

Character Evidence in Civil Cases

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Introduction

In the decisions that we make about the conduct of others in our daily lives, character is perhaps the most important single factor. Men act and react and go about their every day business on their expectations of what others will do. It is common sense when asked to judge a man's conduct on a particular occasion to enquire how he behaved on other occasions. Character is simply a compendious summary of a person's past actions, good and bad. The conclusion may be expressed in terms of moral and mental qualities, but these are in turn determined only by what a person says and does. The law is principally concerned with the character of a person in the estimation of those who know him, which is his reputation.

In the early history of the law, character was the major determinant of a person's fate at the hands of the law. The following is an account of the role of character in an 11th century trial.

The opinion of neighbours always prevailed, and a trial was a test of character: the question was, 'can the oath of the defendant be relied upon?'. *Notoriety* in England, as in many primitive societies, was for long as good a reason for condemning a man as proof of a particular crime: a man 'regarded with suspicion by all the people', said Canute, was to be put under surety by the king's reeve to answer any charges brought against him, and if he had no surety he was to be slain and to lie in unconsecrated ground.¹

When the ordeal was the favourite mode of trial, character and reputation became especially important.

The more notorious a criminal, the greater was his ordeal. He must fast, go to Mass and swear to his innocence; then he holds the hot iron (if the burn festers, he is guilty); or is lowered into water (he is guilty if he floats, for the water rejects him); or, if he is a clerk, swallows the sacred morsel which has been adjured to choke the guilty man.²

While it would be difficult to argue from a common sense point of view that character evidence is not logically relevant, the danger

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¹ Harding, *A Social History of English Law*, (Penguin 1966), at p. 22.

² *Ibid.*, at p. 24.

of its illogical use is considerable. The logical function of character evidence may be shown by the following illustration. If a man is accused of stealing, his reputation as a thief logically weighs heavily against him. There is a strong tendency, however, that character evidence will produce a dislike or hatred for the party against whom the evidence is tendered which may result in an adverse finding to vindicate the trier's feelings and in disregard of culpability.

The impact of the use of character evidence and its potentially prejudicial operation are illustrated in Camus' novel *The Outsider*. Meursault, a young French Algerian, was being tried for the murder of an Arab, whom he was alleged to have shot on the beach outside Algiers. Coincidentally, the shooting took place a few days after his mother's death in an old age home. The court, as was the custom, saw fit to allow wide-ranging character evidence to be admitted. The warden and gatekeeper of the home gave evidence and Meursault recounts this court room scene:

To another question he [the warden] replied that on the day of the funeral he was somewhat surprised by my calmness. Asked to explain what he meant by 'my calmness', the Warden lowered his eyes and stared at his shoes for a moment. Then he explained that I hadn't wanted to see Mother's body, or shed a single tear, and that I'd left immediately the funeral ended, without lingering at her grave. Another thing had surprised him. One of the undertaker's men told him that I didn't know my mother's age...

The prosecutor was then asked if he had any questions to put, and he answered loudly: 'Certainly not! I have all I want.' His tone and the look of triumph on his face, as he glanced at me, were so marked that I felt as I hadn't felt for ages. I had a foolish desire to burst into tears. For the first time I'd realized how all these people loathed me.

After asking the jury and my lawyer if they had any questions, the judge heard the door-keeper's evidence. On stepping into the box the man threw a glance at me, then looked away. Replying to questions, he said that I'd declined to see Mother's body, I'd smoked cigarettes and slept, and drunk *café au lait*. It was then I felt a sort of wave of indignation spreading through the courtroom, and for the first time I understood that I was guilty.³

The character evidence in this illustration is quite unrelated to the issue but the prejudicial effect is overwhelming. It was perhaps because of this possible prejudicial effect on juries that for a period of time in English legal history the use of character evidence was in disrepute, epitomized by the abolition of its use in criminal cases.⁴

³ Camus, *The Outsider*, (Penguin Modern Classics, 1971), at pp. 90-91.

⁴ I Wigmore (3rd ed., 1940), at p. 451.

There has been a gradual erosion of this ultra-protective attitude. It is the purpose of this article to examine the extent to which this erosion has taken place with respect to civil cases. In this respect, character is sought to be introduced into evidence in two distinguishable ways.

The Use of Character Evidence to Prove a Fact in Issue.

The first is where it is tendered in proof or disproof of some other issue apart from character, or to show the doing or not doing of an act by the person against whom the evidence is tendered. The second is where, under the law and pleadings in the action it is one of the issues, or the issue to be resolved. For convenience the first kind of evidence may be referred to as secondary evidence of character and the second primary evidence of character.

In the introduction some illustrations were given of the use of secondary character evidence. In respect to the use of character evidence as secondary evidence to prove some other fact in issue the reaction against its use resulted in its total prohibition subject to some limited exceptions. The modern rationale for its exclusion was enunciated in the *Attorney General v. Radloff*.⁵ In the course of his judgment Martin, B. made the following statement:

In criminal cases evidence of the good character of the accused is most properly and with good reason admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime; but in civil cases such evidence is with equal good reason not admitted, because no presumption would fairly arise, in the very great proportion of such cases, from the good character of the defendant, that he did not commit the breach of contract or of civil duty alleged against him.⁶

While the above statement deals with the introduction of evidence of good character the same prohibition applies with respect to evidence of bad character⁷ unless the evidence meets the rigid standards relating to the admission of evidence of similar acts.

In criminal cases the exception referred to by Martin, B. was introduced at the beginning of the 19th century.⁸ The rationale for allowing this evidence in criminal cases was clearly based on its relevance. Thus in *R. v. Rowton*, Willes, J. said:

⁵ (1854), 10 Ex. 84; 23 L.J. Ex. 240; 156 E.R. 366.

⁶ 156 E.R. 366, at p. 371.

⁷ *Laird v. Taxicabs Limited* (1914), 6 O.W.N. 505 (C.A.); *Sinclair v. Ruddell* (1906), 3 W.L.R. 532; 16 Man. R. 53 (C.A.).

⁸ I Wigmore (3rd ed., 1940), at p. 451.

Such evidence is admissible, because it renders it less probable that what the prosecution has averred is true. It is strictly relevant to the issue;...⁹

If the logical relevance of the evidence were the test of admissibility it would be difficult to rationalize its exclusion in civil cases and its admission in criminal cases. In tort actions such as assault, deceit and negligence evidence of good character on the part of the defendant would appear to be as relevant as the evidence of good character of the accused in a criminal case.

It is submitted that, while the courts appear to exclude character evidence in civil cases on the basis of irrelevance, the real rationale is the policy to restrain civil proceedings within manageable limits and to prevent unfairness to civil litigants who cannot be expected, without previous notice, to be prepared to protect themselves against imputations which may range over their whole career.¹⁰

There are very few reported cases in which character evidence has been sought to be introduced by the examination of witnesses in chief.¹¹ The vast majority of cases which deal with the use of character evidence as secondary evidence are cases where such evidence is attempted to be introduced by way of cross-examination. Here character evidence is admitted as part of a broader rule. On cross-examination, subject to the discretion of the trial judge to disallow any question which is vexatious or oppressive,¹² a witness can be asked literally anything as a test of his credibility.¹³ This broader rule is subject to the qualification, however, that if the question is irrelevant to the facts in issue, but is asked purely for the purpose of testing credibility, the cross-examiner is bound by the answer. He cannot lead evidence to contradict the witness.¹⁴

In turn the rule precluding rebuttal evidence is subject to a number of exceptions.¹⁵ The generally recognized exceptions in

⁹ (1865), L. & C. 520; 169 E.R. 1497, at p. 1506.

¹⁰ *Edwards et al. v. The Ottawa River Navigation Company* (1876), 39 U.C.Q.B. 264; 13 Halsbury (2nd ed.) 572.

¹¹ In *A.-G. v. Bowman* (1791), 2 Bos. & P. 532 a defendant to an information for keeping false weights was precluded from calling a witness as to good character on the ground that the proceedings although criminal in form were civil.

¹² *Brownwell v. Brownwell* (1910), 42 S.C.R. 368.

¹³ *Geddie v. Rink*, [1935] 1 W.W.R. 87 (Sask. C.A.).

¹⁴ *Id.*, *Hickey v. Fitzgerald* (1877), 41 U.C.Q.B. 303 (C.A.); *S. v. S.*, [1954] 2 D.L.R. 765 (Man. C.A.).

¹⁵ Phipson on Evidence (11th ed. 1970), at pp. 660-661, paras. 1554-1555; Cross (3rd ed. 1967), at pp. 219-222.

which the cross-examiner may introduce contradictory evidence are as follows:

- a. to prove a charge of bias or partiality in favour of the opposite party;
- b. to prove that the witness has previously been convicted of a criminal offence;
- c. medical evidence to prove that by reason of the physical or mental condition another witness is incapable or unlikely to tell the truth;
- d. independent evidence that an adverse witness has a general reputation for untruthfulness and that the witness testifying to such reputation would not believe the impugned witness on his oath;
- e. where the proper foundation has been laid, a previous inconsistent statement may be proved to contradict a witness.

The rule as to cross-examination with respect to collateral matters applies to parties as well as ordinary witnesses.¹⁶

The consequences of character evidence being classified as irrelevant are particularly felt in the application of the rule as to cross-examination on collateral matters. By reason of the rationale referred to above for excluding character evidence in civil cases, this evidence is treated as irrelevant. Subject to the above exceptions a witness' character, therefore, cannot be proved if he denies on cross-examination the imputations put to him.¹⁷

While in many cases character evidence has little probative value,¹⁸ by labelling all secondary character evidence as irrelevant much evidence which would otherwise serve the ends of justice is often excluded. Thus in an action of fraud or deceit unless the plaintiff is able to convince the court that the evidence constitutes similar acts he is precluded from adducing evidence as to the defendant's previous deceitful conduct. The defendant has only to deny the imputation in cross-examination.¹⁹

If the courts applied what it is submitted is the proper rationale for excluding such evidence²⁰ more exceptions would have been judicially developed. With respect to the objection that such evidence opens up a new and lengthy inquiry, an exception could

¹⁶ *Hickey v. Fitzgerald*, *op. cit.*, n. 14.

¹⁷ *Harris v. Tippett* (1811), 2 Camp 637; 170 E.R. 1277.

¹⁸ *S. v. S.*, *op. cit.*, n. 14 is a classical example. The case involved a property dispute between husband and wife. Counsel for the wife cross-examined the wife as to her adulterous association with other men. The husband's rebuttal evidence was rejected as collateral.

¹⁹ *Larson v. Boyd* (1919), 58 S.C.R. 275.

²⁰ *Supra*, at p. 249.

logically be made if the evidence were shown to be easily proved, and when proved, indisputable.²¹

The objection that such evidence operates unfairly to the defendant could be overcome by the exercise of a sound judicial discretion to exclude evidence where it is oppressive or vexatious.

The four exceptions²² which appear to have evolved in an anomalous manner provide little scope for the introduction of character evidence.

a. *Bias or Partiality*

Under this exception it is possible to introduce specific acts of bad character such as for instance that the witness is a kept mistress of the party calling her²³ or that a witness for the defendant attempted to induce a stranger to the action to break his contract with the plaintiff by deceitful means.²⁴ The introduction of such evidence is predicated on a denial from the witness that he is biased or partial.²⁵

b. *Previous Convictions*

This is a statutory exception to the rule that answers on collateral matters are conclusive. It has been held in Ontario that the use of the word "crime" in the *Ontario Evidence Act*²⁶ restricts such questions to offences created by Federal Legislation.²⁷ While this exception allows a specific act tending to show bad character to be introduced it is a tactic that is seldom used and is unpopular with trial judges in civil cases.

²¹ In *Goody v. Odhams Press, Ltd.*, [1966] 3 All E.R. 369 (C.A.). This reasoning moved the Court of Appeal to permit evidence of specific acts of misconduct to be introduced in a libel action as an exception to the general rule that character evidence in mitigation of damages must be of general bad reputation.

²² *Supra*, at p. 251.

²³ *Thomas v. David*, 7 C.P. 350.

²⁴ *General Films v. McElroy*, [1939] 4 D.L.R. 543 (Sask. C.A.).

²⁵ *Id.*

²⁶ R.S.O. 1970, c. 151, s. 23.

²⁷ *Street v. Guelph*, [1964] 2 O.R. 421; [1965] 2 C.C.C. 215 (High Ct. of Justice); 45 D.L.R. (2d) 652.

c. *Previous Inconsistent Statements*

While this is stated to be an exception to the rule that a cross-examiner is bound by answers to collateral matters²⁸ it is not universally accepted as such.²⁹ It is submitted that the statutory provision permitting cross-examination on a previous inconsistent statement does not apply where the witness' testimony does not relate to a fact in issue but to collateral matters. The statutory provision is merely declaratory of the common law³⁰ and applies where the present testimony and previous inconsistent statement relate to the matter in question.³¹

d. *Physical or Mental Condition of Untruthfulness*

Under this exception medical evidence is admissible to show that a witness suffers from some disease, or defect or abnormality of mind that effects his credibility. Such evidence is not confined to general opinion of the unreliability of the witness, but evidence may be given of all matters necessary to show not only the foundation of and reason for the diagnosis, but also the extent to which the credibility of the witness is affected.³² This rule does not appear to operate in reverse so as to admit similar evidence to show that the witness is credible.³³

e. *Evidence of Reputation for Untruthfulness*

While this is treated as an exception to the rule, the case which appears to have originated the practice *Mawson v. Heartsink*³⁴

²⁸ Cross, *op. cit.*, n. 15, at p. 219.

²⁹ Phipson, *op. cit.*, n. 15.

³⁰ *Crowley v. Page* (1837), 7 C. & P. 789; 173 E.R. 344.

³¹ The *Ontario Evidence Act*, R.S.O. 1970, c. 151, s. 22, is typical and it provides: If a witness upon cross-examination as to a former statement made by him relative to the matter in question and inconsistent with his present testimony does not distinctly admit that he did make such statement, proof may be given that he did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. R.S.O. 1960, c. 125, s. 22.

³² *Toohy v. Metropolitan Police Commissioner*, [1965] A.C. 595; [1965] 1 All E.R. 506.

³³ *R. v. Burkart*, [1965] 3 C.C.C. 210 (Sask. C.A.).

³⁴ 4 Esp. 103.

does not indicate that it is a condition precedent to the introduction of this contradictory evidence that the subject of the contradictory evidence be put to the witness.

The case was brought on an *assumpsit* against the defendants, who pleaded bankruptcy, and produced their certificates. One Stanley Leathes was called by the plaintiff to impeach the certificates on the grounds that they were improperly obtained. The defendants then called several witnesses to impeach the credit of Leathes. The chief clerk of the Magistrates Court at Bow Street attempted to testify that Leathes had been before the Justices and from what transpired he (the clerk) would be unwilling to believe Leathes. Lord Ellenborough rejected this evidence as well as evidence of Leathes' general character gained as a result of particular enquiries made by the clerk. Questions, however, were allowed in this form.

Q. Have you the means of knowing what the general character of this witness was?

Q. And from such knowledge of his general character would you believe him on his oath?

It was held that in cross-examination the witness could be asked as to his means of knowing Leathes' character. In reply to this question presumably specific instances of bad conduct could be given.³⁵ Of all the so called exceptions to the rule this is the only one that allows character evidence properly so called to be adduced. While the other exceptions permit specific acts of conduct to be introduced, evidence of a witness' reputation is not allowed.

A witness whose reputation for veracity has been impugned may have his credibility rehabilitated in several ways. Evidence may be adduced that the impeached witness is worthy of credit. The better view is that such general evidence is not admissible where merely particular discrediting facts have been elicited in cross-examination.³⁶ In cases in which the technique in *Mawson v. Heartsink* has been employed, the party producing the witness, whose credit has been impeached, can in turn lead independent general evidence that the impeaching witness is unworthy of credit. The exercise however cannot be repeated.³⁷ Another rehabilitating device, which is a curious exception to the hearsay rule, permits evidence of previous consistent extra-judicial statements made by the witness to be

³⁵ Phipson, *op. cit.*, n. 15, at p. 661, para. 1555.

³⁶ *Ibid.*, at p. 662, para. 1556.

³⁷ *R. v. Whelan*, 14 Cox 595.

adduced in evidence when the witness' testimony at trial is attacked on the basis that it is a concoction.³⁸

The Use of Character Evidence as a Fact in Issue.

Character may be directly in issue either on the question of liability or the quantum of damages. The causes of action in which this occurs are:

- a. Defamation;
- b. Breach of promise to marry;
- c. Seduction;
- d. Actions in which damages for adultery are claimed.

a. *Defamation*

In an action for libel or slander, although the good character of the plaintiff is presumed at the outset, he may, notwithstanding, adduce evidence through witnesses other than himself as to his reputation.³⁹ The types of question which the character witnesses may answer are:

'What are you? How long have you known him? Have you known him well? Have you had an opportunity of observing his conduct? What character has he borne during that time for honesty, morality or loyalty [according to the nature of the case]? As far as you know, has he deserved that character?'⁴⁰

A character witness called by the plaintiff cannot however be asked questions in examination-in-chief about particular facts to illustrate the plaintiff's good behaviour. In cross-examination however the witness may be asked about particular facts known to him in order to test the grounds of his belief.⁴¹

The defendant, whether he pleads justification or not, may in mitigation of damages, adduce evidence of general bad character directed to that sector of the plaintiff's character which is relevant.⁴² The defendant may not, however, adduce in the examination of his witnesses-in-chief particular instances of bad character, but, as in the case of the plaintiff, the defendant's witnesses may be

³⁸ *Welstead v. Brown*, [1952] 1 S.C.R. 3, 19.

³⁹ *Plato Films, Ltd. and others v. Speidel*, [1961] 1 All E.R. 876 (H.L.), at p. 889.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Ibid.*, at p. 890.

cross-examined as to specific instances to test their general evidence.⁴³

If an attempt is made to circumvent this rule by cross-examining the plaintiff as to specific instances of misconduct under the guise of credibility, the trial judge, in the exercise of his discretion, should disallow such questions.⁴⁴ The defendant can, of course, in support of a plea of justification, adduce evidence of specific acts to prove that the alleged defamatory statement is true.

Prior to the decision in *Scott v. Sampson*⁴⁵ the defendant was allowed, in mitigation of damages, to adduce evidence that, prior to the defamatory statement complained of, there were rumors to the same effect as the statement complained of.⁴⁶ This evidence was admitted on the theory that, if people were saying these things about the plaintiff in any event, he had received little injury.⁴⁷ In *Scott v. Sampson*, however, it was finally decided that evidence of such rumors was inadmissible. This decision was affirmed by the House of Lords in *Plato Films, Ltd. and others v. Speidel*. Lord Denning buried rumour once and for all with the following eulogy:

Rumour is a lying jade, begotten by gossip out of hearsay, and is not fit to be admitted to audience in a court of law.⁴⁸

If the defendant pleads qualified privilege but not justification and the plaintiff replies malice, the defendant may be permitted to adduce evidence of specific acts, tending to prove the truth of the defamatory statement, in order to show *bona fides* rebutting the imputation of malice.⁴⁹

In *Goody v. Odhams Press, Ltd.*,⁵⁰ Lord Denning who was Master of the Rolls was faced with his previous decision in *Plato Films, Ltd. v. Speidel* and the following fact situation:

A newspaper owned by the defendants published a story containing many references to the plaintiff in connection with the great mail bag robbery. The story alleged that the plaintiff had been in prison for thirty years for his part in the mail raid. The defendants

⁴³ *Id.*, *Scott v. Sampson* (1882), 8 Q.B.D. 491; *Associated Newspapers, Ltd. and others v. Dingle*, [1964] A.C. 371.

⁴⁴ *Plato Films, Ltd. and others v. Speidel*, *op. cit.*, n. 39, at p. 892.

⁴⁵ *Op. cit.*, n. 43.

⁴⁶ *Leicester v. Walter* 2 Camp. 251; 170 E.R. 1146.

⁴⁷ *Id.*

⁴⁸ *Op. cit.*, n. 39, at p. 888.

⁴⁹ *McKergow v. Comstock* (1906), 11 O.L.R. 637 (Div. Ct.).

⁵⁰ [1966] 3 All E.R. 369 (C.A.).

at first pleaded justification, but in order to establish this defence the defendants would have been required to prove that the plaintiff was in fact one of the robbers. It would not have been sufficient to prove his conviction by reason of the rule in *Hollington v. F. Hewthorn & Co., Ltd.*⁵¹ The defendants then amended their defence to plead partial justification, viz., that the plaintiff was in prison and had been convicted. The defendants further pleaded by way of particulars eight previous convictions of the plaintiff, in mitigation of damages. The case came before the court of appeal on the question whether the amended plea was proper. Notwithstanding the previous decision in *Plato Films, Ltd. v. Speidel*, that the defendant in a libel action cannot adduce evidence as to specific instances of misconduct the plea was allowed to stand. Lord Denning distinguished his previous decision as follows:

I think that previous convictions are admissible. They stand in a class by themselves. They are the raw material on which bad reputation is built up. They have taken place in open court. They are matters of public knowledge. They are accepted by people generally as giving the best guide to his reputation and standing. They must of course be relevant, in this sense, that they must be convictions in the relevant sector of his life and have taken place within a relevant period such as to affect his current reputation; but being relevant, they are admissible. They are very different from previous instances of misconduct, for those have not been tried out or resulted in convictions or come before a court of law. To introduce those might lead to endless disputes. Whereas previous convictions are virtually indisputable.⁵²

b. *Breach of promise to marry*

In *Jones v. James*⁵³ the defendant pleaded a general charge of immorality and not merely specific acts of misconduct against the plaintiff. It was held that the plaintiff was entitled to give general evidence of good character for modesty and propriety of demeanor. But for a general allegation of immorality, it appears such evidence cannot be given by the plaintiff in the first instance, presumably on the theory that the plaintiff's character is not in issue unless the defendant attacks it. The defendant on the other hand can adduce general evidence of bad character and specific acts of immorality.⁵⁴

⁵¹ [1943] 2 All E.R. 35 (C.A.).

⁵² *Op. cit.*, n. 50, at pp. 372-373.

⁵³ 18 L.T. 243.

⁵⁴ *Foulkes v. Selway* (1801), 3 Esp. 236; *McGregor v. McArthur* (1856), 5 U.C.C.P. 493.

c. Seduction

The defendant may adduce evidence of general reputation for immorality and of specific acts on the part of the person seduced, committed prior, but not subsequent to the act complained of.⁵⁵ The reason is that subsequent acts may have been brought about by the defendant's own misconduct.⁵⁶ Evidence that the plaintiff's father had illicit relations with other women was rejected⁵⁷ although this would appear to be relevant to his loss. The blow to the fatherly pride must surely be lessened if he himself is a seducer.⁵⁸

d. Actions for damages for adultery

In actions for criminal conversation, alienation of affections and enticement, the wife's general moral character and previous acts of adultery (not subsequent acts for the same reason as in seduction cases) may be proved by the defendant.⁵⁹ The defendant may also prove that the husband was a philanderer as this depreciates his loss.⁶⁰

Conclusion

It has perhaps been demonstrated that the law of evidence in civil cases is somewhat of a hodgepodge. There does not appear to be a consistent logical thread connecting the various rules. Some evidence is excluded which appears to be logically relevant. This over-zealousness on the part of the courts to protect character is perhaps the hallmark of an advanced civilization. One must be free to indulge his idiosyncrasies, oddities and peculiar habits without fear of having them exposed when seeking civil redress. Failure to cry at one's mother's funeral may not live up to the expectations of those who sit in judgment, but it should not be a basis for attracting liability.

⁵⁵ *McCready v. Grundy* (1876), 39 U.C.Q.B. 316; *Elsam v. Faucett*, 2 Esp. 562; *Winter v. Henn*, 4 C. & P. 494.

⁵⁶ Phipson on Evidence (11th ed. 1970), at pp. 238-9, para. 541.

⁵⁷ *Grainger v. Hamilton* (1902), 1 O.W.R. 819 (Div. Ct.).

⁵⁸ *Bromley v. Wallace*, 4 Esp. 237; 170 E.R. 704.

⁵⁹ *Id.*

⁶⁰ *Id.*