

## Objectives of Evidence

- a. **Limit** what is given **to juries**: make sure it is **relevant** and **reliable**
  - **How much do we trust the jury?**
  - Why not just let the jury hear everything and make a decision?
    - Hasn't been USA tradition. Idea is guard the gates - don't let bad evdc in, but once in, let it go with the flow --- leave it to the jury, stop caring about it
      - **Ask: Why won't justice be served** if you let me make this argument about an inference?
- b. Evidence focuses on the front end: **right facts** to the jury to get the **right result**
- c. Tell your **narrative**, or interrupt your opponent's narrative

## Reasons to restrict information that goes to jury

- a. **Length** and **finality** of trials; trials must end, so repetitive and pointless evidence must be excluded
- b. Some evidence is deemed **UnCON** by SC
- c. **Privacy** of certain communications (husband and wife, lawyer and client)

## Advocacy - take the facts and paint the picture

- **Emph some facts, de-emph other facts**
  - Evdc law interrupts your opponent's narrative - create mine fields for them
    - Your fact is not:
      - Relevant
      - Reliable
      - or is too prejudicial (too much emotion, not enough fact);
      - Or violates policy goals
        - C-Args of why the court should allow you to continue your narrative

## Grey words in the statutes:

- **Reasonable**
- **Substantial**
- **Prejudicial**
- **Unfair**
- **Material**
- Etc

## Main Q: Where would you throw a mine to disrupt the narrative of your opponent?

- Learn to look at the facts as Defc counsel and how to keep evdc out

## Evidentiary Hypo: If X, then Y is (more) likely to be true

## Documentary - the Staircase - Peterson case - main case throughout year

### Main points of evdc in the case:

#### Homosexual cheating on wife

- Cheating on wife - **shows motive** to kill wife (adulterers have greater motive to kill spouse)
  - **But the homo stuff not** really that **relevant** + probably **super prejudicial** esp in conservative **North Carolina**
  - The digital porn irrelevant, the prostitute stuff sure, but probably shouldn't be able to mention that it was a male prostitute - **can't trust the jury** of North Carolina **to process** the info

#### The emergency staff giving opinion about the blood splatter and it being more than they've ever seen

- But even though it's relevant, they are not blood splatter experts, they're **going beyond their expertise**

#### The forensic evidence from the computer

- You're "pretty confident" --- but how confident is that? Even with the cross, would that remove the possible jury prejudice?
- My arg: the jury already hears it, so damage is done...(already rung the bell)

- Maybe let the lawyers fight it out, the strongest survive (**Gazelle Theory**)

**The opinion that not sure whether the dead wife knew she was on the "optimization list" (firing line at Nortel job), then that husband/perp knew**

- So how are we supposed to know whether the husband knew? = **speculation upon speculation (cond'l relevance - huddleston std)**
  - Even with a good cross, could be overwhelming the jury with too much info

**Objection to letting in evidence about the deft's and ex-wife's friend who died in similar way (Doctrine of chances)**

- Prejudicial - trial within trial, trying to link a pattern but he wasn't tried for that; too many assumptions/jumps in conclusion

**Rich estate/large estate** - object to that characterization - might be prejudicial

**Blood splatter** - was it just spots or splatters? - object to that characterization

**ENORMOUS amount of blood** - how much blood was really there? - objection

- Where'd you get your PHD in blood forensics?

**UNUSUAL amount of blood** - is that an opinion that an EMT is allowed to make?

**Spending and deft's lack of income prior to 1999** - is that a given motive or prejudice (buddy's just living off of his wife)

**Asked his ex-wife for money**

- But how does that make him a murderer?! ---
  - Me: Gazelle Theory? Weigh the probativeness (if lots of money, more likely to influence a decision to want to kill someone) with the prejudicial nature/risk (jury is blue-collar and really doesn't like men who aren't breadwinners)

## **Rule 606(b) - Inquiry into validity of verdict or indictment:**

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify to any matter or statement made during jury deliberations, or to the effect of anything upon that, or any other juror's mind or emotions as influencing the juror. **But** they may testify as to:

1. Whether **extraneous** prejudicial **information** was brought to the jury's attention,
2. Whether any **outside influence** was improperly brought to the jury's attention,
3. Whether there was a **mistake in recording** the verdict.

## **Tanner v. U.S. (S.C.; 1987) - evdc after verdict of jury drinking and doing drugs during deliberation not considered external influence + other ways to bring up that info to judge DURING trial before verdict**

**Facts:** Juror reached out to defense counsel, unsolicited, to say that jury was drinking and doing drugs during deliberation

**Issue:** was an evidentiary hearing required to consider jury testimony of alcohol and drug use during trial when counsel or foreman didn't bring to judge's attention and verdict already handed out?

- **What's external v.s. internal influence?**

**External v. Internal Influence:** External influences are improper; internal influences are barred from the rule.

1. Literal "inside" or "outside" is not the distinction, but rather distinction is based on the nature of the allegation.
2. Pcdt case with woman "possessed" by demons - considered strictly internal
3. **Black-box thinking** - once the evidence is in, let the juries run with it however they'd like.
  - a. If a juror complains about other jurors who did not properly follow the judge's instructions or weren't paying attention during deliberations, then that **would open the door to investigating jurors' minds during deliberations**

**Post-verdict investigation into jury misconduct is generally not encouraged.**

1. **Disrupts** the **finality** of the process.
2. Want to encourage **full, frank discussion** during jury deliberations - not fear from peer pressure

3. Jurors must be **willing to deliver an unpopular verdict**.

4. Must maintain community trust in **jury's decisions (public respect)** - not fear that case will re-open, decisions don't stick anyway.

5. **Protection of jurors from harassment** by dissatisfied litigants (who would call/chase).

**Exception:** Except in the **gravest and most important of circumstances** ---> this is a crim case which can deprive person of human liberty (gravest deprivation).

- **Right to fair trial is in the CON**, thus would trump FRE.

#### **Safeguards:**

- Bailiff or attorneys can bring to attention of judge during trial, or trial judge can notice before verdict is determined
- Non-jurors who observe jurors drinking during deliberation can testify (such a court marshal who accompanied the jurors to a dining hall at which the jurors were deliberating)

**Dissent:** Present issue is **not an invasion of action DURING jury deliberations**, but an inquiry into juror consumption of alcohol **THROUGHOUT trial**.

- Even under "outside influence exception," drugs and alcohol constitute an outside influence.

**MP:** Tanner stands for reluctance of system to look past the verdict and into the reasoning and deliberation process; illustrates why we need to closely monitor what juries hear in the first place, if there will be no inquiry into their judgment or fairness.

**Note: the Constitution trumps the Federal Rules of Evidence; in criminal cases, argue 6<sup>th</sup> amendment right to impartial jury.**

**NB** - CONG thought about the issue about alcohol etc and let it through/left it alone = **CONG intent**

**Policy concern - how does admitting this evdc reflect our faith in the jury system?**

- What about this evdc will lead to unjust result

**HYPO** - the rationales aren't served, or perhaps the procedural safeguards won't work, or the exceptions will apply

- **WHAT DOES THE TEST MEAN**
- **HOW DOES IT FORWARD THE RATIONALE**
- **HOW DO THE SAFEGUARDS MAKE IT SAFE**
- **AND HOW DO THE EXCEPTIONS APPLY**

## **PAGE 36-37 OUR STUDY GUIDE**

- Relevance
- Cond'l Relevance
- Policy reasons to exclude evdc - R408-411? (chapter 3)
- Then Propensity reasoning (chapter 4)
- Always R403 as your final objection
  - Me: can maybe even appeal under 6th Amdt - unfair trial - jury wasn't coherent? --- VS Tanner case R606B

# **RELEVANCE**

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## **R401 - AND-rule - evdc is Relevant if:**

1. **ANY tendency to make a fact more or less probable** than without the evdc
  - It is **PROBATIVE** - helps us prove a logical syllogism
2. **AND** the fact is a **consequence in determining the legal action**

- **A test of materiality**
  - **Must look to substantive law, not evdc law, to determine materiality**
  - **Eg - statutory rape - Strict Liability crime - thus, no defc that the rape victim told you she were over age - doesn't change the legal outcome...**
    - **So, though it might be probative of something, your intent is not material - fails part b of the test**

\*\*\*EXCEPT WHEN OTHERWISE PROVIDED BY ---> SC, CON, or these rules/fed statutes

**SHORTCUT** - evdc makes a fact more or less probable AND the fact is a consequence to the dispute

- 2-part test

**Discovery** in civil cases - reasonably calc'd to lead to admissible evdc (thus, needs to be relevant)

**Effect on building your narrative:** Doesn't matter how important a piece of evdc is to building your narrative - if it's not relevant, it's inadmissible.

**Probativeness:**

- **Fact X exists, and therefore WHAT?**
  - Even if it were true that fact X exists, what does it prove? Must provide proof for your point you're actually proposing to prove
  - Always need to ask **why you're offering the evdc - what does it prove?** Otherwise, not relevant.
    - It might be a **long link**, so you have to be able to **explain each link** in the chain when you're offering evdc
    - **Eg** from the book - someone attempts to commit suicide in jail after trying to get someone in jail to take the rap, told the details to an informant, learned the person was an informant, tries to hang herself in her cell
      - **Arg that "try to commit suicide = guilt" is too broad**
        - Need to **frame more narrowly**: she tried to hang herself, therefore she wanted to die, therefore she had a reason to want to die, and therefore ----> she had a consciousness of guilt ----- and therefore, she is guilty
          - **C-Arg - enough alternative reasons:**
            - She was sick/depressed
            - She was on drugs/addiction
            - She was railroaded and thought that she'd be falsely accused and convicted
            - Childhood abuse
              - A lot of things can bring people to the brink of suicide....you want to **break the link between the fact and CONSCIOUSNESS OF GUILT** arg ie **show there isn't ANY tendency**
              - **You're not weighing the probativeness, BUT** arg that she tried to commit suicide 3 years before the murder shows she's more likely to have guilty conscience etc has NO TENDENCY since inference is SO weak

**Judge** has wide latitude based on **life experience and own common sense:**

- They're **looking at evidentiary hypothesis**, and judge needs to use life experience and own logic/commonsense to determine what the link is
- Can ask for a higher burden of proof or say that there's no proof of any tendency
  - **Weird**, because **justice** you get **might depend on the judge you get** - regarding perception of prejudice, substantial prejudice etc
- When probative value is zero, simply inadmissible under R401
- **Standard of review: ABUSE of discretion** - trial judge gets discretion - need to be worried about that

**Eg Chain:** X had affair, adulterers have motive to kill their spouses, X is the killer

- Thus, I should have right to bring in evdc that X hired a prostitute

- You have to know what your evidential hypothesis is
  - Motive, cheated on wife, therefore killed wife - therefore material
  - The inferences that stem from the fact (that he cheated on his wife)

### Min. Req'd Persuasive Force:

- Judge not ascribing persuasive force to the evdc - she's not weighing it
  - She's not saying this is strong evdc. - **No preponderance requirement: Not required that the evidence render the fact more probable than not.** Not saying if I were on a jury I would rely on this evdc. Under R401 - **if it has ANY tendency, it's relevant - you need ANOTHER objection**
    - **Maybe need 401b, maybe R403**
  - **No credibility determinations** (comes up under 403, instead)
  - Doesn't ask whether it's VERY persuasive to determine relevancy - that comes up under R403
  - **Gazelle theory** - just let it in, and let the cross (trial procession) take care of the weak evdc
    - The strongest gazelles survive

### 3 types of evdc:

- **Real** (witness testimony)
- **Demonstrative** - diagrams/item
  - Includes pipe witness saw deft use to hit victim or drawing sketch of deft for ID
- Circumstantial

### Circumstantial Evdc

- **Evid'try hypo = Can you infer an increased possibility that a fact will exist**
- If that increases possibility of fact to be proved, then will have **relevant circumstantial evdc**
  - Eg Perp had no money, tends to prove motive to steal --- usually dispute its relevance - **does it really increase the chances that the middle inference (no money = intent to steal) really exists?**
    - **VS person saw X hit Y with a pipe - that's direct evdc that X hit Y with a pipe - there's no inference really needed, thus rarely disputed**

**Sidebar** - talk out of ear of jury; **esp if item could be inadmissible**, hard to make jury forget what they heard

**Eg String:** "Shortly after investigators found the bodies about which she confessed to informant," she attempted suicide

- She probably found out from her lawyer that the investigators found the bodies, so saying "shortly after" shows that she must've known/learned that her fellow inmate was an informant
  - **C-Arg - prejudice** - as soon as the **jury hears that she tried to commit suicide, jury will think too strongly that she's guilty**
    - **Rebut** - let counsel defeat the weak evdc - if there really are a whole host of alternative explanations why she would try to kill herself, present it to the jury and let them decide ---> let's have dueling evidentiary hypothesis - **Gazelles**
      - **Re-rebut** - but the **reason why she tried to commit suicide in the past is a sensitive subject** - she was a **meth addict - the jury will hate her if they learn that**, even if it helps jury learn about alternative reasons why she tried to commit suicide
      - **Esp if** the prosecution is trying to say she's a meth manufacturer who kills people
        - Maybe judge will let in but with a **jury instruction?**

**Eg String:**

- V1 - convicted of fraud 3 times thus lying on the stand
  - V2 - rephrase - convicted of fraud 3 times, thus likely not telling the truth, thus lying on the stand

### KEY: how alternative explanations affect admissibility under the ANY tendency test

- I can see how this is probative
  - Don't make the weighing of evdc - even the prejudice - does it really outweigh the probative value - that's weighing

- The gazelle theory works here - let the evdc in, let the dueling parties duke it out

R401 you'll likely let it in, **but R403 - the prejudice outweighs probativeness (esp the necessary counter-proof to show alternative)**

- But the evidence is definitely probative
  - **Me: Thus, even with R401 relevance (easy threshold), can 105 jury instruction or 403 substantial unfair prejudice (esp when counter-proof to fight evdc under gazelle theory creates prejudice)**
- **Eg:** guy not wearing glasses claims to have seen the perp - prob not strong weight, but def relevant and can leave to jury to decide

**Problem 2-2 p.** - fact that Peterson didn't earn money was relevant R401 to support hypo that he had motive to kill wife, even though there's a dueling hypo that he depends on his wife + would be prejudicial = gold digger

- Was fact that deferred compensation for life insurance + net outflow of money each year + def't earned nothing for 3 years + that they have large outstanding debt relevant?
  - **Why is prosecutor bringing this to the table?**
    - Financial problems means motive to kill to be rich - does this have **ANY tendency to be true?**
  - **What's the weakest of the 4 pieces of evdc?**
    - The fact he earns nothing
      - Means he's a gold-digger, can't live on his own etc...jury will be prejudice towards him
    - **If the evidential hypo weakened, need to ask why**
      - **If it's because of something that the witness could say at trial to argue against it, then why not let it in? - Gazelle theory works**
- Cross-X: Shows the debt is being paid down, not THAT much debt etc - so maybe not that much of strong financial motive - so hey, the gazelle theory seems to be working

**EXCEPTION: Any tendency doesn't work when pointing to someone who's NOT A PARTY to the case**

- **Diff std for non-parties: Evdc must UNERRINGLY**
- If you have nothing to back up the evidential hypothesis, we're not gonna let it in

**Jones v. Pak-Mor p. 45** - need good data collection that would cover most accidents out there for DEFT mfc to be able to claim that long history of lack of accidents is actually probative of no accidents + gives a factor list (nature of product [stairs v.s. products], dissimilar uses, length of exposure, product monitoring program [type of product makes it easier/harder to track])

**Ptf's Claim:** Negc and product liability action when mfc's truck tipped to side and scraped user's leg

**Defc:** safe product, but inexperienced crew

- **To prove safe product, they want to offer the history of the product** (26 years with no main model changes and no accidents)
  - Leads to inference that the product is not generally defective, not dangerous, and def't didn't have notice that it was dangerous
  - Thus, probative to defeating any ptf theory that can be thrown
    - Material because talks to foreseeability

**Need to know the theory of the case** (JONES) before you can determine the evidentiary hypothesis

- We know what the **end of the chain** is - **lack of accident means lack of liability because of lack of foreseeability**
  - **But how does lack of accident mean lack of foreseeability??**

For ptf to use prior accidents - No per se rule, but certain factors need to be met

- In terms of prior accidents to demonstrate that the mfc had foreseeability/knowledge was harmful:
  - Need to prove those exist, no doubt it will happen, and substantially similar to the incident at hand
    - But if not substantially similar then not foreseeable to deft and not good proof
      - Me: does that mean that won't be admissible?

**ISSUE** - in Arizona, there's a per se restriction on admitting absence of accidents - this absence of accidents would be inadmissible...but FRE shows that this would be **perverse to allow intro of one accident but not proof of 1000x use without accident for other users of same product in similar manner**

**Policy Problems:**

- **Collateral issues** - cases from other states' courts will come in, but this is AZ
- **Opposing counsel surprised**, no fair time to rebut
  - **But** can check with other ptf's attnys, surveys, check with gov't agencies, keep detailed data/records
- **Prejudice** - jury will take the info about 26 years with no accidents, stop thinking about the facts of this particular case
  - **le jury will over-rely on the evdc in favour of DEFT**

**MAIN ARG:** If you can let in evdc that there has been an accident, why can't we let in credible testimony that has never happened?

- **There could be a case in which a CEO could show with insurance records, detailed office data, surveys etc that there really weren't any accidents in the past**
  - Counters the arg that lack of accident is harder to prove
- If witness HAD known about it, def would be probative - but how would they have known about it? Insurance company, retail partners, gov't agencies, etc - not a difficult standard to meet for a mfc **with good data collection practices**, so why not let them use the same methods to show lack of accident?
- **POLICY ARG:** there's a **perverse incentive to not know about problems with your products**, with current law, because then not really reas. Foreseeable
  - **But when allowed to show lack of accidents, you have more incentive to collect info about your product, keep it safe**

**Main chain the Defc is trying to argue:** No evdc of prior accidents = no accidents = not defective product/dangerous = not cause of the injury

- **But defc needs to prove that had there been accidents, they probably would've known about them; otherwise, evdc of no accidents does not establish that there were no accidents (ie no probative weight ie no tendency to prove)**

**Factor list**, what factors matter to prove lack of accident (where deft goes on the defensive) - saying no accident = no foreseeability (the substantive law's req't):

1. **Nature of the Product:** A hole in the stairs that was new, can't say that wasn't dangerous, given the obvi nature of the danger
  - A hole in the stairs is def dangerous to pedestrians + the new age of it, absence of accidents doesn't show it wasn't dangerous (not enough history)
  - **Premises liability** - no evidence of accidents doesn't tell us how many **near-accidents or lucky escapes** from injury occurred, so doesn't tend to prove that not dangerous
    - **VS products Li - claim that negt design means all units have that negt design, so easier to infer that no evdc of accidents means product not dangerous** --- if you have the right monitoring - see #4
2. **Dissimilar Uses:** Eg swiss army knife with many different tools
  - **One testimony that never sued for the scissors; evdc that had accidents with the can-opener, doesn't impeach the first witness -those are two different uses**
  - **Need to look how each particular plaintiff used the product**
3. **Length of Exposure:**
  - **New product, then probative value decreases viz a product that's been on the market for 26 years**

4. **Product Monitoring:** Were you monitoring the product such that we can feel confident about your assertion that no other accidents exist - ie **not willfully blind - you were searching this out (data retention etc)**
  - Prior similar accidents can be investigated - defc counsel can go there and check it out
  - **Type of product makes it easier/harder to track:** Products with variable designs (unique, big ticket item, easier to track who bought them etc)
    - **Thus, could be a difficult std based on the product**

**Ptf's easier test:** can bring in prior accidents if **substantially similar** factually

- **KEY: "substantially similar" is a grey area - how close does it have to be? Exactly similar?**
- Should mean the accident happened in almost the exact same way, **to show foreseeability**

**In this case - there's no evdc that there's a comprehensive scheme for the company to be certain in saying that we don't know of any accidents**

- Ie the first 3 factors were pretty much in deft's favour, but the **4th factor was strongly against the deft**

**Me Flip:** had all these data collection and survey teams in place, tracked the cases

**U.S. v. James (9th Circuit; 1999) - prejudicial evdc which documented decedent's alleged violent acts may be admitted to corroborate D's self-defc fear of decedent's REMARKABLE stories**

**Facts:** Mother wants to introduce evidence of boyfriend's past bragging about remarkable crimes (like stabbing with a pen a guy's back of neck) to prove that she believed she and her daughter were in peril after confrontation at a party, causing her to give gun to daughter who shot the boyfriend when he came after the daughter.

**Materiality:**

- Probative about **state of mind (reasonable fear)** needed for self-defc
- Probative about her **credibility** - corroborates her story - which **jury needs to believe for her to use self-defc** arg
  - **BUT not** gonna allow the jury to infer "**committed crime = reasonable fear**"; only that "committed crime" = corroborates the self-defc arg/def'ts reasonable fear story

**THUS, same evidence but diff evidentiary hypothesis can be dispositive on admissibility**

- If committed crime, then reasonable fear **VS** if committed crime, then she's telling the truth that she had reasonable fear??

If arg rested on **credibility** (ie **her self-defc would hold up only if jury believed her**) - **particularly central to this case**

- **Another twist** - since this is a **he-said/she-said game, and HE is dead - can't testify** whether he actually said those things, even more important - **requires more corroboration**
  - Self-serving testimony by deft

**KEY HERE:** Absolutely necessary to her defc that she wasn't making up the stories, and there's reason to believe this man is the man who did those things

- **Can we say ABSOLUTELY NECESSARY is a req't to go down the inference chain?**

**Flip:** he told the story at a party in front of 10 people...same result?

- Maybe wouldn't need the extrinsic evidence now since have 10 peeps' testimony
  - Me: but still concern about the credibility of her story and belief since the stories were so wild and outrageous - at a party, could've been just a joke/for him to seem like a bad-ass



- **BUT gazelle theory** - put those other witnesses on the stand to see whether they believed the stories (witness's perception vs non-expert opinion)

**Flip:** he told her he stole a 10-speed bike

- But that's **not really a remarkable story anymore, so her credibility may not be so central...**so we prob wouldn't be as worried about corroboration

### MP - not a broad proposition that can enter evdc through back door for corroboration

- **Needs to be:**
  - a. he-said/she-said
  - b. remarkable stories
  - c. central to her defc
  - d. no other way to corroborate through witnesses/victim etc
    - **USE THE FACTOR TEST**

### Dissent:

- Remote corroboration - corroborates one thing he did, and she didn't know about that evidence
- Jury's letter asking judge for clarification read as jurors trying to determine whether decedent was a bad guy; but majority reads the letter as jury asking, should we be believing this woman or not?

### Your evidentiary hypo matters:

- **If it were that these docs about bf's prior convictions show that the fear was reasonable, that's not relevant - she couldn't have known about the docs anyway, so NO TENDENCY to prove anything**
  - **But if you change the evidentiary hypo, the evdc has a diff track**
    - The magical hypo was CORROBORATION - goes to her credibility - makes her seem truthful
      - **But let's not overuse this corroboration admissibility -- this particular case depended on her credibility from the outset - jury needed to believe she was a battered girlfriend** (but jury might think, hey if were really true you would've left so of course you're lying - so this counters that possible jury thought)
      - + this guy is dead and now you're creating this story that he's a monster - how convenient....this shows that it's true
      - + the remarkability of these stories (SO unusual, not like stealing a bike or throwing an object)...this shows that one of those brags is actual fact

**KEY: WHAT OTHER HYPOS CAN I BRING TO THE CRT ROOM TO MAKE RELEVANT THIS OSTENSIBLY IRRELEVANT EVDC?**

**Limiting Instrxn - R105:** When you have evdc that has two possible inferences - one impermissible and one permissible, may have a limiting statement to jury

- Jury, you can use this evidence just to corroborate the witness's story etc, **not for propensity reasoning**
- Judge needs to make sure that the jury will not start to use impermissibly - that the decedent is a bad guy and got what he deserved - **R403 still applies** - substantially outweighs the probativeness

### **Problem 2-3, p.55 - Refusal of plea bargain with minimal relevancy to D's consciousness of guilt was inadmissible under 403 bc too prejudicial to the state - they could've made the offer for many other reasons (save time etc)**

- Deft wants to use refusal of plea bargain to show consciousness of innocence
  - **Things that decrease relevance (tendency to prove):** bargain wasn't that great
    - If he does take it, he'd serve county jail time + lose his union job + maybe lose his apt etc; he's probably willing to take the risk to fight it bc he covets that union job + first brush with the law so even if you lose you know judge will probably give out a minimal sentence etc
- **Big Q - do the diff args mean not relevant?**

- **R401 = low tendency threshold** - this could show that man believes innocence, so leave it in
  - **But court here excluded - too prejudicial to the State - didn't see it as probative -**
  - **The state could've offered the plea for many different reasons**, not necessarily because they thought they didn't have a good case - they could just be really busy and not want to have to waste time and resources to try the case

## **Problem 2-4 p.56 - cop self-defc saying saw V pull out something black, corroboration matters more when that black thing turned out to be a black wallet because makes us wonder more why the V would pull out a black wallet when faced with a gun in his face**

- **Facts:** Guy known for crime stopped by police in car with friend, police had to ask them 3 times to stop etc...driver looked to past criminal for cues on what to do, **driver reached for pocket while officer had gun drawn, officer claimed self-defc for shooting the victim; but the ptf offered evdc that the victim was unarmed at that time - deft officer objected to admitting that evdc**
- **Evidential Hypo:** if you can prove that he was unarmed, can show that the fear was unfounded/unreasonable, and thus didn't act in self-defence - ie **victim no gun, didn't deserve to be met with deadly force**
  - **Defc Arg - Substantive Law: victim doesn't need to actually have a gun for reasonable self-defc claim.** Just knew that he was approaching a really bad guy and looks like the guy had a gun and reached for it - that's how the cop should be judged
- **VS James Case - corroboration matters less since not calling into question the officer's credibility**
  - **Flip: cop claimed he saw driver reach for something that looked like a black gun. Open door to rebut that evidence now?**
  - **Easier Flip: cop claimed he saw driver reach for something black, turned out to be a black wallet. Makes us wonder why driver when pointed gun in his face would reach for pants but even more so why a wallet?**
    - **ie Cop's credibility comes more into question; corroboration matters more, so evidence of gun/no gun matters more**

## Conditional RELEVANCE

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### **R104(b) - Relevancy that depends on a fact - 33% - favours admissibility**

1. When the relevance of evdc depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evdc on the condition that the proof be introduced later

**Common-known Fact vs Unstated Assumption:** the sun rises in the east is common, but that witness knows the deft is not known, need to prove that

- **With context** - if witness was deft's father, then proves from context that knows the deft
  - **But if not**, need something else - the condition - to prove the preliminary fact - that he knew the deft

**Explanation:** when a logical inference chain depends on links, any disproved link makes the whole chain fall apart

- **Eg:** a bullet is not relevant unless it is the bullet that struck someone in the head (the condition to make the bullet relevant)
- **Strategy - more burden of proof than pure relevance test = 33% Huddleston Test = better objection than "not relevant"**
- **Judge first** determines whether if this condition is true, will the whole chain be relevant anyway?
  - **Then**, Judge just needs to determine whether a REASONABLE JURY could find POE (51%) that this is true/happened = **33% test - favours admissibility**
  - **RULE: a judge will determine if sufficient evdc exists to prove the cond'l fact - ie need SUFFICIENT evdc**

- If the missing factual premise is not reasonably known - ie an unstated factual assumption (like witness knew the person in question), then you have a conditional evdc objection
  - **So always ask yourself whether there's an unstated factual assumption**
  - **Prelim Question of Fact**
    - **Eg:** Deft tried to kill herself because she knew/realized her confidant was an informant. Tried to show this by providing evdc that feds found the hidden bodies
      - **Missing assumption:** how did deft know that bodies were found?
      - **Need evdc to prove this** - eg corrections officer told deft that bodies were found
        - Assuming judge first determined that her attempted suicide was relevant to consciousness of guilt, then needs to determine whether that evidence (that CO told deft the bodies were found) was suff FOR REASONABLE JURY to determine the prelim question of fact - that deft knew the bodies were found (yes, suff)
    - **Eg:** Arg that he knew she was gonna lose the job FROM ---> wife was on optimization list = **she knew she was on list (missing link)** = deft knew wife was on list
      - **The Chain:** she knew she was on the list - told husband - being on the list means that the deft knew that insurance proceedings will be lost \$\$ - then the biggest inference that the loss of money gives him a motive to kill - therefore he's guilty
        - **Irrelevant?** Does loss of money mean motive to kill?
          - **Judge will use life experience**, likely yes
      - **The assumption is** that he knew which gave him motive, but the defc is that EER never told wife so how could the deft have known?
        - **C-Arg:** wife's sister testifies that had convo with wife (but then there's hearsay problem)
          - **But** Deft can also argue that though the wife knew, the husband still didn't know
            - **But** if judge thinks JURY WILL BELIEVE possible that in a marriage, wife tells husband these things, judge will let it in
              - **BUT can still make R403** --- highly prejudicial - putting in front of jury that he makes no money, all these bad facts about him just to let in something with minimal probative value - he's a gold digger, doesn't work, doesn't make money, what kind of guy is he....thus LTD probative value but substantially outweighed by the possible prejudice.
                - **But** if the judge sees some prejudice but that the money motive is quite probative, will deny the defc's motion

## R403 - Relevant Evdc is too prejudicial - weighing the evdc - Favours admissibility

**Rule:** 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 undue delay, waste of time, or needless presentation of cumulative evidence.

- **At trial judge's discretion**
  - i. **Abuse of discretion standard** for review
  - ii. **"Unfair prejudice"** - inflame a jury such that they're relying on **emotions and irrationality** (away from logic). Relevant facts normally hurt your case; needs to be unfairly so to use 403
    - **EG:** he had it coming/deserves to be dead - that's the type of unfair prejudice we care about
  - iii. Liberal evidence rule: "substantially outweighed by" leans toward admission of evidence.
- **Can lower prejudice through:**
  - **105 limiting instruction** - how jury can use the evidence
  - **Change the evidence/Scalpel out** - make a photo black and white or leave out the gang name

## Factors:

1. Is it a **central point** in the case?
2. **High need** for the evdc?
  - a. If yes, then means there's strong probative value, will need an awful amount of prejudice
3. **Other avenues** of proof - can you prove without using the graphic photos? Can't the officer just describe the scene?
  - a. If there are other avenues, then that lowers the probative value that the person is offering, favours exclusion
4. And the **jury instrxn** - will a jury be able to understand that they can use the evdc for X and not for Y, and will they follow that instruction?
  - a. Grizzly picture, child victim etc - should a jury see that? Even if a judge says you can use that picture to focus on manner of death but not purpose (how the child died) - can a jury not get emotional seeing a dead child?
    - Some judges will say ya, some will say no people will get too emotional --- judges have different faith in the jury
      - Me: I think as a practical matter, judges take into account the people on the jury - if you're in the south, might be emotional about evdc that deft was gay etc

## Problem 2-5 on p.61 - Deft opened door to attack his "loving and healthy marriage" in opening statement, allowing prejudicial extrinsic evdc about gay porn and hooker

- **Peterson case** - admit the porn and gay prostitute to REBUT what deft opened door to in his opening statement - that he had a healthy and loving marriage, not likely to cheat on his wife
- **Issue:** 403 prejudice?
  - **Held** - Admissible - need it to rebut deft's own claim - he painted a strong picture of a loving marriage
    - But helps deft that it's a prostitute (no emotional connection) + gay = experimentation --> healthy in a marriage + didn't actually go through with it
  - Arg to keep out porn unsuccessful?
    - Shows progression to acting on gay/cheating thoughts
- **Key:** got the door open to the porn/hooker evdc, so she pushed it to the most prejudicial effects - what kind of sex, trying to make it look like it was clients looking for warm companionship etc

## VS State v. Rinaldi p.64 -

- There, Deft hired his gay lover to kill the wife; homosexuality wasn't needed to prove that he wanted to kill the wife
- So why doesn't Rinaldi decide the Peterson arg about keeping out gay sex proposition?
  - Arg: not clear that in Rinaldi the deft tried to argue that he had a great relationship with his wife
  - Arg: Rinaldi was a long time ago, when sexual orientation wud cause more prejudicial damage
  - Arg: collateral evdc - you already have evdc that deft wanted to hire a hitman to murder wife, don't need the extra info (less probativeness) so substantially outweighed by PRJ effect
    - Me: maybe increased probativeness since deft's counsel opened door to strength and idealness of his marriage - makes the homo stuff more relevant, thus raises the bar for possible prejudice to substantially outweigh (ie there's a premium on the probativeness now)
- **Flip?** - what if deft hadn't opened the door? Would the gay prostitute have been relevant enough to intent to kill to say wasn't substantially outweighed by the prejudice?

## Problem 2-6 p. 65: cops excessive force witnesses - scalpel out details + limiting instructions + (witness bias = probative) + credibility matters

- **Facts:** Cop charged for excessive force, bringing in two cop friends to testify, but those two cops had been suspended for excessive force.
- **Issue:** can prosecution keep out the evidence of the cops' previous suspensions + details of those charges?
  - **Bias** - the **probative value goes to bias** - they're **fellow officers**, they're gonna take care of each other, and furthermore, these are **improperly over-zealous officers**, so I need those past convictions to show that these guys have no credibility saying their deft friend didn't exceed standard protocol when these guys have exceeded professional protocol
  - **(James) credibility matters** --- Let the gazelle in, let it run the course...you should take it to its prejudicial limit - you don't play by the book, so how can you say your friend here played by the rules?
    - **But actual facts might be substantially prejudicial** - the details of slamming a pregnant women into a curb during arrest will be too prejudicial - will **play too much into the jury's emotional decision-making**
      - **Scalpel:** take out the prejudicial stuff
      - **Limiting Instruction:** not to make guilty by association with cops who use excessive force etc... --- limit the emotional response to the evdc
- **MP:** If offer to stip makes less prejudicial, judge might be more likely to let it in
- **Ct held if we dive too deeply into circumstances, we risk an emotional response and we may waste a lot of courts time**
  - **We don't want a trial within a trial to determine what this witness did**

### **Problem 2-7: using evdc AND DETAILS of past sex harass**

- **Facts:** Trying to bring in evdc for sex harass case that victim HEARD from coworker that deft beat wife + evidence from crim conviction that deft accosted the victim (which has diff std. from sex harass - less strict)
  - **Prejudicial: propensity inference**
    - **But going towards reasonable fear**
      - But reasonable fear not a statutory req't for sex harass.
      - But even assuming it were, too prejudicial (especially since probative value is light - hearsay - heard from coworker that someone else was accosted by the deft)
- **Held:** she was allowed to testify that she heard from a co-worker something that would reasonably lead her to fear this guy's advances
  - But what's the something that the ptf heard? ---> leaves the jury thinking about the degree of the fear
  - Takes away the most emotional part of the evdc = dry reasoning, ruins the narrative; dissatisfies jury
    - **Even with limiting instruction, too much possible prejudice** - punish the guy bc he hits his wife
    - **Diff stds for diff crimes can confuse jury** - Accosting falls short of sexual harassment- crim case vs civil case - **they're gonna think their work has already been done for them; but the cases are different** - here the judge didn't think the jury could handle the difference

### **Old Chief v. U.S. - FORCING a stipulation when just about legal status (narrow) + Discounting prejudicial effect of one set of evdc when have alternative evdc with EQUAL PROBATIVE VALUE (broad)**

- **Facts:** crime for possession of a firearm after a previous felony conviction, Gov't needs to prove that deft had at least one of the listed convictions. Gov't wanted to bring in evidence of the prior conviction - that it was 5 years ago and got 5 year sentence (ie was a bad crime + committed crime again shortly after release) to paint the picture and give the full story of why deft was not allowed to possess a gun (something traditionally very acceptable). BUT deft wants to stipulate that yes, fits one of those listed previous felony convictions.
- **Relevance:** the past crime is relevant to show more probable that deft fits the felony status req'd by the statute
  - **403:** Thus, if relevant, can't exclude just bc there's other relevant evdc - only if unfairly prejudicial or cumulative
- **Defc Args:** When prior conviction was for same or similar crime at bar, then the UNFAIR prejudicial risk is especially obvious + alternative avenue is just as probative and less prejudicial + jury might be more lenient in convicting a bad person with an already tarnished record

- **Gov't's policy args** for not depriving the jury of hearing the proper narrative:
  - **Convince jury it's morally ok to deprive deft of freedom:** It's a big task to ask a jury to deprive a fellow citizen of daily pleasure for 5 years - so you need to convince them that it's morally okay to do that
  - **Dry logic doesn't tell jury a proper story:** simple logic is too boring for a jury; they won't see the human element to it) - should have the right to help the jury see the narrative richness and visualize the crime and its seriousness
  - **Satisfy certain jury expectations to see evdc/hear story:** Might penalize a person who can't satisfy a jury's expectation to fill in the missing pieces of the story (when left vague/general through stip). if you expect to see evdc of a gun, I should be allowed to show you that stuff.
    - **But this doesn't really hold when the missing pieces is for a past conviction, not for one that the jury needs to decide on in the current case** - element is already satisfied through the stip
    - Ie not depriving the Prosec of multiple utility (eg to prove motive, intent, plan etc)
- **End Rule (broad): Alternative evdc with equal probative value? Discount the probative value of the more prejudicial alternative**
  - Can bring in reasonable admissible alternatives - **offers same probative value but minimizes prejudice:**
    - Eg picture of a dead child or officer testify orally what he saw at the scene (as long as the officer isn't overly dramatic)
    - **Here, admission that fits the previous conviction status is all that the statute req'd, don't need to pile on the evidence that goes ONLY to the same point (decreases probative value)**
  - **Cannot look at evidence as an island in a vacuum;** must compare in full context the evidentiary alternatives to the prejudicial evidence that go to the same point.
    - **But doesn't necessarily mean won't get in** - just mean lowers the probative value relative to possible prejudicial effect
  - In addition, **must look at the material elements of the crime;** not the name of the crime or any subcategory of crime - those points make no difference to the charge, so they're not necessary to prove, so there's no probative value in admitting the evidence
    - **But Gov't has burden of proof beyond reasonable doubt,** so should be able to fully develop story
    - Just jury instruct for proper use.
      - **But high risk of prejudice, especially when for the same type of crime** - possessing/using gun - greater risk of unfair prejudice - leave this case to "was he carrying a gun this time" (already stipp'd that shouldn't be carrying a gun)
- **VS Narrow holding of the Rule:** When proof of convict status is at issue, it is generally an abuse of discretion to admit the record when an admission is available.
  - **Exception - additional other purpose? Eg intent, might be admissible**

## SPECIALIZED RULES OF RELEVANCE

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See/Copy chart on p. 78 - **things that almost always fail 403 balancing**

**MP: good policy for keeping these out, as a matter of law** - they fail a 403 balancing test - ie the burden is against you if you're trying to intro this type of evdc (**low probative value and high prejudice**) + **encourage good social policy + predictable for attnys trying cases**

- **But doesn't mean it's auto-inadmissible** - EVERYTHING depends on your evidential hypo
  - **R105 Limiting Instrxn might be NSF**
  - **Ie dual tracks running parallel - R403 - just depends whether unfair prejudice substantially outweighs probative value (the grey area)**
  - **Tip: Think about the evidentiary hypo** - it's more pronounced if we know what we're worried about

- **Still 403 Objection as last resort:** Even if someone offers something that is a permissible purpose - just shown for control - **can argue that under 403 jury won't understand that it goes to show control, will think it's liability;** just bc we changed something doesn't mean we were negt before

See chart on p.80

## Rule 407 - Subsequent Remedial Measures

**Def: Subsequent remedial** measures that would've made an **earlier injury** less likely to occur, **NOT admissible to prove:**

- Negligence
- Liability**
- Defect in a product or its design
- A need for warning or instruction

**Exceptions** (non-exhaustive list...can be used for anything that isn't liability) - impeachment or if disputed, proving:

- Ownership**
- Control**
- Or the **feasibility** of precautionary measures - **must actually be in dispute**
  - Need to **look at degree of contradiction and probative value of contradiction**
    - **Thus, Hubris Test - highest of the superlatives** (X was the **SAFEST/BEST**) **vs comparatives** (X was BETTER than Y, or **EXCELLENT**)...Yes, we'll have contradiction AND yes we'll have probative value
      - **VS Vague superlatives** - EXCELLENT...EXCELLENT what? Excellent looking design or best in safety? **Best = best selling?** or best wood chipper because those are rated on safety?
      - For excellent, **reasonable minds can disagree** - just **make the ARGUMENTS**
  - Conceding that feasible that you can expand the chute, makes evidence to show feasibility OOS to 407

**Policy for keeping out:**

- **Encourage remedies** that keep the population safe
- **403 Weighing Probativeness and Unfair Prejudice:**
  - **Weak evidence of liability** - making a change does not mean that you were negt before; **just making a safe product safer**

## Problem Areas:

- **Remedial includes:** changing policies, warning signs, and even **firing engineers** involved with the project
  - **But does not include post-event investigations**
- **Subsequent excludes:** changes made after mfc but before ptf was injured
  - **Eg. Mfc changes design after selling to ptf but before ptf injured**, that's not subsequent
  - **Eg. if someone injured in similar way before ptf's injury caused mfc's remedial measure**, next ptf is not barred from using that
- **Third-party remedial measures not shield mfc:** if owner or another person makes the remedial measure, mfc shouldn't benefit from the shield to block that remedial measure as evidence of liability

**Wood v Morbark p.84** - Trying to use impeachment other than to prove liability - Hubris Test applies to see whether feasibility actually controverted. D mfc misled jury by making it seem that gov't was using the same chipper as that involved with P's injury to show that the old chipper was "SAFEST" - opened door for P to impeach: ie D using 407 as sword instead of shield