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Court of Appeals Signals Stricter Enforcement of Sandoval Guidelines

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special damages and specific intent to injure, the courts have been careful to avoid applications that would weaken the doctrine's strict pleading requirements.[277] By permitting the plaintiff to maintain his suit without alleging special damages or specific intent, the *Drago* court extended the remedy well beyond its deliberately circumscribed limits. It is suggested that reliance on the third department's *sub silentio* rejection of these well-settled requirements for prima facie tort actions may meet with differing results when the factual circumstances are less compelling or the argument is advanced before a different tribunal.[278]

Dennis Glazer

Court of Appeals signals stricter enforcement of Sandoval *guidelines*

It is well settled in New York that a defendant who testifies in his own behalf may be cross-examined concerning prior criminal, vicious or immoral acts which tend to impugn his credibility.[279] Such

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[277] In Ruza v. Ruza, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't 1955), the court stated the oft-quoted rule regarding the prima facie tort doctrine and its function:

> The key to the prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful. The need for the doctrine of prima facie tort arises only because the specific acts relied upon—and which it is asserted caused the injury—are not, in the absence of the intention to harm, tortious, unlawful, and therefore, actionable.

Id. at 769, 146 N.Y.S.2d at 811; *see* note 256 *supra.*

[278] In a recent decision, Belsky v. Lowenthal, 62 App. Div. 2d 319, 405 N.Y.S.2d 62 (1st Dep't 1978), the Appellate Division, First Department, reversed a trial court's finding that a defective complaint for malicious prosecution of a medical malpractice suit could be sustained as a prima facie tort claim.

[279] *See, e.g.*, People v. Sandoval, 34 N.Y.2d 371, 376, 314 N.E.2d 413, 417, 357 N.Y.S.2d 849, 854 (1974); People v. Kass, 25 N.Y.2d 123, 125, 250 N.E.2d 219, 221, 302 N.Y.S.2d 807, 809 (1969); People v. Webster, 139 N.Y. 73, 84, 34 N.E. 730, 733 (1893); E. FISCH, NEW YORK EVIDENCE § 702 (2d ed. 1977) [hereinafter cited as FISCH]; 3 L. FRUMER & E. BISKIND, BENDER'S NEW YORK EVIDENCE § 141 (1975) [hereinafter cited as FRUMER & BISKIND]; W. RICHARDSON, EVIDENCE § 498 (10th ed. J. Prince 1973) [hereinafter cited as RICHARDSON]; 3A J. WIGMORE, EVIDENCE § 890 (rev. ed. 1970). At early common law, individuals convicted of an "infamous crime" were believed to be predisposed to commit perjury and thus were prohibited from testifying before any court. FISCH, *supra*, §§ 262, 263; C. MCCORMICK, LAW OF EVIDENCE § 43 (2d ed. 1972); 2 J. WIGMORE, EVIDENCE § 519 (3d ed. 1940); Note, *The Dilemma of the Defendant Witness in New York: The Impeachment Problem Half-Solved*, 50 ST. JOHN'S L. REV. 129, 134 (1975). In 1879, the New York Legilsature abolished this prohibition but retained its underlying philosophy by enacting a statute that permitted introduction of past convictions as a means of impeaching a witness. Ch. 542, § 832,[1879] N.Y. Laws 609 (current version at CPLR 4513 (McKinney 1963)). Today, the New York approach is followed in a majority of jurisdictions. 3A J. WIGMORE, EVIDENCE § 890 (rev. ed. 1970).

inquiry is prohibited, however, when its purpose is to demonstrate that the defendant has a criminal character or propensity.[280] In *People v. Sandoval*,[281] the Court of Appeals suggested criteria for distinguishing between admissible and inadmissible prior conduct[282]

Acts of "moral turpitude," because they relate to the character trait of honesty, are also proper material for impeachment. People v. Montlake, 184 App. Div. 578, 583, 172 N.Y.S. 102, 106 (2d Dep't 1918); Seventh Ave. Delicatessen v. Manhattan Provision Co., 146 N.Y.S.2d 25, 29 (Sup. Ct. Kings County 1955), *aff'd mem.*, 1 App. Div. 2d 1037, 153 N.Y.S.2d 572 (1956). Where the witness is a criminal defendant, however, the prosecutor must conduct the inquiry in good faith and his questions must have a reasonable basis in fact. People v. Alamo, 23 N.Y.2d 630, 633, 246 N.E.2d 496, 497, 298 N.Y.S.2d 681, 683, *cert. denied*, 396 U.S. 879 (1969); RICHARDSON, *supra*, § 498. Moreover, a defendant witness cannot be questioned concerning a criminal charge of which he has been acquitted, People v. Reingold, 44 App. Div. 2d 191, 195, 353 N.Y.S.2d 978, 984 (4th Dep't 1974); nor can he be asked whether he has been indicted for other crimes, People v. Rivera, 26 N.Y.2d 304, 307, 258 N.E.2d 699, 700, 310 N.Y.S.2d 287, 289 (1970); People v. Alamo, 23 N.Y.2d 630, 634, 246 N.E.2d 496, 498, 298 N.Y.S.2d 681, 683-84, *cert. denied*, 396 U.S. 879 (1969); People v. Cascone, 185 N.Y. 317, 334, 78 N.E. 287, 292 (1906); People v. Balsano, 51 App. Div. 2d 130, 134, 380 N.Y.S.2d 129, 133 (4th Dep't 1976). Similarly, convictions for traffic infractions and juvenile delinquency adjudications may not be used as a basis for impeachment. N.Y. VEH. & TRAF. LAW § 155 (McKinney Supp. 1977-1978); N.Y. FAM. CT. ACT § 783 (McKinney 1975).

[280] *See, e.g.*, People v. Wright, 41 N.Y.2d 172, 175, 359 N.E.2d 696, 698, 391 N.Y.S.2d 101, 103 (1976); People v. Duffy, 36 N.Y.2d 258, 262, 326 N.E.2d 804, 806, 367 N.Y.S.2d 236, 239, *cert. denied*, 423 U.S. 861 (1975); People v. Schwartzman, 24 N.Y.2d 241, 247, 247 N.E.2d 642, 646, 299 N.Y.S.2d 817, 823, *cert. denied*, 396 U.S. 846 (1969). The rule prohibiting the use of prior crimes to impugn the general character of a defendant witness is based upon the recognition that such evidence is of limited probative value and is highly prejudicial. *E.g.*, People v. Zackowitz, 254 N.Y. 192, 198, 172 N.E. 466, 468 (1930); McQuage v. City of New York, 285 App. Div. 249, 253, 136 N.Y.S.2d 111, 116 (1st Dep't 1954); 1 J. WIGMORE, EVIDENCE §§ 57, 194 (3d ed. 1940). *See also* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 160-61 (1966).

[281] 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974).

[282] 34 N.Y.2d at 376-77, 314 N.E.2d at 417-18, 357 N.Y.S.2d at 855-56. The *Sandoval* Court outlined a two-step inquiry in which the nature of the prior conduct would be examined, first to determine whether it is the type of conduct which reflects upon credibility at all and, second, to ascertain whether the risk of prejudice is so great that the evidence should be excluded notwithstanding its relevance. Among the factors suggested by the Court to be considered in weighing the risk of prejudice to the defendant against the probative value of prior convictions are the relevance of the prior criminal conduct to the issue of credibility, the length of time since the criminal acts were committed and the similarity between the prior activity and the current charge. *Id.* Emphasizing that only those crimes bearing on veracity should be admitted, the *Sandoval* Court further noted:

> To the extent . . . that the prior commission of a particular crime of calculated violence or of . . . vicious or immoral acts . . . revealed a willingness . . . on the part of the . . . defendant voluntarily to place . . . self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. . . . On the other hand, crimes or conduct occasioned by addiction or uncontrollable habit, as with alcohol or drugs . . . may have lesser probative value . . . .

Id. at 377, 314 N.E.2d at 417-18, 357 N.Y.S.2d at 855-56 (citations omitted).

The "balancing" test set forth in *Sandoval* had been used earlier by courts in determining the permissible scope of cross-examination concerning prior criminal conduct. *See, e.g.*, People v. Schwartzman, 24 N.Y.2d 241, 247 N.E.2d 642, 299 N.Y.S.2d 817, *cert. denied*, 396 U.S. 846 (1969); People v. McKinney, 24 N.Y.2d 180, 247 N.E.2d 244, 299 N.Y.S.2d 401 (1969).

and approved a procedural device whereby, in the exercise of its discretion, the trial court prospectively determines whether particular convictions may be used to impeach a defendant witness.[283] The *Sandoval* criteria were merely advisory, and broad discretion to determine the scope of cross-examination was left with the trial judge.[284] Recently, in *People v. Carmack*,[285] the Court of Appeals indicated that certain of *Sandoval's* guidelines may be more than mere recommendations by affirming the reversal of a trial court's *Sandoval* ruling without explicitly finding clear abuse of discretion.[286]

The defendant in *Carmack* had been charged with criminal sale of a controlled substance.[287] Following a *Sandoval* hearing,[288] the trial court, permitted the district attorney to cross-examine the defendant on the facts underlying a 1971 drug-related arrest and a conviction arising from the same incident.[289] The defendant subse-

[283] 34 N.Y.2d at 374, 314 N.E.2d at 416, 357 N.Y.S.2d at 853. Under the procedure approved in *Sandoval*, the defendant ordinarily would make a pre-trial motion requesting an advance ruling on specific prior convictions and acts. The *Sandoval* Court noted that this ruling could be made after an informal inquiry into the facts and circumstances of the case. The defendant would be free to demonstrate that the use of prior convictions would be overly prejudicial, but only in rare instances would a full evidentiary hearing be necessary. While a motion for a *Sandoval* hearing could be made at a later stage of the proceeding, the Court stated that a pre-trial determination would be preferable, since it would enable the defendant to decide intelligently whether to take the witness stand in his own behalf. *Id.* at 375, 314 N.E.2d at 416-17, 357 N.Y.S.2d at 854. *But cf. Recent Decisions*, 41 BROOKLYN L. REV. 665, 672 (1975) (in order to encourage defendant to testify, *Sandoval* ruling should not be made until trial is in progress).

[284] Trial courts traditionally have enjoyed broad discretion in determining the proper scope of cross-examination in criminal trials. *See, e.g.*, People v. Dickman, 42 N.Y.2d 294, 297, 366 N.E.2d 843, 845, 397 N.Y.S.2d 754, 756 (1977); People v. Duffy, 36 N.Y.2d 258, 262, 326 N.E.2d 804, 806, 367 N.Y.S.2d 236, 240, *cert. denied*, 423 U.S. 861 (1975); People v. Schwartzman, 24 N.Y.2d 241, 244, 247 N.E.2d 642, 644, 299 N.Y.S.2d 817, 820, *cert. denied*, 396 U.S. 846 (1969); People v. Sorge, 301 N.Y. 198, 201-02, 93 N.E.2d 637, 639 (1950); People v. Lustig, 206 N.Y. 162, 171, 99 N.E. 183, 186 (1912); La Beau v. People, 34 N.Y. 223, 230 (1866); People v. Bullock, 45 App. Div. 2d 902, 902, 357 N.Y.S.2d 722, 724 (3d Dep't 1974); People v. Jackson, 79 Misc. 2d 814, 815, 361 N.Y.S.2d 258, 260 (Sup. Ct. Queens County 1974). Absent a clear abuse of discretion, their rulings on such guidelines generally are not subject to reversal. *See, e.g.*, People v. Duffy, 36 N.Y.2d 258, 262-63, 326 N.E.2d 804, 807, 367 N.Y.S.2d 236, 240; People v. Malkin, 250 N.Y. 185, 197, 164 N.E. 900, 905 (1928); RICHARDSON, *supra* note 279, § 500.

[285] 44 N.Y.2d 706, 376 N.E.2d 919, 405 N.Y.S.2d 446 (1978) (mem.), *aff'g*, 52 App. Div. 2d 264, 383 N.Y.S.2d 738 (4th Dep't 1976).

[286] 44 N.Y.2d at 707, 376 N.E.2d at 919, 405 N.Y.S.2d at 447.

[287] 44 N.Y.2d at 707, 376 N.E.2d at 920, 405 N.Y.S.2d at 447 (Cooke, J., dissenting).

[288] *See* note 283 *supra*.

[289] 52 App. Div. 2d at 265, 383 N.Y.S.2d at 739. The defendant had been arrested in 1971 for criminal possession of a hypodermic instrument, attempted possession of dangerous drugs, and possession of a weapon. The first charge had been dismissed at the request of the district attorney "without prejudice," but the narcotics and weapons charges resulted in convictions. *Id.* While the *Carmack* trial court permitted the prosecutor to use the facts underlying these

quently was convicted.[290] The Appellate Division, Fourth Department, reversed,[291] finding that the district attorney's detailed and extensive cross-examination concerning the defendant's prior drug-related activities[292] was intended not to weaken the defendant's credibility as a witness, but rather to demonstrate to the jury that the defendant was a habitual narcotics user who was predisposed to commit the crime charged.[293] On appeal, the Court of Appeals affirmed, basing its ruling upon the reasoning of the appellate division.[294]

Judge Cooke, writing for the dissent[295] in *Carmack*, would have reinstated the defendant's conviction.[296] Emphasizing that the proper scope of cross-examination traditionally has been left to the discretion of the trial court, Judge Cooke stated that a *Sandoval* ruling should not be overturned absent " 'plain abuse and injus-

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charges to impeach the defendant, it excluded evidence of nine other prior criminal incidents. 52 App. Div. 2d at 268, 383 N.Y.S.2d at 741 (Dillon, J., dissenting).

[290] 52 App. Div. 2d at 265, 383 N.Y.S.2d at 739.

[291] *Id.* at 268, 383 N.Y.S.2d at 741. The appellate division unanimously approved the propriety of cross-examination on the weapons charge. 52 App. Div. 2d at 268, 383 N.Y.S.2d at 741 (Dillon, J., dissenting).

[292] 52 App. Div. 2d at 267, 383 N.Y.S.2d at 741. The appellate division noted that the cross-examination of defendant's past narcotics use covered twenty pages of the record and was again raised on recross-examination. In addition, the court was disturbed by the prosecutor's reference to the defendant's income, which at times was less than the cost of his drug habit. *Id.* 383 N.Y.S.2d at 741; *see* note 293 *infra.*

[293] 52 App. Div. 2d at 267, 383 N.Y.S.2d at 741. In People v. Sandoval, 34 N.Y.2d 371, 377-78, 314 N.E.2d 413, 418, 357 N.Y.S.2d 849, 856 (1974) (citing United States v. Puco, 453 F.2d 539, 542 n.9 (2d Cir. 1971)), the Court of Appeals observed that the use of a defendant's prior drug history as a basis for cross-examination is highly prejudicial, since many believe all drug users to be addicts and habitual criminal offenders. The possibility of the jury's bias against previous drug users, coupled with the similarity of the *Carmack* defendant's earlier criminal activities to the crime charged, led the appellate division to conclude that the trial court's *Sandoval* ruling was improper. 52 App. Div. 2d at 268, 383 N.Y.S.2d at 741.

The appellate division dissent, authored by Justice Dillon, would have affirmed Carmack's conviction. Dillon reasoned that the trial court judge had "meticulously" followed the guidelines of *Sandoval.* Furthermore, there was no indication that the prosecutor's cross-examination was conducted in bad faith or without a reasonable basis in fact. 52 App. Div. 2d 383 N.Y.S.2d at 743, 743 (Dillon, J., dissenting). Justice Dillon concluded that no "'plain abuse and injustice'" had occurred, and therefore the trial judge's discretionary ruling should be affirmed. *Id.* at 271, 383 N.Y.S.2d at 743-44 (Dillon, J. dissenting).

[294] 44 N.Y.2d at 706, 376 N.E.2d at 919, 405 N.Y.S.2d at 447. The court issued a short memorandum decision in which Chief Judge Breitel and Judges Fuchsberg, Wachtler and Jones concurred.

The *Carmack* majority stressed the impropriety of the extensive cross-examination on the prior charges as well as "the great . . . danger that the evidence would tend to demonstrate a propensity to commit the very crime for which the defendant was on trial . . . ." *Id.*, at 707, 376 N.E.2d at 919, 405 N.Y.S.2d at 447.

[295] Judge Jasen and Gabrielli concurred in Judge Cooke's dissenting opinion.

[296] 44 N.Y.2d at 707, 376 N.E.2d at 920, 405 N.Y.S.2d at 447 (Cooke, J., dissenting).

tice.' "[297] Since the trial court had followed the procedures recommended in *Sandoval* and had given the jury the proper limiting instructions,[298] the dissent concluded that the appellate division should not have substituted its judgment for that of the lower court.[299]

While *Sandoval* rulings have not been immune from appellate review, reversals generally have been limited to instances of clear abuse of discretion.[300] The *Carmack* decision, however, may indicate a shift away from the permissive approach of *Sandoval* toward the more categorical position[301] that under certain circumstances, seldom, if ever, would it be proper to use a defendant's prior criminal activity[302] as a basis for impeaching his credibility as a witness.[303]

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[297] *Id.*, (Cooke, J., dissenting) (quoting People v. Sorge, 301 N.Y. 198, 202, 93 N.E.2d 637, 640 (1950)); *see* text accompanying note 284 *supra.*

[298] The *Carmack* trial court instructed the jury that the evidence of the defendant's prior illegal activities could be used only to test the defendant's credibility as a witness. 44 N.Y.2d at 707, 376 N.E.2d at 920, 405 N.Y.S.2d at 447-48 (Cooke, J., dissenting); *see* People v. Webster, 139 N.Y. 73, 34 N.E. 730 (1893); People v. Jesmer, 53 App. Div. 2d 795, 385 N.Y.S.2d 151 (3d Dep't 1976) (mem.); FRUMER & BISKIND, *supra* note 279, § 49.01 [6][c]. The effectiveness of such limiting instructions, however, has been questioned. *See* Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring); Blumenthal v. United States, 332 U.S. 539, 559-60 (1947); Note, 50 ST. JOHN'S L. REV. 129, 141 (1975). *See generally* United States v. Tramaglino, 197 F.2d 928, 932 n.2 (2d Cir.), *cert. denied,* 344 U.S. 864 (1952); Note, *Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant-Witness,* 37 U. CINN. L. REV. 168, 172 n.25 (1968).

[299] 44 N.Y.2d at 707, 376 N.E.2d at 920, 405 N.Y.S.2d at 447 (Cooke, J., dissenting).

[300] *See, e.g.,* People v. Dickman, 42 N.Y.2d 294, 366 N.E.2d 843, 397 N.Y.S.2d 754 (1977); People v. Wright, 41 N.Y.2d 172, 359 N.E.2d 696, 391 N.Y.S.2d 101 (1976); People v. Caviness, 38 N.Y.2d 227, 342 N.E.2d 496, 379 N.Y.S.2d 695 (1975); People v. Russell, 266 N.Y. 147, 194 N.E. 65 (1934); People v. Moore, 20 App. Div. 2d 817, 248 N.Y.S.2d 739 (2d Dep't 1964) (mem.); People v. Redmond, 265 App. Div. 307, 38 N.Y.S.2d 727 (3d Dep't 1942); People v. Mallard, 78 Misc. 2d 858, 358 N.Y.S.2d 913 (Sup. Ct. Queens County 1974) (mem.).

[301] Some jurisdictions have attempted to solve the problem of prior convictions by explicit legislation limiting the use of previous convictions to impeach a defendant. *See, e.g.,* CAL. EVID. CODE § 788 (West 1966) (prior felony convictions admissible); IOWA CODE ANN. § 622.17 (prior felony convictions admissible); MASS. GEN. LAWS ANN. ch. 233, § 21 (West 1959 & Supp. 1978-1979) (timely misdemeanors, felonies, and traffic violations admissible); OKLA. STAT. ANN. tit. 12, § 381 (West 1960 & Supp. 1977-1978) (all felonies and those misdemeanors involving moral turpitude admissible); UTAH CODE ANN. § 78-24-9 (1953) (prior felony convictions admissible).

[302] A narcotics prosecution such as the *Carmack* trial presents the clearest example of a situation in which a categorical interpretation of *Sandoval's* guidelines would be warranted. In such cases, the exceedingly high risk of prejudice, coupled with the minimal probative value, suggests that only in rare instances should evidence of the defendant's prior drug history be admitted for impeachment purposes. *See* People v. Sandoval, 34 N.Y.2d at 377-38, 314 N.E.2d at 417-18, 357 N.Y.S.2d at 855-56. *But see* People v. Rahman, 404 N.Y.S.2d 110 (1st Dep't 1978) (mem.). Similarly, evidence of previous conduct involving drunkenness might be deemed overly prejudicial when introduced in a trial for drunken or reckless driving. *See* People v. Dickman, 42 N.Y.2d 294, 298, 366 N.E.2d 843, 845, 397 N.Y.S.2d 754, 757 (1977).

This shift, in turn, represents a change in emphasis from simply ensuring that the procedures guaranteed by *Sandoval* are followed toward a concern for the substantive effects of *Sandoval* rulings.[304]

It is submitted that the Court of Appeals' apparent emphasis on the substantive effects of *Sandoval* rulings represents a positive step toward affording the accused a trial free from prejudice. The procedure outlined in *Sandoval* is not alone sufficient to ensure a just trial. A defendant who elects not to testify because of a substantively unfair *Sandoval* ruling may be as seriously prejudiced as one who is denied a *Sandoval* hearing entirely.[305] For this reason, affording unfettered discretion to the trial court seems inconsistent with the underlying rationale of *Sandoval*. On the other hand, mandatory rules governing the use of prior conduct, while having the advantage of certainty, are on balance unsatisfactorily rigid in the area of cross-examination. Narrowly defined trial court discretion supported by close appellate scrutiny would seem to offer the best solution to the problem, and it appears the Court of Appeals has taken a significant step in that direction.

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[303] The inference that *Carmack* represents a shift toward a categorical rule is supported by the Court's order that all evidence of prior drug activity be prohibited on retrial. 44 N.Y.2d at 707, 376 N.E.2d at 919, 405 N.Y.S.2d at 447. Moreover, the appellate division opinion, approved by the *Carmack* Court, contained the statement that "evidence of prior drug activities may in some cases be harmless error." 52 App. Div. 2d at 268, 383 N.Y.S.2d at 741. This dictum suggests that admission of prior drug activities is error as a matter of law, although reversal may not be required in every case.

[304] The change in the Court's orientation is reflected in the sharply contrasting majority and dissenting *Carmack* opinions. While the majority concentrated its attention on the scope of the prosecutor's cross-examination and its likely prejudicial effect on the jury, 44 N.Y.2d at 707, 376 N.E.2d at 919, 405 N.Y.S.2d at 447, the dissent stressed that the defendant had been accorded a full *Sandoval* hearing. *Id.* at 707, 376 N.E.2d at 920, 405 N.Y.S.2d at 448 (Cooke, J., dissenting).

[305] The practice of allowing evidence of prior crimes for impeachment purposes places the accused in a serious dilemma. If he decides not to testify, his silence may cause the jury to draw an unfavorable inference. If he takes the stand, however, his prior record can become a basis for inquiry, and he risks exposing the jury to prejudicial information. *See* McCORMICK, *supra* note 279, § 43, at 89.