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CHAPTER 7

Evidence

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§7.1. Legislation—Admissibility of Evidence of Sexual Conduct of Victim in Sexual Assault and Rape Cases. Advocates of legislative and judicial reform in the treatment of sexual assault and rape cases have often noted that the victim in a sexual assault case is on trial as much as is the defendant.1 Chapter 110 of the Acts of 1977, approved April 19, 1977 and effective immediately as an “emergency measure,”2 suggests the impact of such comments upon the legislature. The stated purpose of the new statute is “to protect the victims of rape and certain other related crimes,”3 by sharply curtailing the scope of permissible inquiry into the victim’s sexual character. The statute applies to all grand jury investigations and criminal proceedings in sexual assault and rape cases, and regulates four categories of evidence: (1) evidence of specific instances of the victim’s sexual conduct other than with the defendant, introduced to show consent or sexual character generally; (2) evidence of the victim’s reputation for unchastity; (3) evidence of conduct “alleged to be the cause of any physical feature, characteristic, or condition of the victim;” and (4) “evidence of the victim’s sexual conduct with the defendant.”4

The statute prohibits admission of any evidence in the first two categories.5 With respect to the first category—specific instances of sexual conduct other than with the defendant, introduced to show sexual character generally—the statutory prohibition merely restates existing case law, for Massachusetts courts have consistently held such evidence in-

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§7.1. 1 See, e.g., Note, California Rape Evidence Reform: An Analysis of Senate Bill 1678, 26 Hastings L.J. 1551, 1552 (1975); Landau, The Victim as Defendant, 10 Trial 19 (July/August 1974).
2 Acts of 1977, c. 110, adding G.L. c. 233, § 21B.
3 Id.
4 Id.
5 Id.
admissible upon the principle that "the victim's consent to intercourse with one man does not imply her consent in the case of another." 4

With respect to the second category—evidence of the victim's general reputation for unchastity—the statutory prohibition changes existing law. Previously the rule was that such evidence is relevant and admissible. 5 Thus, in one recent case the Supreme Judicial Court held such evidence to be so material on the issue of consent that its exclusion was prejudicial error requiring reversal of a conviction for rape. 6 The Court in that case further held that the excluded evidence not only was material to the issue of consent, but also cast doubt upon the credibility of the victim generally, to such an extent that its exclusion required reversal of the defendant's convictions for assault and battery, sodomy, and unnatural and lascivious acts, which had been tried with the rape charge. 7 Thus, the new statutory exclusion of such evidence marks a noteworthy departure from prior law.

With respect to the remaining two categories of evidence—specific instances of sexual conduct with the defendant and specific instances of sexual conduct to explain a physical feature, characteristic, or condition of the victim—the statute also departs from prior law. Generally, such evidence was admissible under prior case law. 8 Under the new statute such evidence is admissible only if the defendant makes "a written motion for admission of same and an offer of proof" and the court "after an in camera hearing" outside the presence of the jury concludes, in a written finding, "that the weight and relevancy of said evidence is sufficient to outweigh its prejudicial effect to the victim ... ; otherwise not." 9

The statute's concern with "prejudice" to the victim deserves special attention. Generally, the concept of "prejudice" in a criminal case is associated with a party, usually the defendant. By applying the concept

5 Commonwealth v. Manning, 367 Mass. 605, 610-11, 328 N.E.2d 496, 499-500 (1975). While some authorities have suggested that admissibility of such evidence may have constitutional overtones, see Fed. R. Evid. 404, Advisory Committee's Note (1973), cited in Commonwealth v. Manning, 367 Mass. at 614, 328 N.E.2d at 501 (Braucher, J., dissenting), there are as yet no cases specifically addressing the constitutionality of exclusion of such evidence.
6 367 Mass. at 613, 328 N.E.2d at 500-01.
7 Id.
9 G.L. c. 233, §21B.
of "prejudice" to the victim in a sexual assault case, the legislature has implicitly voiced its agreement with the views of reform advocates that the victim in such cases is very much a party "on trial" who may have rights entitled to legislative protection.12

§7.2. Admissibility of Deposition Against Party Joined After Deposition Was Taken. Rule 32(a) of the Massachusetts Rules of Civil Procedure allows the deposition of an unavailable witness to be admitted into evidence against "any party who was present or represented at the taking of the deposition or who had due notice thereof."11 During the Survey Year the Appeals Court examined, for the first time in Massachusetts, the admissibility under that Rule of a deposition against a party who was not joined to the litigation until after the taking of the deposition. The case, Frizzell v. Wes Pine Millwork, Inc.,2 arose out of a collision between an automobile driven by Ryder and another automobile owned by the defendant Wes Pine Millwork, Inc. and driven by Madore.3 The passengers of the Ryder vehicle brought six separate actions against Madore and Wes Pine Millwork.4

All six actions were tried together, although there was apparently no formal order for consolidation and the cases had proceeded separately prior to trial.5 In one of the six actions, brought by a passenger named Carfagna, the defendants took a deposition in Oakland, California of Ryder, who was apparently then living in Oakland.6 Before taking that deposition, the defendants gave due notice to Carfagna and to the plaintiffs in the other actions, but at the deposition only the deponent and an attorney for the defendants were in attendance.7 At the joint trial, the defendants sought to introduce the Ryder deposition not only

12 The fact remains, however, that there is a very real difference between the defendant and the victim in a sexual assault case. In particular, where evidence is both prejudicial to the victim and also material to the defense, the defendant's constitutional right to present such evidence may necessarily outweigh the victim's right to have it excluded. See Davis v. Alaska, 415 U.S. 308 (1974); cf. Commonwealth v. Gouveia, 1976 Mass. Adv. Sh. 2877, 2882, 358 N.E. 2d 1001, 1004 (holding evidence of victim's sexual conduct with persons other than the defendant irrelevant and therefore properly excluded to protect the victim). Similarly, even though the balancing of prejudicial effect against materiality in other contexts is left to the trial court's broad discretion, the constitutional dimensions of the defendant's right to present evidence may require closer appellate control over the exercise of such discretion under this new statute. See Chambers v. Mississippi, 410 U.S. 284 (1973).
against Carfagna but also against the other plaintiffs, including Thomas Frizzell.\textsuperscript{6} Over Frizzell's objection, the trial court admitted the deposition without restriction, and the jury found for the defendants.\textsuperscript{7} Frizzell appealed, claiming error in the admission of the deposition as against him.

It being clear that Ryder was unavailable as a witness, the sole issue on appeal was whether Frizzell was a "party" against whom such a deposition may be admitted under Rule 32.\textsuperscript{8} The Appeals Court held that Frizzell was not such a party and reversed the judgment against him.\textsuperscript{9} The court rejected the argument, upon which the trial court had apparently relied, that the language of Rule 32(a), making such a deposition admissible against "any party," necessarily included Frizzell, who was a party at the time of trial.\textsuperscript{10} The court noted that nothing in the text of the Rule required such an interpretation. Moreover, the court stated that elsewhere in the Rules relating to depositions, the word "parties" was limited to those who were parties "as of the time of the deposition."\textsuperscript{11} Because the language of Rule 32 was not determinative, the Appeals Court looked beyond the language, to the justification for admission of deposition testimony, to fashion an appropriate definition of "party." As the Appeals Court viewed the Rule, "use [of a deposition] at trial is premised upon a prior right to cross-examine the deponent."\textsuperscript{12} Since the only parties who have that right are parties at the time of the deposition, and since most other rights relating to deposition procedure are also limited to parties at the time of the deposition,\textsuperscript{13} the court reasoned that such a limitation would similarly be appropriate in interpreting Rule 32(a)(3). Moreover, the court concluded that such a limitation would conform admissibility of depositions to the same rules of admissibility applicable to former testimony generally, since Massachusetts courts allow such testimony to be admitted only against parties to the previous action or their privies.\textsuperscript{14}

The Appeals Court also examined federal court decisions interpreting the Federal Rules corresponding to Massachusetts Rule 32(a)(3), since such precedents would be controlling in interpreting the Massachusetts Rules.\textsuperscript{15} Like the Appeals Court, the federal courts have rejected the

\begin{itemize}
  \item Id.
  \item Id. at 1243-44, 358 N.E.2d at 450-51.
  \item Id. at 1249, 358 N.E.2d at 454.
  \item Id.
  \item Id. at 1245, 358 N.E.2d at 451.
  \item Id. at 1245-46, 358 N.E.2d at 451-52.
  \item Id. at 1245, 358 N.E.2d at 451.
  \item Id. at 1245-46, 358 N.E.2d at 451-52. But see Mass. R. Civ. P. 32(a)(2).
  \item Id. at 1246, 358 N.E.2d at 452; see Rollins Environmental Inc. v. Superior Court, 1975
\end{itemize}

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argument that depositions in the circumstances of the Frizzell case are admissible against all who are parties as of the time of trial, and instead apply a more flexible test based upon the purposes and justification for the Rule. However, unlike the Appeals Court, some of the federal courts have phrased that justification not solely in terms of the adverse party's right to cross-examine the deponent, but more broadly in terms of whether "the deposition is taken under adversarial circumstances." As authority for this broader formulation, the federal courts have cited Wigmore, whose position is extremely liberal in favor of admitting such hearsay. Wigmore has advocated dispensing with the common law requirement that the party against whom the testimony is admitted must have been a party to the prior action, asserting instead that it is "sufficient to inquire whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has." Wigmore has also stated the issue in terms of whether a thorough and adequate cross-examination has been had. His reasoning is that "where the interest of the person was calculated to induce equally as thorough a testing by cross-examination, then the present opponent has had adequate protection for the same end." Thus, the federal courts, at trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(3) the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.


Ikerd v. Lapworth, 435 F.2d 197, 205 (7th Cir. 1970).

5 J. WIGMORE, EVIDENCE § 1388 (Chadbourn rev. 1974) [hereinafter cited as WIGMORE].


WIGMORE, supra note 20, §1338.

Id.
following Wigmore’s analysis, have not insisted upon strict adherence to the common law rules of admissibility and have allowed in evidence depositions which would be inadmissible under the strict common law rules.24

After discussing all of the foregoing formulations the Appeals Court concluded that it was not necessary to decide which of them to adopt, for the court determined that the deposition of Ryder would be inadmissible in the circumstances of the case under any test. Because neither Carfagna nor any of the other plaintiffs cross-examined, or even appeared, at the Ryder deposition, that deposition failed the test of “whether a thorough and adequate cross-examination has been had.”25 For the same reasons, the deposition was not “taken under adversarial circumstances.” Nor in fact, did the circumstances of the Ryder deposition meet the most liberal test—that there be an opportunity for cross-examination by a party with the same interest and motive as the party against whom it was offered; for although Carfagna may have had an opportunity to cross-examine Ryder, there was no basis for determining that his interest and motive coincided with Frizzell’s inasmuch as Carfagna did not even appear at the deposition. As the Appeals Court pointed out, “Carfagna’s decision not to participate in California may have been based upon considerations (e.g. the amount at stake, Carfagna’s financial condition, access to California counsel) quite different from those which might have motivated Frizzell.”26 Accordingly, even if the court were inclined to require a litigant to rely upon another party’s cross-examination, it refused to “bind a litigant to the decision of such party not to attend at all.”27

Although it was thus unnecessary for the Appeals Court to decide which rule of admissibility to adopt or what the result would have been if Carfagna had in fact cross-examined, or at least appeared, at Ryder’s deposition, the court’s opinion does give some guidance as to the proper procedure to be followed under more difficult fact situations. For example, if Carfagna’s action had been consolidated with Frizzell’s before, rather than at, trial, the Appeals Court’s opinion suggests the defendants could have secured permission to use the deposition if they had applied to the trial court for such permission sufficiently in advance of trial to enable Frizzell to depose Ryder himself, assuming Ryder’s availability for such deposition. This procedure prevails in the federal

26 Id. at 1247, 358 N.E.2d at 453.
27 Id.
courts, and also would satisfy the Appeals Court’s concern with “a prior right to cross-examine the deponent.” Moreover, there is little justification for a contrary rule forbidding use of such a deposition, for such a prohibition would merely require the proponent of the deposition to renounce the deposition, repeat his previous examination, and presumably receive the same answers, a waste of both time and expense.

A more difficult problem arises if the proponent of the deposition does not give adequate pre-trial notice of his intention to use the deposition, or if there is adequate notice but the deponent is then unavailable for re-examination. The language of some of the federal cases suggests that such depositions would be admissible so long as at least one party to the deposition had an opportunity for cross-examination with the same motive and interest as the party against whom the deposition is offered at trial. However, an examination of the facts of those cases demonstrates that in nearly all of them the party against whom the deposition was offered at trial was in fact represented at the deposition or had the opportunity to conduct his own pre-trial examination because of adequate pre-trial notice. Moreover, because the language of the most liberal federal cases comes from Wigmore’s description of rules relating to former testimony generally, their reasoning is questionable now that both the Federal Rules of Evidence and the Uniform Rules of Evidence have expressly rejected Wigmore’s formulation, and limit the use of such testimony to actual parties to the prior proceeding or successors in interest.

30 See Fullerform Continuous Pipe Corp. v. American Pipe and Constr. Co., 44 F.R.D. 453, 454 (D. Ariz. 1968); Hertz v. Graham, 23 F.R.D. 17, 23 (S.D.N.Y. 1958), cert. denied, 368 U.S. 929 (1961). The only exception, where a deposition was admitted against a party who was not a party at the time of the deposition, is Ikerd v. Lapworth, 435 F.2d 197, 200 (7th Cir. 1970). The facts of that case are exceptional. Of the two plaintiffs, only one was a party at the time the defendant took depositions of two witnesses, and only that plaintiff’s attorney appeared at the depositions. However, that same attorney also assumed “almost complete charge of both cases from the standpoint of the presentation of the plaintiffs’ evidence and the cross-examination of the defendant’s witnesses” at trial. Id. at 206. Thus, because the plaintiff who was not a party to the deposition relied almost completely upon his co-plaintiff’s attorney's examination and cross-examination at trial, he could not very well complain of being forced to rely upon that same attorney’s examination at the deposition as well. In the more usual case, where each party’s attorney conducts his own trial examination, there would be more force to the argument that a party should not be compelled to rely upon a co-party’s deposition examination, but should have the opportunity to cross-examine the witness himself. See Falknor, Former Testimony and the Uniform Rules: A Comment, 38 N.Y.U.L. Rev. 651, 655 (1963).
31 Wigmore, supra note 20, § 1388.
Therefore, unless the federal courts find a justification for admitting deposition testimony in broader circumstances than former testimony generally, it is likely that in future cases they will retreat from Wigmore's formulations with respect to depositions as well. If so, then Massachusetts courts, whose rules relating to former testimony are at least as restrictive as the federal rules, should similarly limit use of depositions.

In light of these developments, if a party seeks to use a deposition against an opponent who was not a party to the deposition, the safest course is to apply as early as possible to the court for leave to introduce the deposition; and the court should allow the request if there is time and opportunity for the opponent to examine the deponent prior to trial. Otherwise, there is a good chance the deposition will not be admissible.

§7.3. Photographs of Homicide Victims—Abuse of Discretion Where Gruesome Injuries Are Not Attributable to Defendant. One of the recurring issues in homicide cases is the admissibility of post-mortem photographs of the victim's body to illustrate the nature and extent of the fatal injuries. The universal rule in such cases is that such photographs are admissible where the cause or manner of death is a material issue in the case, unless the photographs are "so inflammatory . . . as to outweigh [their] probative value," a determination left almost exclusively to the sound discretion of the trial court.

Shortly before the Survey year began, the Supreme Judicial Court reaffirmed the almost limitless breadth of the trial court's discretion in such matters, and further observed:

Counsel have cited no case which this court has held that it is error to admit photographs or slides of the victim's body in the trial of an indictment charging an unlawful homicide by violence. On at least two occasions we have commented on the paucity, and perhaps the absence, of any such holding by this court. . . . Nevertheless, undaunted by our repeated holdings that such evidence was properly admitted, defendants, or perhaps more correctly their counsel, continue to press appeals on this now well settled issue. Perhaps this persistence is encouraged by our frequent suggestions that the admissibility of such evidence is a matter within the sound discretion of the trial judge. If, indeed, the admissibility of such evidence depends to any extent on the exercise of judicial discretion, . . .


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discretion, it is obvious that the defendant who claims an abuse of that discretion assumes a heavy burden.  

In *Commonwealth v. Richmond*, only seven months after writing the opinion quoted above, the Supreme Judicial Court finally rewarded one such defendant's persistence by holding, apparently for the first time ever in Massachusetts, that the trial court’s admission of post-mortem photographs was an abuse of discretion requiring reversal of the defendant's conviction of first degree murder.

There was evidence in *Richmond* that the defendant raped and murdered the victim on January 11, 1975 and left her nude body in a snow bank. Before discovery of the body on January 16, 1975 dogs had attacked the body and severely mutilated the victim’s face. Photographs of the victim which were taken subsequently showed the effects of this mutilation. Over the defendant's objection and exception, the trial court admitted the photographs into evidence. On the defendant’s appeal, the Supreme Judicial Court viewed the photographs and unanimously reversed the defendant’s conviction, holding that admission of the photographs was prejudicial error.

The Court was careful to emphasize the extraordinary circumstances of the case, including the gruesome nature of the injuries which the dogs caused and the impossibility of the jury’s separating those injuries from those which the defendant caused. Nevertheless, despite the Court’s disclaimers, the fact remains that there is now at least one precedent for excluding photographs of the victim’s body.

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3 *Id.* at 1373-74, 348 N.E.2d at 433.
5 *Id.* at 2873-74, 358 N.E.2d 999-1000.
6 *Id.*
7 *Id.*
8 *Id.* at 2876, 358 N.E.2d at 1002.
9 *Id.* Significantly, the Court noted that “the Commonwealth had a very strong case, and with the testimony of the pathologist, [it] would not have been harmed had the pictures of the injuries to the victim after death not been exhibited to the jury as they were.” *Id.*