence

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Evidence Hypothetical #1

Mary sued Trucking Company (TruckCo) for the wrongful death of her husband, Hal. Hal was killed when a log truck driven by Boyd crossed the center line and struck Hal's car. Boyd was severely injured and died a week later from complications. TruckCo asserts that Boyd was an independent contractor hauling logs for TruckCo and not a TruckCo employee. At the trial by jury, the following occurred.

1. Plaintiff called Tom, TruckCo's president, as a hostile witness. Plaintiff asked the following question: "Didn't you call Mary the day after the crash, tell her it was Boyd's fault, and offer to pay Hal's funeral expenses?"
2. Plaintiff then asked Tom: "Didn't TruckCo have a liability insurance policy covering the truck driven by Boyd at the time of the collision?"
3. Plaintiff called Officer Reno. Reno testified that Boyd had given him a statement after the crash. Reno then read the following from his report: "Boyd stated he fell asleep at the wheel and ran over the center line."
4. Mary testified that Hal loved her and was a kind and considerate spouse. Defendant then called Smith, Mary and Hal's long-time neighbor, and asked Smith the following: "What was Hal's reputation in the community, prior to the crash, for fighting with Mary?" Plaintiff's objection was sustained. If allowed to testify, Smith would have testified that Hal had a reputation for being quarrelsome and physically violent with Mary.

Assume that in each instance all appropriate objections were made.

1. Was the question asked in paragraph 1 objectionable? Discuss.
2. Was the question asked in paragraph 2 objectionable? Discuss.
3. Should Reno have been permitted to read from his report as set forth in paragraph 3? Discuss.
4. Was the objection in paragraph 4 properly sustained? Discuss.

- I. Tom's alleged admission and offer to pay Hal's funeral expenses
 - A. Relevance: establishes liability
 - B. Objection: hearsay
 - C. Objection: public policy
 - D. Conclusion: Inadmissible in federal court, admit only the admission in CA

- II. TruckCo's liability insurance on Boyd's truck
 - A. Relevance: attacks the defense that Boyd was an independent contractor
 - B. Objection: public policy
 - C. Conclusion: admit to show ownership and control

- III. Reno's testimony about Boyd's statement
 - A. Relevance: establishes liability.
 - B. Objection: double hearsay.
 - 1. Reno's report
 - 2. Boyd's statement
 - C. Conclusion: admissible

- IV. The objection to Smith's testimony was improperly sustained.
 - A. Relevance: attacks Mary's loss of consortium claim.
 - B. Objection: Improper Character Evidence
 - C. Conclusion: Smith's statement should have been admitted.

Evidence Hypothetical #2

Don has been charged with murder. The prosecution claims that Don started a fistfight in a boardinghouse where he and the victim, Vic, were staying and that when Vic seemed to be getting the better of him, Don drew a dagger and stabbed Vic. Don testifies in his own defense and claims that Vic started the fight, and that he (Don) drew the dagger only when he became afraid that Vic was going to “beat my brains out.”

Should each of the following items of evidence offered by the defense be admitted into evidence? Why or why not? Discuss.

1. Don’s testimony that several other residents of the boardinghouse told him that Vic was out to get him.
2. Testimony of Fred, that he had seen Vic start many other fights.
3. Testimony of Mindy, the boardinghouse manager, that in her opinion Don is ordinarily a nonviolent person, and that she remembers several occasions when Don “walked away” from potentially explosive situations in the boardinghouse.

Should each of the following items of evidence offered in rebuttal by the prosecution be admitted into evidence? Why or why not? Discuss.

4. Evidence in the form of a certified judgment that Don was convicted of assault with a deadly weapon eight years ago. (The prosecution had not asked Don about this conviction while he was on the stand.)
5. Testimony by Smith, another boardinghouse resident with a long acquaintance with both Vic and Don, that Smith heard Don lie to a census taker about his age, his family, and other matters. (The prosecutor had asked Don about these incidents during his testimony and Don had denied them.)
6. Testimony by Smith that in his opinion Vic was a very peaceful and non-aggressive person, but that Don has “a very short fuse.”

- I. Don's Testimony
 - A. Relevance: Supports Dan's self-defense claim.
 - B. Objection: Hearsay
 - C. Conclusion: Admissible as nonhearsay to show Don's state of mind.

- II. Fred's Testimony
 - A. Relevance: Supports Dan's self-defense claim.
 - B. Objection: Improper Character Evidence
 - C. Conclusion: Specific Bad Acts Evidence is Inadmissible.

- III. Mindy's Testimony
 - A. That Don is Non-Violent
 - 1. Relevance: Supports the Defense
 - 2. Objection: Improper Opinion Evidence
 - 3. Conclusion: Admissible
 - B. That Don "Walked Away"
 - 1. Relevance: Supports the Defense
 - 2. Objection: Improper Character Evidence
 - 3. Conclusion: Specific Acts Evidence is Inadmissible.

- IV. Certified Judgment
 - A. Relevance: Supports Prosecution, Rebutts Defense Claims
 - B. Objection: Authentication
 - C. Objection: More Prejudicial than Probative
 - D. Objection: Improper Rebuttal Evidence
 - E. Conclusion: Inadmissible

- V. Smith's Testimony That Don Lied
 - A. Relevance: Suggests Defendant is not Truthful
 - B. Objection: Hearsay
 - C. Objection: Improper Character Evidence for Rebuttal
 - D. Conclusion: Inadmissible

- VI. Smith's Opinion
 - A. Relevance: Supports Prosecution Theory
 - B. Objection: Improper Opinion Evidence
 - C. Objection: Improper Character Evidence
 - D. Conclusion: Admissible

Evidence Hypothetical #3

Phil's car and Don's car collided in the intersection of Main and Elm Streets. Phil sued Don for his injuries and for damage to his car. Phil alleged that Don went through the stop sign at Main and Elm Streets. In the jury trial of Phil's suit against Don, Phil called Officer Jones as his witness. The following questions were asked and answers given:

- Q: Tell us your name.
A. Jo Jones.
- Q: Your business?
A. Police officer.
- [1] Q: You've been assigned to traffic division for sixteen years?
A. Yes.
Q: Did you go to the intersection of Main and Elm on July 1, 1993?
A. Yes.
Q: What did you see?
A. A red car and a blue car in the intersection.
Q: Describe the condition of the cars.
A. The front of the blue car was smashed up against the driver's side of the red car.
- [2] Q: Did you later learn the identity of the drivers of the cars?
A. Yes, Phil drove the red car and Don drove the blue car.
Q: Were any persons present?
A. Yes, Phil and Don.
Q: Did you hear them say anything?
- [3] A. Yes. Don said to Phil, "I'm sorry I blew the stop sign. Let me pay your hospital bills."
Q: Did you observe Phil at the time?
- [4] A. Yes. He had a concussion, a bloody nose and a cut lip.
Q: What did you do next?
A. I checked out the cars and made some measurements, using my tape measure.
Q: Based on what you heard and what you did, what did you think occurred?
- [5] A. Don ran the stop sign and plowed into Phil.
Q: What did you next do at the scene?
- [6] A. I issued a ticket to Don for failing to obey the stop sign.
Q: By the way, do you know what happened to that ticket?
- [7] A. Yes. Don was found guilty and his license was suspended for six months.
- [Cross-examination by Don's attorney]
Q: Didn't you make a police report about this incident?
A. Yes.
Q: Isn't this the report?
(Tendering document)
- [8] Q: In your report where you refer to Don's statement, all you have written is, "Don said, 'Let me pay your medical expenses.'" Isn't that correct?
A. Yes. That's all that's there.
- [9] Q: Isn't it true that you have received four departmental reprimands for using excessive force?
A. Yes.

What objection or objections could Phil's attorney or Don's attorney reasonably have made to the question or answer at each of the places indicated above by the numbers in the left-hand margin, and how should the court have ruled in each instance? Discuss.

- I. “You’ve been assigned to traffic division for sixteen years?”
 - A. Relevance / Leading
 - B. Conclusion: Overruled

- II. “Yes, Phil drove the red car and Don drove the blue car.”
 - A. No Foundation
 - B. Non-Responsive - Sustained

- III. “I’m sorry I blew the stop sign. Let me pay your medical bills.”
 - A. Non-Responsive
 - B. Hearsay / Policy Exclusion - Sustained in part

- IV. “Yes. He had a concussion, a bloody nose and a cut lip.”
 - A. Non-Responsive - Sustained
 - B. Improper Opinion - Sustained

- V. “Dan ran the stop sign and plowed into Phil.”
 - A. Improper Opinion - Overruled

- VI. “I issued a ticket to Don for failing to obey the stop sign.”
 - A. Relevance - Sustained
 - B. Hearsay - Sustained

- VII. “Yes. Don was found guilty and his license was suspended for six months.”
 - A. Non-Responsive - Sustained
 - B. Improper Character Evidence / Hearsay - Sustained

- VIII. “In your report...Don says, ‘Let me pay your medical expenses.’”
 - A. Leading - Overruled
 - B. Best Evidence - Overruled
 - C. Hearsay - Overruled

- IX. “...you have received four departmental reprimands for excessive use of force.”
 - A. Relevance - Sustained
 - B. Improper Impeachment via Improper Character Evidence - Sustained

Evidence Hypothetical #4

During business hours, a man entered the Superhealth Pharmacy, pointed a revolver at the pharmacist, and demanded a bottle of morphine, a statutorily controlled dangerous substance. The pharmacist complied, and the assailant rushed from the pharmacy with the morphine. Based on information secured in their investigation, the police lawfully arrested Dee for the crime several days later.

Charged with armed robbery, Dee proceeded to jury trial, advancing the defense that he was at his residence when the robbery occurred.

At the trial, during the prosecution's case in chief, the following occurred:

1. Tom, a close acquaintance of Dee, testified that Tom had personally observed Dee possess and consume morphine on numerous occasions during the two years prior to the robbery.
2. The court admitted into evidence a properly authenticated letter, dated ten days before the robbery, written by Dee to his clergyman, which letter stated: "I am going to rob a pharmacy to get some morphine. I am suffering."
3. Police officer Alert testified that, as he was placing Dee in the patrol car after his arrest on the street, Dee suddenly turned and ran but was recaptured about a block away.
4. Police officer Alert testified that Wit, an eyewitness now deceased, identified Dee at a regularly conducted police line-up as the person who had committed the robbery by stating to Alert: "Number 3 is the man who did it. I'm positive."
5. Lockup, a prison inmate, testified that on the second day of Dee's incarceration, Dee stated to him in the course of conversation: "I was in the Superhealth Pharmacy when it was robbed, but I did not do it."

Assume that in each instance all appropriate objections were made.

Were the items of evidence properly admitted? Discuss.

- I. Tom's Testimony: Dee's Prior Possession And Use Of Morphine
 - A. Relevance: Motive
 - B. Objection: Character Evidence
 - C. MIMIC Rule
 - D. Habit Evidence
 - E. Conclusion: Not An Abuse Of Judicial Discretion

- II. Dee's Letter To His Clergyman
 - A. Relevance: The letter shows Dee's motive and intent.
 - B. Objection #1: Clergy-Penitent Privilege - Sustained
 - C. Objection #2: Hearsay - Overruled

- III. Officer Alert's Testimony About Dee's Attempted Escape
 - A. Relevance: Dee's Consciousness of Guilt
 - B. Objection: Hearsay - Overruled

- IV. Officer Alert's Testimony About Witt's Line-up Identification
 - A. Relevance: It supports the charges against Dee.
 - B. Objection #1: Hearsay - Prior ID - Overruled
 - C. Objection #2: 6th Amendment Right To Confront

- V. Lockup's Testimony About Dee's Statement In Jail
 - A. Relevance: It attacks Dee's alibi.
 - B. Objection #1: Hearsay - Admission - Overruled
 - C. Objection #2: Miranda

Evidence Hypothetical #5

Paul has commenced an action in intentional tort against Don, alleging injuries suffered from stab wounds inflicted by Don, and seeking damages. At the trial by jury, Paul was called as the first witness and the following questions were asked and answers given:

[Direct examination of plaintiff Paul]

- Q: What is your name?
 A: Paul Jones.
 Q: Where do you live?
 A: 637 Broadway, here in town.
 [1] Q: And you've lived there for the past eight years?
 A: That's right.
 Q: What do you do for a living?
 A: For the past four years I've been the assistant dean at the College of Law.
 Q: Directing your attention to January 11th of this year at about 8:00 a.m., where were you?
 A: I was standing in the reception office of the law school.
 Q: Tell the jury what happened when you were standing there.
 [2] A: Well, the first thing I remember is that a student, Bonnie Brown, said, "Paul, here comes Don, and he seems to be pointing at you."
 Q: Then what happened?
 A: I noticed that defendant Don was rushing toward the office, screaming at me and waving his arms.
 [3] Q: O.K., what happened after he rushed toward you screaming and waving a knife?
 A: Well, I just turned and ran down the hall.
 [4] Q: I see. So you didn't say anything to him and you didn't provoke him in any way?
 A: Yes, definitely. I didn't know what had gotten into him.
 [Paul proceeded to testify about the chase, the attack, and its aftermath.]
 Q: Where were you interviewed by the police?
 A: At the hospital.
 Q: And did you tell them anything different from what you have told the jury today?
 [5] A: No, I told the police exactly what I've said here. I have had a clear recollection of what happened ever since that day.
 [Paul was then examined about his damages.]
 Q: How much were your medical expenses?
 A: I don't remember specifically.
 [6] Q: Would it refresh your recollection if I told you it was \$27,520?
 A: No, but it's on the bill from the University Hospital.
 Q: Showing you the bill, do you now remember the specific amount?
 [7] A: (Reading from the bill) Yes, it says here \$27,520.
 [Cross-examination of plaintiff Paul]
 [8] Q: You testified that you didn't know what had provoked Don, but they day before the incident you expelled six of his students for no reason, changed the lock on his office, and scraped the parking sticker off his car. Isn't that correct?
 A: That's not right.
 Q: Would you agree that you and Don had your differences?
 [9] A: No, we always got along well, and when he came after me that morning he had a lethal weapon.

At each of the nine indicated points, what objection or objections, if any, should have been made, and how should the court have ruled? Discuss.

- I. “And you’ve lived there for the past eight years?”
 - A. Leading Question - Overruled

- II. “...Bonnie Brown said, ‘Paul, here comes Don...’”
 - A. Hearsay - Overruled - Present Sense Impression

- III. “OK, what happened after he rushed toward you screaming and carrying a knife?”
 - A. Assumes Facts Not In Evidence - Sustained

- IV. “...So you didn’t say anything and you didn’t provoke him in any way?”
 - A. Leading / Compound / Hearsay - Sustained

- V. “...I told the police exactly what I’ve said here...”
 - A. Hearsay - Sustained - Prior Consistent Statement

- VI. “Would it refresh your memory if I told you”
 - A. Leading / Hearsay - Sustained

- VII. “Yes, it says here \$27,520”
 - A. Hearsay / Non-Responsive / No Foundation - Sustained

- VIII. “You testified that you didn’t know what provoked Don...”
 - A. Leading / Compound - Probably Sustained

- IX. “No we always got along well...”
 - A. Non-Responsive Answer - Sustained

Evidence Hypothetical #6

Dave, a waiter at Bill's Cafe, (Cafe), is on trial by jury for the crime of arson, defined by statute as setting a building afire either intentionally or with gross and reckless disregard for human life.

1. The prosecution's first witness was Sam, a cook at Cafe, who testified, over objection, that just prior to the time Cafe burst into flames, Bart, another waiter, ran into the kitchen shouting that Dave was spilling gasoline all over the lobby, and that someone should call the police because what Dave was doing would kill them all. Bart cannot be located by either party.
2. Ellen, assistant manager of Grill Restaurant (Grill), was called as a witness by the prosecution and testified, over objection, that Dave had been a busboy at Grill before he became employed at Cafe, and that she had fired him after she found Dave showing other employees how to construct a gasoline bomb.
3. After the prosecution rested, Dave took the witness stand and testified that he had been ordered to clean the lobby doors and ornamental brasswork at Cafe, and that he was using gasoline as a cleaning solution in that work when a patron entered and flipped a lit cigarette butt on the lobby floor, igniting the gasoline. On cross-examination, over objection, the prosecution elicited the fact from Dave that, two years earlier, he had been expelled from college for cheating on a final examination.
4. The defense next called Dr. Hix, a chemist, who testified, over objection, that based on his pretrial review of standard scientific treatises, as well as his own experimentation, it was his expert opinion that although use of gasoline as a cleaning fluid cannot be recommended, its use for that purpose in normal circumstances is reasonably safe, if the gasoline vapor is kept from contact with hot filaments or burning objects.
5. In rebuttal, the prosecution, over objection, asked the judge to take judicial notice that gasoline vapor is so combustible that use of gasoline as a cleaning fluid in space occupied by other persons constituted gross and reckless disregard for human life, as a matter of law. The court stated that it took such notice.

Assuming that all objections were properly made, should the evidence objected to in items 1 through 5 have been admitted? Discuss.

- I. Sam's testimony about Bart's statement
 - A. Relevance - The testimony suggests defendant is guilty.
 - B. Objection - Hearsay
 - C. Objection - Improper Opinion
 - D. Conclusion - Admissible

- II. Ellen's testimony about firing Dave
 - A. Relevance - The testimony suggests defendant is an arsonist.
 - B. Objection - Character Evidence - Prior Bad Acts
 - C. Conclusion - More prejudicial than probative

- III. Dave's testimony about using gasoline for cleaning.
 - A. Relevance - The testimony suggests defendant did not have criminal intent.
 - B. Objection - Hearsay
 - C. Cross-Examination of Dave about being expelled from college for cheating
 - D. Conclusion - Both the direct and cross-examination testimony are admissible.

- IV. Dr. Hix's testimony about gasoline being reasonably safe when used as a solvent.
 - A. Relevance - This testimony suggests defendant did not have reckless disregard.
 - B. Objection - Improper Expert Opinion
 - C. Conclusion - Probably not an abuse of discretion to admit.

- V. The Court Taking Judicial Notice - Clear Error