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. 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.

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. Such

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277 In Ruza v. Ruza, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't 1965), 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.

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


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 probable 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).

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. The Sandoval criteria were merely advisory, and broad discretion to determine the scope of cross-examination was left with the trial judge. Recently, in People v. Carmack, 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.

The defendant in Carmack had been charged with criminal sale of a controlled substance. Following a Sandoval hearing, 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. The defendant subse-

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233 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).


236 44 N.Y.2d at 707, 376 N.E.2d at 919, 405 N.Y.S.2d at 447.

237 44 N.Y.2d at 707, 376 N.E.2d at 920, 405 N.Y.S.2d at 447 (Cooke, J., dissenting).

238 See note 283 supra.

239 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
iquerently was convicted. The Appellate Division, Fourth Department, reversed, finding that the district attorney's detailed and extensive cross-examination concerning the defendant's prior drug-related activities 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. On appeal, the Court of Appeals affirmed, basing its ruling upon the reasoning of the appellate division.

Judge Cooke, writing for the dissent in Carmack, would have reinstated the defendant's conviction. 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 injust-

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).

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

211 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).

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.

212 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).

214 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 Fuchsig, 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.

215 Judge Jasen and Gabrielli concurred in Judge Cooke's dissenting opinion.

216 44 N.Y.2d at 707, 376 N.E.2d at 920, 405 N.Y.S.2d at 447 (Cooke, J., dissenting).
Since the trial court had followed the procedures recommended in Sandoval and had given the jury the proper limiting instructions, the dissent concluded that the appellate division should not have substituted its judgment for that of the lower court.

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

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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 & Bishkind, supra note 279, § 49.01 [6][c].


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.\textsuperscript{364}

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.\textsuperscript{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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\textsuperscript{364} 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 288, 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.

\textsuperscript{305} 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).

\textsuperscript{364} 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.