

Relevance

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2.1 Common Law Rules of Relevancy and Materiality

Most jurisdictions no longer follow the common law definition of relevancy, but instead follow the more comprehensive definition found in the Federal Rules of Evidence. Nonetheless, the concepts found in the common law are integrated into the Federal Rules, and understanding those concepts allows understanding the law of relevancy today in greater depth.

The common law definition of relevancy is broad, and to some degree, imprecise. Generally, evidence is relevant under common law if it sheds light on a contested matter, or if reasonable inferences can be drawn from the evidence regarding a fact at issue. This definition is so inclusive, however, that over time additional constraints have been placed on relevancy in the cases.

Material Evidence
Evidence that affects the outcome of the case.

Immaterial Evidence
Evidence that is not material.

Adversary System
A system of justice where the parties work in opposition to each other, and each party tries to win a favorable result for itself.

Proponent
The party who proffers or presents the evidence.

First, in order for evidence to be admissible, the cases hold that the evidence must not just be relevant, but must also be material. Although this term is somewhat vague, generally it is taken to mean that the evidence must matter, or in some way potentially affect the outcome of the case. If the evidence sheds light on an issue in the case, but really can't affect the outcome of the case, it is immaterial. The difference between materiality and relevancy is often difficult to define.

The concept of materiality is most often applied in the cases when one of the parties attempts to introduce evidence in order to inflame the jury against the opposing party. Keep in mind that a majority of the evidence presented in an adversary system is introduced to prejudice the factfinder in favor of the proponent. The evidence becomes immaterial when the prejudice it creates is related to an issue that has either been thrown out of court, or already decided.

Frequently, the concept of materiality is raised after the parties have entered into a stipulation. Consider the following hypothetical example.

Assume a lawsuit is based on allegations that defendant took the plaintiff's car without the plaintiff's permission and thereby committed a trespass. Assume further that the defendant stipulates that he took the plaintiff's car. The only remaining issue is whether the defendant had the plaintiff's permission to do so. If the plaintiff tries to present evidence that his car was seen (after it had been taken) at a movie theatre where an "X" rated movie was being shown, this evidence would be relevant to show that the defendant left the car at the porno movie, but it would be immaterial to any issue existing in the case. This is because the defendant already admitted taking the car. The sole purpose of such evidence would be to inflame the jury.

The following case illustrates a situation where the court found that the issue of the defendant's being drunk at the time of the accident was immaterial because the defendant had already admitted being liable for damages caused in the accident. The court did not rule the evidence irrelevant but reasoned that since the defendant had already admitted he was responsible for damages, anything tending to prove liability was immaterial. Evidence that the defendant was drunk at the time of the accident was also considered inflammatory.

Jarvis v. Hall

210 N.E.2d 414 (Ohio, 1964)

This action was commenced in the Common Pleas Court of Scioto County by Gladys Jarvis against Clell Hall seeking damages for per-

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sonal injuries alleged to have been sustained in an automobile collision on December 16, 1961, in the city of Portsmouth. The parties will be referred to herein as the plaintiff and defendant in the same relation they appeared in the trial court.

The petition alleges in substance that the plaintiff was operating her husband's automobile in a westerly direction on Gallia Street; that she stopped for a traffic control light; that the defendant was operating his automobile on the same street in the opposite direction, under the influence of alcohol; that defendant crossed the center of the street and collided with the automobile the plaintiff was driving; and that as a result of the defendant's negligent act plaintiff sustained serious and permanent injuries.

The defendant filed an answer admitting the collision but denying all other allegations of the petition. The case came to trial on January 30, 1964, and on that date the defendant was granted permission to amend his answer, admitting that defendant was negligent in driving his automobile on the left of the center line of the highway and that such negligence was the proximate cause of the collision of the two vehicles. In other words, the defendant admitted liability, leaving the question of damages, if any, the only issue to be determined by the jury.

The trial by jury resulted in a verdict in favor of the plaintiff in the sum of \$5,000 upon which judgment was entered, the motion for a new trial was overruled, and the defendant now seeks a reversal of the judgment.

Under the first assignment of error the defendant claims that the court erred in overruling defendant's motion to withdraw a juror and declare a mistrial. The record shows that before the jury was empanelled and after the defendant had been granted permission to amend his answer admitting liability, counsel for plaintiff inquired whether the defendant would admit that the defendant was driving his automobile under the influence of alcohol. Upon receiving a negative reply, the plaintiff made a motion to amend her petition to include in the prayer of the petition a sum for punitive damages because of the operation of the automobile under the influence of alcohol. This motion was overruled.

The plaintiff began the introduction of testimony by calling the defendant for the purpose of cross-examination. So far as pertinent to this assignment of error the record reads:

- Q. How fast were you driving, Mr. Hall, when your car collided with that car occupied by Mrs. Jarvis?
 A. Well, I would say around 30 or 35.
 Q. Was there anybody in the car with you?
 A. No sir.
 Q. Do you remember this accident clearly?
 A. Yes sir.

Q. Isn't it a fact that you were under the influence of alcohol, or intoxicated?

Objection

Mr. Howland: May I finish my question?

Q. Mr. Hall, had you had anything intoxicating to drink?

Thereupon the defendant moved to withdraw a juror and declare a mistrial. This motion was overruled, and the jury was instructed to disregard the question. The defendant contends that liability having been admitted by the defendant, the attempt to inject intoxication into the case by the plaintiff was prejudicial and the court's instruction to disregard it was ineffective: that the damage had been done. In *Cleveland Ry. Co. v. Kozlowski*, ... Stephenson, J., says:

An admission of liability in a personal injury case sends the pleadings to the four winds except as to the nature and scope of the injuries on the one side and the denial thereof on the other. Negligence and proximate cause go out of the case as if by magic and nothing remains for the jury to do except fix the amount of damage. This is the sole and only issue left in the case.

In the colloquy between the court and counsel, in the absence of the jury, the court had expressly advised counsel that the only issue to be determined was the nature and extent of the injuries, if any, sustained by the plaintiff and that the question of whether the defendant was intoxicated was removed from the case.

The court said: "The only issue now is the question of money damage."

The purpose of pleading is to define the issues to be determined, to inform the respective parties of the claims of each and the nature and scope of the trial. [citation.] The plaintiff, by propounding the question relating to defendant's intoxication, not only attempted to inject an immaterial and inflammatory issue into the case, under the pleadings, but violated the instructions of the court in regard to the issues to be submitted to the jury. Regardless of the motive in asking the question, it served only to improperly influence the minds of the jury in determining the only issue in the case, i.e., damages.

* * *

For the reasons above set forth the judgment is reversed and this cause is REMANDED to the Common Pleas Court of Scioto County for a new trial.

Since Mr. Hall was willing to pay for his negligence in this case, the only thing left for the jury to decide was how much he would

Probative

Assisting in the exploration for truth; informative.

have to pay. Mr. Hall's drunken state wasn't **probative** of the dollar value of Mrs. Jarvis's damages. The **plaintiff's** purpose in introducing such evidence was to get the jury angry at Mr. Hall, so they'd be more inclined to award Mrs. Jarvis more money.

The appellate court concluded that the attempt by plaintiff to inject into the case evidence that was immaterial and inflammatory warranted that the matter be reversed and remanded for a new trial. This is an unusual result in that ordinarily the appellate court will not overturn a trial judge's ruling unless there has been an abuse of discretion on the part of the trial judge. In this case, the trial judge did instruct the jury to disregard the inflammatory question, but the appellate court felt the damage had already been done, and the jury had been unfairly prejudiced by hearing about the allegation of alcohol consumption.

The result might be the same under the Federal Rules of Evidence today, but the reasoning would be slightly different, as discussed in the next section.

2.2 Relevancy under the Federal Rules of Evidence

Under the Federal Rules of Evidence, materiality is not an issue. This is because the federal rules and most state evidence codes have eliminated the concept of materiality by merging it with the concept of relevancy. Although in courtrooms (especially television courtrooms) it is not uncommon to hear, "Objection, Your Honor! Irrelevant and immaterial!" the reality is that only the relevancy objection has legal meaning in most jurisdictions today.

FRE 401, P. 222

The Federal Rules of Evidence define relevancy in FRE 401, as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The result is that materiality is now incorporated into the definition of relevancy. Under an FRE 401 analysis, Mr. Hall's inebriated state in the *Jarvis* case, above, is simply irrelevant. It is not related to a fact of consequence to the determination of the action, because the issue of liability has already been determined.

Reconsider the hypothetical example in section 2.1 involving the plaintiff who was suing the defendant for taking his car without permission. In that hypothetical, the defendant admitted that he had taken the car, but plaintiff wanted to introduce evidence that after the car was taken, it was seen at a porno theatre. The only remaining issue to be determined in that action, however, was whether or not the defendant had plaintiff's permission to take the car. Since the place where the car was seen has no relationship to any fact that was "of consequence to the determination of the action," this evidence

was irrelevant under the Federal Rules. Under common law, it would have been relevant to show where the car was seen, but immaterial to any outstanding issue in the case.

Ultimate Issue

A legal question that must be answered to resolve the case.

In all other respects, the definition of relevancy under the Federal Rules either reflects or expands common law applications. In early common law, to be relevant evidence had to relate to an ultimate issue in the case. An ultimate issue is one that must, in the final analysis, be answered in the lawsuit. For example, an ultimate issue in an automobile accident case is whether or not the defendant was negligent. Under the FRE definition of relevancy, all evidence having any tendency to prove any fact of any consequence to the determination of the action is relevant. According to the Advisory Notes, "The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." Consider the following example.

Dave, the noncustodial parent of a four-year-old boy, took his son from preschool one day and did not return him to Mary, the custodial parent. Dave was arrested two weeks later for child-stealing, and the child was then returned to his mother. At the time of his arrest, Dave had a cocktail napkin in his pocket with Mary's address and phone number on it. This cocktail napkin would not be relevant to the ultimate issue of his guilt in that it would not go to prove whether Dave actually "stole" his child away from the mother. It might, however, be probative of his state of mind. If Mary gave Dave the cocktail napkin, this might create inferences that she and Dave were negotiating about the child. If Dave wrote the information himself, it might be probative that he was intending to return the child. The cocktail napkin would be relevant because inferences can be drawn from that evidence, which, in the context of other evidence presented, might be of consequence in the determination of the action.

Although the concept of "ultimate issues" is still important in some areas of evidence law, for purposes of relevancy, whether or not evidence relates to an ultimate issue does not affect its admissibility under FRE 401. Therefore, such things as a defendant's financial condition prior to the robbery, or a defendant's attempt to flee after the issuance of a warrant, or love letters written to the spouse of a murder victim, are all potentially relevant pieces of evidence.

For the most part, the Federal Rules of Evidence are extremely liberal. It is noted in the Advisory Notes that the success of showing the relevance of a particular item to a fact in the case is often coextensive with the ingenuity or creativity of the lawyer. If a lawyer wants the evidence to come in, she has wide berth to argue that it is relevant.

2.3 Admissibility of Relevant Evidence

FRE 402, P. 222

Evidence must be shown to be relevant before the court will allow it to be admitted for consideration by the trier of fact. Once relevancy is established, FRE 402 indicates a predisposition to accept rather than reject relevant evidence. However, after establishing relevancy, the proponent may have to overcome various other obstacles before the evidence is admitted. Relevancy is only the essential first step. FRE 402 states;

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

The words "except as otherwise provided" are operative in this rule. Exceptions to the admissibility of relevant evidence are the subject of a large number of evidentiary rules relating to such things as character, habit, hearsay, unfair prejudice, authentication, and identification. These exceptions will be discussed at length in this textbook.

Laws from sources other than the rules of evidence may also require the exclusion of relevant evidence, as is acknowledged under Rule 402.

- Federal Rules of Civil and Criminal Procedure require the exclusion of relevant evidence in some instances. For example, if a party refuses to produce documents when requested to do so by the opponent, the document is inadmissible if proffered by the party who refused to produce it.
- iii The Constitution may require that relevant evidence be excluded. For example, a confession given without proper Miranda warnings is certainly relevant, but inadmissible to prove a crime for Constitutional reasons.
- iii Relevant evidence may be excluded based on legal privilege. For example, statements by a client made to a paralegal while working as an agent of another may be relevant to a proceeding, but are inadmissible because they are protected by the attorney/client privilege.
- Other exceptions can be found throughout the law.

Finally, notwithstanding the predisposition in the rules to accept rather than reject relevant evidence, the courts do recognize that certain evidence is so unfairly prejudicial that were it to be admitted simply because it is relevant, the outcome would likely be an unjust result. Rules relating to highly inflammatory or unfairly prejudicial evidence are presented in the next section of this chapter.

2.4 Evolution of the Unfair Prejudice Objection

The courts grapple a great deal with issues surrounding evidence that is likely to create unfair prejudice against a party in the eyes of a jury, or evidence likely to inflame a jury and cause it to reach its decision on improper grounds. Before the Federal Rules of Evidence existed, the courts constructed legal theories through which they were able to exclude certain evidence that would have caused unfair prejudice. Evidence that was relevant but inflammatory was considered "logically relevant" but "legally irrelevant." In other words, such evidence could not be construed as factually irrelevant, so the courts ruled the evidence irrelevant as a matter of law. The Federal Rules have replaced the concept of legal relevancy with Rule 403.

FRE 403, P. 222

Discretionary Provision
A rule that is not absolute and gives the court latitude to decide.

FRE 403 is a **discretionary provision** through which highly prejudicial evidence may be found inadmissible. If you work for a prosecutor or in a criminal defense firm, you might hear Rule 403 referred to by some cynical members of the bar as the "whiner's objection." This comes from the perception that if the opposition doesn't want certain evidence to come in, it may be anticipated that they will "whine" about it to the judge, pursuant to Rule 403.

Rule 403 is actually extremely important in the courtroom, as it allows the judge a certain amount of discretion to keep out evidence that might lead to an unjust result. FRE 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. [Emphasis added.]

Rule 403 requires that the court exercise discretion in balancing the conflicts that certain proffered evidence may cause. Rule 403 assumes that the evidence is relevant, but gives the court discretion to exclude it anyway. The court is under no obligation to exclude evidence under this rule. It is merely required to balance the competing interests. Under this rule, the court must first examine the evidence to consider its probative value. The more probative value a given piece of evidence has, the less likely it is to be excluded under this rule.

Probative value is weighed against several criteria for ultimate determination of the admissibility of evidence under Rule 403. The court must look at whether the evidence will unfairly prejudice, confuse, or mislead the jury. In addition, the court must consider whether the proffered evidence will cause undue delay, waste of time, or needless presentation of **cumulative evidence**.

Cumulative Evidence
Evidence repetitive of other evidence.

FRE 403, P. 222

Rule 403 is the result of a long history of concern by the courts regarding fairness in the admission of inflammatory or extremely burdensome material. As discussed previously, at common law, evidence that was highly inflammatory or unfairly prejudicial would be

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2.5 What Constitutes Unfair Prejudice

Keeping in mind that in a criminal case, any evidence offered to convict a defendant may well prejudice the jury against the defendant, the operative word to be considered under FRE 403 is "unfair." The prejudice caused by the admission of the evidence must be "unfairly prejudicial" against the party who objects to it. Even where there is a possibility of unfair prejudice, this is not sufficient to exclude the evidence if it is extremely important to the prosecution's case. The use of the evidence may be limited, or partially expurgated to accommodate some of the objectioner's concerns, but if it is extremely probative, it is likely to come in. The following is an example of testimony admitted over all objection of unfair prejudice, pursuant to Rule 403, in a court trial.

- Limited
- Restricted,
- Expurgated
- Deleted out or removed.

FRE 412, P. 225

D was a coach for a high school basketball team. Two boys alleged that D molested them. D's attorney offered evidence that the alleged victims were gay. Prosecution objected on the grounds of unfair prejudice. (Also, prosecution objected on the grounds that prior sexual history of a victim is generally inadmissible - see Rule 412.) D's attorney argued that the information regarding the boys' sexual preference was probative to D's defense that the allegations made by the boys were the result of a vindictive conspiracy they had entered into after the coach's son had rebuked the boys' sexual advances. D's defense was that the alleged victims had made up their story to strike back at the coach's son by accusing the coach.

In this case, the court admitted the evidence of the alleged victims' sexual preference. The sexual preference of the alleged victims was critical to the accused's defense, and therefore the potential prejudice against the alleged victims was outweighed by the probative value of the evidence.

The following is an example of evidence that was excluded upon objection by prosecution under Rule 403, because of its highly prejudicial nature.

Richard Barber, a 19-year-old man, was charged with the count of robbery, based on his stealing a purse from Bambi, a middle-aged woman. The defense attempted to introduce evidence that Bambi

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was extremely wealthy, on the grounds that this was probative of Byfar's defense that the woman gave him her purse willingly.

Prosecution argued that raising the issue of the victim's wealth would unfairly prejudice the jury. There was risk that the jury would decide out of sympathy for the indigent defendant and against the wealthy woman who could afford the loss.

In this case, the court found that the probative value of evidence of the victim's wealth was outweighed by its prejudicial effect, and the evidence was excluded.

Conventional wisdom would provide the following rule of thumb when dealing with Rule 403 objections based on unfair prejudice, confusion of the issues, or misleading the jury. Evidence will most likely be excluded if it is really going to be used for an impermissible purpose. If the reason for wanting the proffered evidence is not an allowable one, the court will most likely refuse to admit it, notwithstanding clever arguments by counsel. It is frequently the job of the paralegal to draft memoranda stating reasons supporting the admission or exclusion of evidence that is subject to FRE 403 objection.

2.6 Undue Delay, Waste of Time, or Needless Presentation of Cumulative Evidence

Rule 403 objections may be made to evidence that if admitted would unduly burden the court or litigants. The court will balance the time and expense that would be consumed in the presentation of the evidence against such things as whether other evidence has already been introduced that adequately covers the subject or whether the evidence possesses only minimal probative value.

The following example illustrates where the court precluded the introduction of certain evidence because the evidence would be needlessly cumulative.

James was charged with assaulting John. James denied the charges. The prosecution indicated that it intended to call 16 witnesses to testify that each of them had heard James threaten John some days prior to the assault. This evidence was admissible to prove James's state of mind. The court ruled that only 4 of the proffered witnesses would be allowed to testify. Although the evidence was admissible, the testimony from 16 witnesses would have been needlessly cumulative and unduly burdensome on the court. In addition, the repetition of such testimony might have confused the jury. So much repetition might cause the jury to improperly believe that the evidence had much greater importance than establishing the accused's state of mind.

2.7 Objection for Unfair Prejudice Where Evidence Is Admissible for a Limited Purpose

FRE 403, P. 222

FRE 403 and comparable state evidentiary rules against unfair prejudice may be used by counsel to keep out evidence admissible for one purpose, but inadmissible for another.

Ordinarily, when evidence is admitted on one ground although objectionable on another, the court will give a limiting instruction to the jury to consider the testimony only for the purpose for which it was admitted. However, if the probative value of the evidence is outweighed by its prejudicial effect, even though admitted for only a limited purpose, the courts have the discretion to exclude the evidence, pursuant to FRE 403.

For example, in general terms, hearsay (which will be discussed at length later in this book) is inadmissible to prove the truth of the matter asserted. Certain hearsay evidence, however, may be considered nonhearsay and admissible when offered for some other reason. Consider the following hypothetical.

Plaintiff Jimmy sued Defendant ChemCo for failure to warn users that exposure to their chemical, Agent X, might be toxic. Jimmy suffered brain damage after using Agent X in a poorly ventilated indoor area. ChemCo denied that Agent X was the cause of Jimmy's injury. Jimmy attempted to introduce into evidence a letter written to ChemCo from another Agent X user. The letter said, in relevant part, "When used for even brief periods in an unventilated area, Agent X causes our employees to become ill. This product appears to be extremely dangerous."

The proffered letter is inadmissible hearsay to prove that Agent X is really extremely dangerous. It is admissible, however, to show that ChemCo had, in fact, been informed of a potential health problem in connection with the product.

Rule 403 can be used to argue that the letter in this example, even though technically admissible to show that ChemCo had been notified of potential health risks connected with the use of Agent X, should be excluded because of the danger that the jury will be unfairly prejudiced by it. There is a high risk that the jury will consider the letter as evidence of the danger of the chemical, notwithstanding a limiting instruction by the court. The court must weigh the probative value of such a letter against the danger of unfair prejudice to determine whether the letter should be admitted.

Once the trial court has made its determination in a situation such as the one in the above hypothetical, the appellate court will rarely tamper with the trial judge's ruling, even when the appellate court questions the trial court's reasoning.

The following case illustrates an instance when the 7th Circuit Court of Appeals was sympathetic to an argument that the probative value of certain evidence, when viewed in terms of the limited purpose for which it was admitted, was outweighed by its prejudicial effect. Nonetheless, the appellate court refused to supplant its own judgment over that of the trial judge, and deferred to the district court's determination.

United States v. Moore

845 F2d 683 (7th Cir. 1988)

A jury convicted Kathryn Joy Moore of one count of conspiring to transmit and present altered postal money orders and five counts of transmitting and presenting altered postal money orders. Moore appeals from her conviction arguing that the admission into evidence of seventeen exhibits, which only remotely tended to prove her state of mind, constituted reversible error. We find the district court did not commit reversible error in admitting the exhibits, and therefore affirm.

During February and March of 1982, defendant-appellant, Kathryn J. Moore, received six money orders in two letters from Frank Baker, Jr., an inmate at the Michigan City State Prison in Indiana. Each money order was payable to Moore in the apparent amount of \$261.00. Moore, then living in Texas, negotiated the money orders at her local post office and two stores by endorsing the money orders using her own name and social security number.

In 1982, postal agents, investigating a massive money order scheme involving altered money orders originating primarily from the Michigan City prison, met with Moore and informed her that the money orders she had cashed had been altered from \$1.00 to \$261.00. Moore agreed to cooperate with the government's investigation.

Moore admitted that she had endorsed the six money orders she received from Baker but claimed she did not know they were altered. She provided the government with six letters from Baker, written between January 26, 1982, and March 8, 1982, in which Baker referred to a "money scheme." Two of the 1982 letters contained the altered money orders. Moore also turned over seventeen other letters from Baker, written between April 24, 1981, and December 17, 1981, in which Baker made no reference to money orders but in which he asked Moore to procure drugs.

At trial, Moore conceded that she received and cashed the money orders which formed the basis of the charges against her. Moore argued, however, that she did not know they had been altered and thus, she could not be found guilty of a crime which required proof of specific intent to negotiate altered money orders.

In an attempt to prove Moore knew the money orders were

altered, the government introduced not only the six letters from Baker, written in 1982 and referring to a money scheme, but also the seventeen letters sent in 1981 containing references to drugs-but no references to a money scheme. Moore objected to the introduction of the 1981 letters. [Moore pointed out in the proceeding that the 1981 letters predated the conspiracy alleged in the indictment.]

* * *

The court found that the letters were admitted not to prove Baker's numerous requests for drugs, but rather, to prove the effect those letters had on Moore's state of mind. In other words, the district court permitted the introduction of the letters as evidence of Moore's knowledge of Frank Baker's propensities.

* * *

Moore alleged that the introduction of the 1981 letters would cause the jury to evaluate her actions on the basis of her association with Baker. Thus, she asserted the harmful effect of the evidence greatly outweighed the probative value of the evidence. Moore's contention that the jury might find her "guilty by association" was not without some plausibility. No evidence was introduced that Moore ever responded to Baker's 1981 requests for drugs by procuring them. She testified that she may have written and stated she would look into it, but that she never did and never had any intention of doing so. Moreover, the letters contained quite a bit of personal information which could easily have portrayed Moore as a less favorable person in the eyes of the jury.

As Moore argued, the harmful effect of evidence seemingly outweighed the only slightly probative value of the 1981 letters (especially given the ample evidence the government had already introduced to prove Moore's knowledge). Yet we do not reverse a district court simply because we would have decided an evidentiary issue differently.

On appeal, we will not find error in a district court's evidentiary determination unless the court "clearly abused its discretion in admitting the challenged evidence." [citations omitted.]

In this case, as we have said, the 1981 letters were relevant to Moore's state of mind and we defer to the district court's determination that any harm of introducing those letters was outweighed by their probative value.

* * *

AFFIRMED.

In the above case, the appellate court found that the letters admitted over the objection of defense counsel had only slight probative value, and the harmful effect of the letters most likely outweighed their probative value. Nonetheless, finding no clear abuse of discretion, the appellate court refused to find error. The fact that the appellate court would have decided the evidentiary issue differently is insufficient to cause it to reverse a district court ruling.

2.8 Rule 403—Inapplicability

For the most part, whenever evidence is proffered, it is subject to review under FRE 403. The probative value must outweigh the prejudicial effect of the evidence for it to be admissible. There is, however, one exception where the court is not permitted to "balance" the prejudicial nature of the evidence against its probative value. Rule 609(a)(2) mandates that evidence of a prior conviction for a crime involving dishonesty or false statement, when offered to attack the credibility of any witness, is absolutely admissible without subjection to Rule 403 consideration. There is no judicial discretion allowed in this situation.

Judicial Discretion

Latitude of choice in the part of the trial judge.

To illustrate, consider the following situation.

Jerome is an excellent security guard at Hitech, Inc. While on duty, he noticed an employee leaving the building with a large package. He asked the employee about the contents of the package, but the employee refused to answer. The next day, it was discovered that one of Hitech's minicomputers was missing. Jerome implicated the employee, who was later found with the missing computer.

Unfortunately, five years prior to this incident, Jerome plead guilty to a misdemeanor charge of welfare fraud. This prior conviction will undoubtedly prejudice the jury against Jerome, and taint the veracity of his testimony against the employee who allegedly took the minicomputer. The embezzlement conviction is admissible notwithstanding its prejudicial effect, pursuant to FRE 609(a)(2).

FRE 609(A)(2), P. 230

This exception is a minor one. It doesn't cover all criminal convictions, only those involving dishonesty. Other evidence that may be offered to impeach a witness is generally subject to FRE 403 review. This will be discussed at length in a later chapter in this textbook.

2.9 In Summary

- Under the common law, evidence had to be both relevant and material to be admissible. Under the FRE, materiality is included in the definition of relevancy.
- All relevant evidence is admissible unless it is subject to an exception in either the Rules of Evidence or some other body of law.
- Under the common law, evidence that was logically relevant could be deemed irrelevant: as a matter of law, if the evidence was inflammatory and caused unfair prejudice. Under FRE 403, if evidence is highly prejudicial, its probative value must outweigh its harmful effect to be admissible.
- Evidence that causes undue delay or is cumulative may be excluded under FRE 403.
- When evidence is admitted for a limited purpose, its probative value in that limited purpose must outweigh its prejudicial effect, or it is subject to exclusion pursuant to FRE 403.
- FRE 403 does not apply to the admission of prior convictions for crimes involving dishonesty or false statement, when offered to prove credibility (or lack thereof). Even though extremely prejudicial, these prior convictions are admissible and NOT subject to judicial discretion.

End of Chapter Review Questions

1. What is relevancy under the FRE?
2. What is materiality under the common law?
3. What is unfair prejudice?
4. What is probative evidence?
5. Who is the proponent?

Applications

Consider the following hypothetical situation.

Danielle rear-ended Charisse, who was stopped at a red light. Charisse sued Danielle for negligent driving. In the back seat of Danielle's car at the time of the accident, there was a magazine wrapped in a brown paper wrapper.

1. Is the magazine in the back seat of the car relevant evidence? Why or why not?
2. Suppose that the magazine was in the wrapper, but in the front seat. Is the magazine relevant evidence now? Why or why not?
3. Suppose that the magazine was unwrapped in the front seat, and that it was filled with child pornography. Is the magazine relevant evidence now? Why or why not?
4. Suppose that the magazine is lying open on the front seat to a page of a picture of a nude child. Is the magazine relevant evidence now? Why or why not?
5. Suppose the magazine is taped open to the steering wheel. Now, is the magazine relevant evidence?
6. Assume that the child pornography magazine is relevant evidence. What is the likely objection that opposition will make to the introduction of the magazine into evidence in the auto accident case? Present arguments for and against admissibility.
7. Suppose in other places in this magazine, there are very explicit pornographic pictures of young children performing sexual acts. These pictures were not on the exposed page at the time of the accident. Does the presence of these pictures make the entire magazine inadmissible as highly prejudicial? Why or why not? What might you do to mitigate the prejudicial affect of the magazine?