Illinois Association of Defense Trial Counsel
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# Trial Court's Discretion

*By: James E. DeFranco*
*Neville, Richards, DeFranco & Wuller, Belleville*

## The Trial Court's Discretion to Exclude Evidence of Convictions For Crimes Involving Dishonesty or False Statement in Civil Cases

### I. Introduction

Most claims for personal injuries are premised, in large measure, on the credibility of the plaintiff. The plaintiff in a slip and fall, Structural Work Act, or products liability case may be the only witness to the "accident" which
produced injuries. Plaintiffs are the only witnesses in the case who can testify as to whether or not they are experiencing pain and suffering subsequent to an accident or whether they experienced similar pain and suffering before the accident. The plaintiff, as a practical matter, frequently is the only witness, other than perhaps family members or friends, who has substantial knowledge concerning claimed disabilities after and capabilities before an alleged injury.

The rules of evidence give little ammunition to the trial counsel on either side to establish the credibility of one witness as compared to others based on the character of that witness. One tool the rules of evidence in Illinois permit is the use of evidence of conviction of a felony or a crime involving dishonesty or false statement. The problem arising in any case in which a party or a witness has been convicted of a crime is the danger that the trial court will exclude evidence of the conviction based on the claim that the prejudicial effect of the evidence of the conviction outweighs its probative value.

The debates over the adoption of Federal Rule of Evidence 609 and the Illinois Supreme Court's adoption of the 1971 proposed version of that rule concentrated primarily on the use of prior convictions in criminal cases. Despite what has been called a "labyrinthine history"[1] little discussion is found in the evidence treatises on the application of the rules concerning use of prior convictions to impeach credibility in civil cases. During the congressional debates on Rule 609, one congressman urged "those on the conference to consider separating out the criminal problem from the civil problem and the non-party situation from the case where the party is a witness . . . ."[2] The policies supporting the principles concerning use of prior convictions to impeach credibility militate in favor of more frequent introduction of such evidence in civil cases than in criminal cases. Moreover, pertinent authorities in Illinois, including a recent Supreme Court of Illinois decision in a death penalty case, suggests that the discretion to exclude evidence of convictions for crimes involving dishonesty or false statement in a civil case is extremely limited[3]

### II. History Of The Rule

The Illinois Supreme Court adopted the 1971 draft of Federal Rule of Evidence 609[4] in *People v. Montgomery.*[5] The proposed rule permitted evidence that a witness had been convicted of a crime if the crime:

1. was punishable by death or imprisonment in excess of one year . . . or
2. involved dishonesty or false statement regardless of the punishment unless
3. in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.

The *Montgomery* court relied, in part, on an Illinois statute which provided that a person was not disqualified as a witness in a criminal case by reason of his having been convicted of any crime but that the conviction

may be shown for the purpose of affecting his credibility.[6] The *Montgomery* decision overruled prior authority that a criminal defendant taking the stand on his own behalf could be impeached by a prior conviction only by the introduction of the proof of an infamous crime.[7]

The adoption of the 1971 draft of Rule 609 in Illinois was extended to civil cases by the Illinois Supreme Court in *Knowles v. Panopolous*.[8] The court determined that there were a number of reasons for not distinguishing "between infamous crimes and misdemeanors, civil proceedings and criminal, regarding the admission of evidence of convictions:"

> 1. First, the court must be more concerned with ascertaining the truth and should not allow into evidence a conviction which does not reasonably relate to testimonial deceit. Unfair prejudice results. Only if the crime bears a sentence of over one year or is a crime of dishonesty is it serious enough to assail the credibility of the witness. The quest for truth is the same in criminal or civil cases and therefore the distinctions are not pertinent;
> 2. The proposed Federal Rules of Evidence relied on by the *Montgomery* court applied to both criminal and civil proceedings;[9]
> 3. The rule of impeachment before the *Montgomery* decision was the same for both civil and criminal cases; and
> 4. The criminal and civil statutes allowing the use of prior convictions "are essentially the same."[10]

The 1971 proposed Rule 609 was never adopted. Rather, subdivision (a)(2) of Federal Rule of Evidence 609, as adopted, provided:

> (2) Evidence that any witness has been convicted of a crime *shall be admitted* if it involved dishonesty or false statement, regardless of the punishment[11]

(emphasis supplied). Subdivision (a)(2) eliminated the balancing test, and thus the discretion to exclude evidence of convictions of crimes involving dishonesty or false statement:

> Thus, subdivision (a)(2) differs from subdivision (a)(1) in several important respects. First, the potential punishment for the crime is of no consequence under subdivision (a)(2); misdemeanors as well as felonies may be admitted. Second, subdivision (a)(2) makes no distinction between the accused in a criminal case and other witnesses. Finally, subdivision (a)(2) neither requires nor permits balancing under Rule 403 or any other test. This means that, if the crime involves dishonesty or false statement, the conviction *must be admitted*; there is *no discretion* to exclude. This aspect of the rule is based on the assumption that the crimes in question are so highly probative of untruthfulness, there is no need to balance.[12]

(emphasis supplied). The appellate courts of Illinois recognize that the changing of the wording of the rule to "shall be admitted" in the present federal rule "allows the trial judge no discretion in admitting a prior conviction" for crimes involving dishonesty and false statement.[13]

The Illinois courts have not adopted the current version of Federal Rule of Evidence. The Illinois Supreme Court, in decisions subsequent to *Montgomery*, noted that the language of proposed Rule 609 was not the same as the language in the Rule 609 eventually adopted for use in federal courts.[14] The Illinois Supreme Court has not explicitly rejected the adopted version of Rule 609(a)(2), but has noted, in unrelated contexts, that it was not "bound by the Federal Rules of Evidence . . . ."[15] The appellate courts presumed from the fact that the Illinois Supreme Court continued to rely on the 1971 proposed rule despite its awareness of the differences in the adopted version that the proposed rule quoted in *Montgomery* and not the adopted version of Rule 609 was the law in Illinois.[16]

## III. Applying The Pertinent Policies In Civil Cases

Because much of the battle concerning the counter-vailing policies concerning the admission of evidence of prior convictions has been waged in the context of criminal cases,[17] less analysis is available in the context of civil cases. An analysis of the policies underlying the application of the evidentiary rules concerning prior convictions as applied to civil cases indicates that the courts should be reluctant to exclude such evidence, especially evidence of prior convictions for crimes involving false statements or dishonesty.

The concerns regarding the use of prior convictions are less significant in civil cases than in criminal cases. A primary concern in criminal cases is that a jury is likely to ignore the issues in the case and convict the defendant because evidence of prior convictions suggests that the defendant is a bad person, who, if not guilty of the crime charged, may be deserving of punishment for something else.[18] In a civil case, since neither party is charged with a crime or subject to criminal punishment, the only danger is that a jury may be less willing to find in favor of a party if it believes the party is "bad." Such a concern has been discounted by commentators:

> On the other hand, when conviction evidence is offered under subdivision (a)(1) against any witness other than an accused, it presents little or no danger of directly inducing the jury to convict an innocent person. While the evidence might induce other grievous errors, none have as serious implications for our justice system. Further, unlike an accused, other witnesses may have no direct interest in the outcome of the case. Even where the witness has such an interest, as would a party testifying in a civil case, that fact does not inform the jury that the witness is willing to commit a crime to promote his interest. Thus, conviction evidence may tell the jury something it does not already know about the witness' willingness to engage in perjury. Finally, since only an accused can choose not to testify, the threat of conviction and impeachment will not result in the loss of other witnesses' testimony. This all means that a rule calling for the admission of conviction evidence against any witness other than an accused has a good chance to advance accurate fact finding.[19]

More importantly, the interests in criminal litigation are fundamentally different than the interests in civil litigation. In criminal litigation, the state, which represents the interests of society as a whole, is not supposed to obtain convictions at all costs, because society has a fundamental interest in not sending innocent persons to jail. The interests of civil litigants, on the other hand, are advanced by parties who may have no concern for society's fundamental interests. The interest of a plaintiff in recovering damages cannot be greater than a defendant's interest in protecting property rights. Indeed, there is no "fundamental right" to recover damages for personal injuries or other civil damages since both the legislature and the courts may limit those rights, or in the case of certain causes of action or defenses to those causes of actions, can completely abolish them.[20] Thus, plaintiffs and defendants in civil litigation have an equal interest in impeaching the credibility of the other party or its witnesses through the use of criminal convictions, especially those for crimes involving dishonesty or false statement.

Similarly, the concern in a criminal case that a limiting instruction will not cure the prejudice from evidence of a prior conviction is less persuasive in a civil case. A major concern in criminal cases is that a limiting instruction advising the jury to use evidence of prior convictions only for the purpose of assessing credibility does not serve its purpose because jurors ignore limiting instructions.[21] In a criminal case, the jury will frequently be concerned with the danger of permitting a dangerous person to return to society if it renders a verdict of not guilty. In a civil case no such concern exists. Moreover, a number of potential biases or prejudices exist which the courts attempt to cure with limiting instructions in civil cases. For example, a jury is instructed that sympathy should not affect its decision [22] to prevent the obvious danger of a verdict rendered based on sympathy to a significantly injured plaintiff or an impoverished defendant. Likewise, a jury is instructed to treat a corporate defendant with the same impartiality as an individual.[23] Thus, "to offset the risk of prejudice that [Federal] Rule 404(b) is intended to address," the courts in civil cases instruct the juries that they may consider testimony about prior criminal convictions only in assessing the credibility of the person who was convicted, and have additionally precluded mention of the conviction in opening statement.[24]

Evidence of convictions of crimes including dishonest or false statement should be admissible in civil cases because the probative value is greater and the prejudicial impact is less than evidence of convictions of other crimes. The courts, in both civil and criminal cases, have recognized the greater probative value of crimes involving dishonesty and false statement in comparison to crimes involving violence or other propensities.[25] At the same time, convictions for crimes involving dishonesty and false statement are less prejudicial because such crimes are more likely to be understood by the jury to give rise to the inference that the witness has a specific propensity for lying rather than the inference that the witness or party is "of bad general character."[26]

## IV. Illinois Decisions

The Illinois Supreme Court's recent decision in *People v. Williams* underscores the distinction between felonies in general and crimes involving dishonesty and false statement. The court, in explaining the *Montgomery* decision's genesis and rationale of proposed Rule 609, quoted then circuit judge Warren Berger's reasoning in *Gordon v. United States*:

> In common human experience, acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A "rule of thumb" should be that convictions which rest on dishonest conduct relate to credibility where as those of violent or assaultive crimes generally do not.[27]

The Illinois Supreme Court's quotation of the *Gordon* case signifies its acceptance of the belief that crimes involving dishonesty and false statement are more probative of credibility than felonies in general.

The Illinois Supreme Court's decision is consistent with prior appellate court authority. In *Holmes v. Anguiano*,[28] the plaintiff argued that the trial court committed reversible error by refusing to allow plaintiff to impeach the defendant with a prior felony conviction involving dishonesty. The court, while conceding that balancing the probative value of the evidence against the danger of unfair prejudice is a matter for the trial court's sound discretion, found that the trial court abused its discretion by excluding evidence of the defendant's conviction. The court noted that the defendant's testimony and credibility "were of utmost importance" in the jury's determination because the defendant's testimony varied significantly from the plaintiff's testimony and was not fully corroborated by the testimony of other witnesses.[29] The court noted the limited purpose for which the evidence was introduced and failed to see how it could subject the defendant to unfair prejudice:

> Furthermore, evidence of the defendant's conviction could have been considered by the jury only insofar as it related to the defendant's credibility as a witness. The defendant has failed to explain how the danger of any unfair prejudice would substantially outweigh the probative value of the evidence, or even show that introduction of the evidence would have subjected him to unfair prejudice.
>
> The purpose behind the impeachment rule is to provide relevant information on the issue of a witness's credibility. The defendant's prior felony conviction for attempted robbery was relevant to that issue in this case. If we were to conclude that the defendant's conviction was properly excluded here, it is difficult to imagine a case where introduction of a prior felony conviction would be considered proper impeachment. Therefore, we do not believe the trial court correctly determined the probative value of this evidence.[30]

The court's reasoning would seem to apply with full force to a plaintiff's conviction of a crime involving dishonesty or false statement. In most cases, the plaintiff's testimony is critical to establishing one or more elements of the plaintiff's cause of action and typically one or more elements of the plaintiff's claimed damages.[31]

Indeed, the *Gordon v. United States* case quoted recently by the Illinois Supreme Court underscores the importance of admitting evidence of prior convictions when a case becomes a credibility battle between the complaining witness and a criminal defendant. The court held that the admission of the prior convictions of the criminal defendant was proper:

> because the case had narrowed to the credibility of two persons — the accused and his accuser — and in those circumstances there were greater, not less, compelling reasons for exploring all avenues which would shed light on which of the two witnesses was to be believed.[32]

In a civil case, the circumstances of the occurrence frequently narrow to the credibility of two witnesses, the plaintiff and the defendant. In other situations, the entire case, or damages in the case, may rest entirely upon the credibility of only one witness — the plaintiff.[33] Thus, the reasons for compelling admission of such evidence are equally compelling in civil cases in which the case narrows to the credibility of the plaintiff and a defense witness.

## Conclusion

The Illinois courts should explicitly recognize what their decisions tacitly imply — that the admission of evidence of prior convictions for crimes involving dishonesty and false statement should be admitted in any case in which the credibility of the party against whom the evidence is admitted is in issue.

## Endnotes

1 *United States v. Smith*, 551 F.2d 348, 360 (D.C. Cir. 1976).
2 Congressional Record, February 6, 1974 at H554 (comments of Representative Wiggins).
3 *People v. Williams*, 161 Ill.2d 1, 641 N.E.2d 296, 204 Ill. Dec. 72 (1994).
4 51 F.R.D. 315, 319 (1971).
5 47 Ill.2d 510, 268 N.E.2d 695 (1971).
6 Ill. Rev. Stat. ch. 38, ¶155 (1967); *Montgomery*, 268 N.E.2d at 697.
7 *Charlton v. Baker*, 36 Ill.App.3d 427, 344 N.E.2d 25, 27 (2d Dist. 1976) (*citing Bartholomew v. People*, 104 Ill. 601 (1882)).
8 66 Ill.2d 585, 353 N.E.2d 805, 6 Ill. Dec. 858, 97 A.L.R. 3d 1144 (1977).
9 *See* Fed. R. Evid. 1101(b).
10 *Knowles*, 363 N.E.2d at 808, citing Ill. Rev. Stat. ch. 51, ¶1 (1975).
11 Fed. R. Evid. 609(a)(2).
12 *Wright & Gold*, 28 *Federal Practice & Procedure*, §6135 at 245-46 (1993).
13 *People v. Vaughn*, 56 Ill.App.3d 700, 371 N.E.2d 1248, 1251-52 (5th Dist. 1978).
14 *Knowles v. Panopolous*, 363 N.E.2d at 807; *People v. Williams*, 641 N.E.2d at 310.
15 *Knowles v. Panopolous*, 363 N.E.2d at 808.
16 *People v. Yost*, 65 Ill.App.3d 386, 382 N.E.2d 140, 142 (3d Dist. 1978); *People v. Vaughn*, 56 Ill.App.3d 700, 371 N.E.2d 1248, 351-52 (5th Dist. 1978); *Charlton v. Baker*, 36 Ill.App.3d 427, 344 N.E.2d 25, 26 (2d Dist. 1976) ("The latter provision of proposed Rule 609(a) was adopted by the Supreme Court in *People v. Montgomery* . . . and we are, therefore, governed by that decision.")
17 *See* generally *Wright & Gold*, 28 Federal Practice & Procedure, §6132 at 190-91 (1993).
18 See Wright & Gold, 28 Federal Practice & Procedure, §6132 at 195; Cleary & Graham, Handbook of Illinois Evidence, §609.1 at 411 (6th Ed. 1994). A more subtle danger may exist. The jury may reduce the burden of proof when they learn of a prior conviction because they are less concerned that a completely "innocent" person may be convicted.
19 Wright & Gold, 28 Federal Practice & Procedure, §6132 at 201.
20 The repeal of the Illinois Structural Work Act (740 ILCS 150/0.01 et seq.) is a recent example. The fact that the legislature may repeal statutes which provide special statutory remedies and deprive a plaintiff of a claim filed or action that is pending because such rights are not "vested" further suggests that the interests of civil litigants cannot rise to the same level of the interests in society in criminal cases. *See Shelton v. City of Chicago*, 42 Ill.2d 468, 248 N.E.2d 121, 124 (1969) (Repeal of civil cause of action for damages resulting from mob violence could deprive civil litigants of cause of action during pendency of action).
21 See authorities collected at note 26, Wright & Gold, 28 Federal Practice & Procedure, §6132 at 198 n. 26.
22 I.P.I. No. 1.01 (3d ed. 1989).
23 I.P.I. No. 1.01 (3d ed. 1989).
24 GEM Realty Trust v. First National Bank of Boston., 1995 W.L. 127825 at 5 (D.N.H. 1995).

[25] Wright & Gold, 28 Federal Practice & Procedure, §6135 at 246 ("This aspect of the rule is based on the assumption that the crimes in question are so highly probative of untruthfulness, there is no need to balance."); See Cleary & Graham, Handbook of Illinois Evidence, §609.3 at 418 (6th ed. 1993). (". . . It is fairly generally accepted that a conviction for a crime involving dishonesty or false statement is probative upon the issue of a witness' truthfulness… .")

[26] *People v. Allen*, 429 Mich. 558, 420 N.W.2d 499, 506 (1988); Wright & Gold, 28 Federal Practice & Procedure, §6132 at 202 (1993).

[27] *People v. Williams*, 641 N.E.2d at 311 (*quoting Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967)).

[28] 174 Ill.App.3d 1081, 529 N.E.2d 300, 124 Ill. Dec. 480 (3d Dist. 1988), the appellate court reversed the trial court's exclusion of a defendant's conviction.

[29] *Holmes v. Anguiano*, 529 N.E.2d at 302.

[30] *Holmes v. Anguiano*, 529 N.E.2d at 302-303.

[31] Occasionally, a plaintiff's testimony may not be in dispute or may not impact the circumstances of the accident, such as when the plaintiff does not remember the accident. *See Deerhake v. DuQuoin State Fair Association, Inc.*, 185 Ill.App.3d 374, 541 N.E.2d 719, 133 Ill. Dec. 508 (5th Dist. 1989), *appeal denied*, 127 Ill.2d 613, 545 N.E.2d 107, 136 Ill. Dec. 583 (1989).

[32] 383 F.2d 936, 941 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029, 88 S.Ct. 1421, 20 L. Ed. 2d 287 (1968); see Weinstein & Berger, 3 Weinstein's Evidence, ¶609 [03] at 609-71 (1978).

[33] Cases can frequently depend entirely on the credibility of the defendant, for example, when the defendant is the only survivor of an accident or the plaintiff has no memory of the accident.