

Character and Prior Conduct of the Victim in Support of a Plea of Self-Defense

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circumstantial evidence that the possessor is the culprit.⁸¹ The fact of possession is of course relevant and admissible evidence during the trial, but the jury alone should have the power to determine what weight the fact should be given in view of the entire evidence presented. There is no legislative empirical evidence which supports the so-called legal presumption contained in Louisiana Revised Statutes section 432. The legislature should amend section 432 to describe the possessory concept correctly as an inference, rather than a legal presumption. Under such an amendment, the prosecutor would not be required to satisfy the "reasonable doubt" standard relative to presumed elements, and would still be able to bring the inference to the attention of the jury, without the benefit of misapplied terminology to the prejudice of the defendant.

Timothy Jonathan Bradley

CHARACTER AND PRIOR CONDUCT OF THE VICTIM IN SUPPORT
OF A PLEA OF SELF-DEFENSE

Charged with murder, the defendant claimed that he shot the deceased in self-defense. Although the defendant introduced evidence indicating that the deceased had attacked him with a knife, the trial court excluded testimony of prior acts of violence committed by the deceased against others. The Louisiana Supreme Court reversed and *held* that, in a homicide case, when there is "appreciable evidence" of an overt act or hostile demonstration on the part of the victim, prior acts of violence by the victim against others, of which the defendant had knowledge, are admissible as tending to show the defendant's state of mind. *State v. Lee*, 331 So. 2d 455 (La. 1976).

When the defendant in a homicide case claims he acted in self-defense, evidence of the character and background of the victim may be relevant to two distinct issues: (1) who was the aggressor in the encounter, and (2) whether the defendant's apprehension of serious bodily harm was reasonable. Admission of this evidence, however, creates a danger that the

81. *E.g.*, *People v. Grimes*, 113 Cal. App. 2d 365, 248 P.2d 130 (1952) (unexplained possession of recently stolen property is a circumstance tending to show guilt when coupled with other suspicious circumstances); *Drew v. State*, 61 Okla. Crim. 48, 65 P.2d 549 (1937); see Comment, *Presumptions and Burdens of Proof*, 21 LOY. L. REV. 377, 399-400 (1975).

jury will improperly empathize with the defendant because of the victim's undesirable nature. To prevent undue prejudice to the prosecution, the law imposes a condition precedent to the admissibility of the evidence.¹ In this connection section 482 of title 15 of the Louisiana Revised Statutes provides: "In the absence of evidence of hostile demonstration or of overt act on the part of the person slain or injured, evidence of his dangerous character or of his threats against accused is not admissible."² The prerequisite has been applied whether the evidence is offered for the purpose of showing who was the aggressor or of showing the defendant's state of mind to prove the reasonableness of his apprehension.³

The admissibility of evidence of the victim's dangerous character to show that he was the aggressor is but one instance of the broader question concerning the use of character evidence to prove conduct. Although an individual's character is logically relevant to show the probability of that person engaging in certain conduct, it is weak evidence and tends to be given improper weight. Thus, circumstantial use of character evidence is generally not allowed,⁴ but under certain circumstances this rule of exclu-

1. The majority of jurisdictions impose the broad limitation of some other evidence of deceased's aggression. 1 J. WIGMORE, EVIDENCE § 111 at 552 (3d ed. 1940) [hereinafter cited as 1 WIGMORE]; see 2 J. WIGMORE, EVIDENCE § 246 at 48 (3d ed. 1940) [hereinafter cited as 2 WIGMORE]. For a collection of authorities on this point see Annot., 1 A.L.R. 3d 571, 582-89 (1965) and Annot., 98 A.L.R. 2d 6, 78-94 (1964). Under the Federal Rules of Evidence, however, no prerequisite is required to introduce evidence of the victim's character to show that he acted in conformity therewith. See FED. R. EVID. 404(a)(2) (1975).

2. LA. R.S. 15:482 (1950), as amended by La. Acts 1952, No. 239, § 1. This note is limited to the application of the statute in homicide cases. Although the language of the statute is not clear, it was intended apparently to apply only to self-defense cases. In most crimes against the person the character of the victim is immaterial since all men, regardless of their character, are entitled to equal protection of the law. The majority of jurisdictions, however, admit evidence of character for chastity of a complainant in a rape case when the defendant raises the question of consent. 1 WIGMORE, *supra* note 1, § 62 at 464-65. But see LA. R.S. 15:498 (Supp. 1975).

3. See, e.g., *State v. Sharpe*, 170 La. 69, 127 So. 368 (1930) (evidence offered to show who was the aggressor); *State v. Harris*, 131 La. 616, 59 So. 1009 (1912) (evidence offered to show reasonableness of apprehension). In the early case of *State v. Birdwell*, 36 La. Ann. 859, 862 (1884), the court explained, "The rule of . . . exclusion [in the absence of an overt act] rests on the wise and philosophical reason that no one is justifiable (sic) in killing a man simply because he is vicious, quarrelsome or dangerous, or because he has made threats which he manifests no intention of carrying into effect." For a discussion of the substantive law requirement of an overt act as the basis for the necessity to defend, see Comment, *Self-Defense in Louisiana—the Criminal Law and the Tort Law Compared*, 16 TUL. L. REV. 609 (1942).

4. Although there is no general statutory rule of exclusion in the Louisiana

sion is relaxed.⁵ If the prerequisite overt act is shown, Louisiana permits a defendant to support his plea of self-defense by introducing evidence of the victim's dangerous character.⁶

Allowing character evidence to be introduced raises the further consideration of the permissible method of proving character. There are at least three logical methods of proof: (1) testimony as to specific acts, (2) testimony in the form of personal opinion, and (3) testimony as to reputation. Although testimony of specific acts and personal opinions may better reveal the actual character of an individual, these types of proof are thought to involve a greater risk of undue prejudice, confusion of the issues, and consumption of time.⁷ Since character evidence offered to imply conduct is admittedly weak evidence, proof of a person's character is generally confined to reputation evidence in Louisiana.⁸

The relevance of prior threats by the victim against the defendant is closely associated with the use of the victim's dangerous character to show

Code of Criminal Procedure, LA. R.S. 15:479-83 deal with the permissible uses of character evidence.

5. A significant exception to the rule of exclusion is that the accused is allowed to "open the door" to his relevant character traits, and after the accused has initiated the inquiry into his character, the prosecution is allowed to produce evidence of bad character in rebuttal. C. MCCORMICK, EVIDENCE § 191 at 454-59 (Cleary ed. 1972) [hereinafter cited as MCCORMICK].

6. Only relevant character traits of the victim may be shown. See *State v. Rollins*, 271 So. 2d 519, 522 (La. 1973) (victim's general moral character irrelevant); *State v. Thompson*, 109 La. 296, 299, 33 So. 320, 321 (1903) (victim's character for honesty not pertinent). The defendant may show the victim's character for violence under the particular circumstances existing at the time of the affray; for example, evidence that the victim was a violent person when intoxicated would thus be admissible. *State v. Domingue*, 166 La. 859, 861-62, 118 So. 46, 47 (1928) (dictum); see *State v. McMillian*, 223 La. 96, 64 So. 2d 856 (1953). When the defendant has introduced evidence tending to show the victim's dangerous character, the prosecution may rebut the evidence by showing the victim's peaceful character. *State v. Lejeune*, 116 La. 193, 40 So. 632 (1906). Wigmore favored the view that the mere claim of self-defense entitled the prosecution to introduce evidence of the victim's character. 1 WIGMORE, *supra* note 1, § 63 at 471.

7. MCCORMICK, *supra* note 5, § 186 at 443. It is questionable whether these policy considerations warrant the exclusion of opinion testimony where character is not an ultimate issue in the case. See 7 J. WIGMORE, EVIDENCE § 1986 at 165-67 (3d ed. 1940). Rule 405(a) of the Federal Rules of Evidence allows both reputation and opinion testimony where character is admissible to prove conduct.

8. LA. R.S. 15:479 (1950) provides: "Character, whether good or bad, depends upon the general reputation that a man has among his neighbors, not upon what particular persons think of him." However, if character is an ultimate issue in the case (for example, in a defamation case when the statement charged bad character and the defendant pleads truth), the proof is not limited to reputation evidence.

who was the aggressor. The victim's expressed declaration of intention tends to show that such intention was in fact carried out.⁹ When character evidence and prior threats are offered for the limited purpose of showing the probability of the victim's actions, prior knowledge by the defendant is immaterial as "[t]he inquiry is one of objective occurrence, not of subjective belief."¹⁰

Evidence of the character and background of the victim may also be relevant to show the reasonableness of the defendant's apprehension of serious bodily harm. When the defendant pleads self-defense, his state of mind at the time of the offense becomes a material issue.¹¹ Since an act by one known to be a violent person may justify a more prompt and decisive response, circumstances known to the defendant *at the time* of the affray are relevant to show the reasonableness of his belief of imminent danger. In contrast to showing the probability of the victim's aggression, it is the reputed character of the victim, irrespective of his actual character,¹² that is relevant to show the defendant's state of mind. Similarly, whether or not the threats attributed to the victim were actually made is, for this purpose, irrelevant if the defendant is shown to have believed that they were uttered.¹³

The Louisiana courts have allowed the defendant to introduce evidence of the victim's reputation for dangerous character and his threats against the defendant to show the probability of the victim's aggression or to show the reasonableness of the defendant's apprehension of serious bodily harm.¹⁴ Evidence of specific acts of violence by the victim was

9. The threats are admissible under the "declarations of mental state" exception to the rule excluding hearsay. MCCORMICK, *supra* note 5, § 295 at 697-701; see *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892).

10. 1 WIGMORE, *supra* note 1, § 63 at 471.

11. LA. R.S. 14:20 (1950) provides in pertinent part: "A homicide is justifiable: (1) When committed in self-defense by one who *reasonably believes* that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself" (emphasis added).

12. For a discussion of the distinction between character and reputation in this area, see Hale, *Some Comments on Character Evidence and Related Topics*, 22 S. CALIF. L. REV. 341, 344-45 (1949).

13. 2 WIGMORE, *supra* note 1, § 247 at 60. If the threats were actually made, however, they are additionally relevant to show the probability of the victim's aggression.

14. Early decisions had rejected evidence of the victim's character and threats where it was not shown to be known to the defendant at the time of the affray, reasoning that unknown matters could not affect the defendant's apprehension. *E.g.*, *State v. Gregor*, 21 La. Ann. 473 (1869). Later cases, however, stated that such evidence was admissible to show who was the aggressor. *E.g.*, *State v.*

repeatedly excluded as an attempt to prove character by particular acts.¹⁵ In determining the admissibility of the tendered evidence, however, the probative value of the evidence must be evaluated in light of the purpose for which it is offered. The supreme court's decision in *State v. McMillian*¹⁶ clearly applied this principle. In support of her claim of self-defense, the defendant in *McMillian* offered evidence of the victim's prior violent attacks upon her. The court held that although the evidence of prior difficulties between the defendant and the victim was inadmissible to show who was the aggressor, such acts were admissible to show the reasonableness of the defendant's apprehension of imminent danger.¹⁷

In the instant case, the Louisiana Supreme Court was confronted with the issue of whether evidence of the victim's prior conduct against *third persons* was admissible in support of a plea of self-defense. Justice Tate, writing for a divided court,¹⁸ approached the question of admissibility by examining the two distinct purposes for which evidence of the victim's character and background may be admissible. Despite the fact that defense counsel's questions sought to elicit testimony of specific acts of violence committed by the deceased,¹⁹ the majority found that the trial court erred in sustaining the prosecution's objections that the testimony was not proper proof of character. Logically extending the rationale of *McMillian*, the majority held that although the victim's violent acts against the defendant or others might be inadmissible as character evidence, they were

Barksdale, 122 La. 788, 48 So. 264 (1909); *State v. Robinson*, 52 La. Ann. 616, 622-23, 27 So. 124, 126 (1900). *But see* *State v. Cox*, 218 La. 277, 288, 49 So. 2d 12, 15 (1950) (court stated, "The trial judge held, and rightly so, that: 'An uncommunicated threat, when no communicated threat has been proven, is so clearly inadmissible that no citation of authority is necessary.'").

15. *E.g.*, *State v. Williams*, 155 La. 9, 98 So. 738 (1924); *State v. Fontenot*, 50 La. Ann. 537, 23 So. 634 (1898).

16. 223 La. 96, 64 So. 2d 856 (1953), discussed in *The Work of the Louisiana Supreme Court for the 1952-1953 Term—Evidence*, 14 LA. L. REV. 220, 227-28 (1953).

17. *Id.* at 99-100, 64 So. 2d at 857.

18. Chief Justice Sanders and Justices Marcus and Summers dissented from the majority opinion on original hearing and rehearing. 331 So. 2d 455, 456 (La. 1976).

19. The questions propounded by defense counsel were extremely broad. For example, a question asked of a defense witness was: "Did you ever see him [the victim] do anything physical to anyone?" *Id.* at 458 n.2. In his dissenting opinion, Justice Summers argued that "no limitations are placed on the response solicited and the opposing counsel has no way of anticipating the character or relevance of the replies." *Id.* at 462-63. The majority admitted that some of the questions "may have been subject to objection as vague." *Id.* at 458 n.2. *See The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 576-77 (1977).

admissible to show the defendant's state of mind since they were known to him at the time of the offense and there was evidence of an overt act.²⁰

As originally enacted,²¹ section 482 codified the prevailing jurisprudence which required "proof" of the overt act or hostile demonstration to the satisfaction of the trial judge before evidence of the victim's dangerous character or of his threats against the accused was admissible.²² Permitting the trial court to exclude such evidence in the event it determined the testimony of an overt act to be incredible served to protect the prosecution against the defendant's unfounded claim that the victim attacked him. Chief Justice O'Neill had repeatedly attacked the constitutionality of such a judicial determination as a usurpation of the jury's function of evaluating the evidence.²³ In 1952, the legislature relaxed the condition precedent to admissibility by substituting the word "evidence" for "proof."²⁴

The majority in the instant case found that the trial court committed error in that it ignored the effect of the 1952 amendment. Admitting that some of the court's own decisions had erroneously repeated the earlier "proof" criterion,²⁵ the majority expressly overruled those decisions.²⁶ Implementing the policy reflected in the legislative amendment, the majority held that when there is "appreciable evidence" of an overt act the

20. Apparently the majority assumed that the testimony sought was known to the defendant as he and the victim were members of a "closely-knit family group" of transient roof repairers. 331 So. 2d at 460.

21. La. Code Crim. P. art. 482 (1928).

22. The first clear presentation of this issue was in *State v. Ford*, 37 La. Ann. 443 (1885), wherein the distinction between "proof" and mere "evidence" of an act was emphasized. The court stated, "In passing on such a question, the trial judge must of necessity be clothed with the authority to decide whether a proper foundation has been laid for the proffered evidence, and that authority necessarily includes the discretion to ignore and not consider testimony which his reason refuses to believe." *Id.* at 461. Although the doctrine announced in *Ford* was generally followed, there were some decisions which suggested that the evidence should be considered by the jury. *E.g.*, *State v. Stockett*, 115 La. 743, 39 So. 1000 (1905); *State v. Kellogg*, 104 La. 580, 29 So. 285 (1901).

23. Chief Justice O'Neill's numerous dissents severely criticized the court on this point and on the inconsistencies of its decisions. *See, e.g.*, *State v. Sandiford*, 149 La. 933, 952-67, 90 So. 261, 267-73 (1921). For a discussion of the Louisiana overt act doctrine see Note, 2 LA. L. REV. 376 (1940).

24. La. Acts 1952, No. 239, § 1.

25. *See The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 529-30 (1975).

26. The decisions which were overruled on this point were: *State v. Groves*, 311 So. 2d 230 (La. 1975); *State v. Weathers*, 304 So. 2d 662 (La. 1974); *State v. Mitchell*, 290 So. 2d 829 (La. 1974); *State v. Foreman*, 256 La. 999, 240 So. 2d 736 (1970); *State v. Cooper*, 249 La. 654, 190 So. 2d 86 (1966); and *State v. Knight*, 227 La. 739, 80 So. 2d 391 (1955). 331 So. 2d at 460 n.4.

trial court is stripped of its discretion and the evidence must be evaluated by the jury.²⁷ The effect of the trial court's withholding of the evidence was found to have deprived the defendant of the use of important evidence which may have corroborated his claim of reasonable apprehension of serious bodily harm.

By its decision, the court has seemingly settled the controversy concerning the jury's fact-finding function.²⁸ Beyond finding that the defense had presented "appreciable evidence" in the instant case,²⁹ however, the court did not elaborate on what constitutes an "appreciable" showing. Presumably future cases will clarify the quantum of evidence necessary.³⁰

By differentiating the purposes for which evidence of the victim's character and background may be admissible, the majority in *Lee* established a reasoned analytical approach despite the ambiguity of the statute. The statute makes no distinction concerning the purpose for which the evidence is offered, nor does it recognize all the conceivable aspects of the victim's background which may be relevant to substantiate the plea of self-defense. As Chief Justice Sanders justifiably pointed out in his dissent, it could plausibly be argued as a matter of statutory interpretation that only evidence of the victim's reputation for dangerous character and his threats against the accused is admissible.³¹ The majority of the court rejected such a narrow interpretation.³²

27. 331 So. 2d at 459.

28. Although *Lee* was a 4-3 decision, Chief Justice Sanders and Justice Marcus did not directly challenge the majority opinion on this point.

29. In the instant case, the first defense witness testified, in direct contradiction to the prosecution's witnesses, that she saw the victim swing at the defendant with something and then drop a knife after being shot. The court found that after this testimony, it could not "be said that there was an 'absence of evidence' of a hostile demonstration or 'overt act.'" 331 So. 2d at 465.

30. For subsequent applications of the "appreciable evidence" test, see *State v. James*, 339 So. 2d 741, 746 (La. 1976) (defendant's "self-serving, contradicted testimony" that the victim leaned toward a place where the defendant believed he kept a gun was not "appreciable evidence" of an overt act); and *State v. Green*, 335 So. 2d 430 (La. 1976) (despite contradiction of defense testimony in a battery case, court found that foundation had been laid).

31. 331 So. 2d at 466.

32. For an overview of the trend in other jurisdictions toward admitting specific acts to show the defendant's state of mind, see 2 WIGMORE, *supra* note 1, § 248 at 62. Rule 404(a)(2) of the Federal Rules of Evidence deals with the admissibility of the victim's character to show conduct and does not purport to deal with the victim's character as a circumstance bearing on the reasonableness of the defendant's belief. *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 21

Since the jurisprudence recognizes that the defendant's apprehension may be affected by his knowledge of the victim's dangerous reputation and prior threats and acts against the defendant, the exclusion of violent acts against third persons of which the defendant had knowledge would be logically and constitutionally³³ questionable. Knowledge that a person has acted violently in the past may have an even greater bearing on the defendant's belief of danger than his knowledge of the victim's reputation.³⁴ As indicated by the court, the victim's prior *threats* against other persons, if known to the defendant, similarly may be admissible.³⁵ By admitting the evidence for the limited purpose of showing the defendant's state of mind, the traditional rule against proof of character by particular incidents is not disturbed. Moreover, the objections to the introduction of specific acts³⁶ are of lesser importance when the inquiry is limited to the defendant's state of mind, since the reality of the prior act and the victim's justifications are immaterial.³⁷

Lee illustrates but one situation where evidence not specifically covered by the statute may be relevant. As another example, would the victim's prior violent acts against the defendant of which the defendant had no knowledge at the time of the affray be admissible?³⁸ While prior violent acts against other persons may be of little value to show the victim's later conduct,³⁹ it is submitted that prior attempts to seriously harm the defendant are of sufficient probative value to be admissible. Such

(Supp. 1973). Apparently evidence of specific acts to show the defendant's state of mind would be admissible under Rule 404(b). *Cf.* Note, 1974 WIS. L. REV. 266, 278 (1974).

33. The exclusion of this evidence may be a denial of due process since the defendant is entitled to a fair opportunity to present his defense. *Cf.* *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

34. Justice Summers objected to the admission of hearsay testimony (331 So. 2d at 462), but when the evidence is offered to show the defendant's state of mind it is non-hearsay since it is not introduced to show that the matter asserted is true.

35. *Id.* at 461.

36. See the text at note 7, *supra*.

37. Wigmore asserted, however, that proof of the objective truth should be admitted as tending to show the probability of the evidence ever having been communicated. 2 WIGMORE, *supra* note 1, § 263 at 84-85.

38. For example, if the victim had fired upon the defendant and the defendant did not know that he had been attacked (or he did not know who had attacked him), would evidence of that violent act be admissible?

39. Wigmore, however, argued that the considerations which exclude specific acts to show the defendant's character were of little or no force when the defendant sought to prove the victim's dangerous character. He favored admitting such evidence subject to the trial court's discretion to control the number of incidents. 1 WIGMORE, *supra* note 1, § 198 at 676-77.

evidence, analogous to prior threats, tends to show the victim's violent propensities toward the defendant.⁴⁰

Undoubtedly future cases will raise questions concerning the admissibility of evidence of the victim's character and background which remain unanswered. It is urged that the court continue its functional interpretation of the statute and require examination of the probative value of the evidence in light of the purpose for which it is offered.

Diane L. Crochet

LAND OCCUPIERS' LIABILITY—THE DUTY OF REASONABLE CARE TO ALL

Louisiana, along with all other jurisdictions, long determined the duty of a land occupier towards those injured on his property by examining the status of the entrant—either invitee, licensee or trespasser—and found a separate and distinct duty owed to each class. Recently, the Louisiana Supreme Court, in two separate decisions, indicated its desire to abandon these classifications and impose upon the land occupier a single duty of reasonable care towards all entrants.¹ In attempting to appraise the impact of these decisions, two questions must be considered. Does the duty of "reasonable care" dictate that identical precautions be taken for the safety of all entrants? If not, how will the facts surrounding the entry affect the determination of what is "the reasonable care" to which the particular entrant is entitled? Analyzing the development of the classification system in Louisiana may help formulate answers.

Long before the development of general negligence principles, English courts established the three classes of entrants,² justifying the system

40. This rationale could be extended to admit evidence of the victim's violent acts against persons closely associated with the defendant—for example, the defendant's family.

1. *Shelton v. Aetna Cas. & Sur. Co.*, 334 So. 2d 406 (La. 1976); *Cates v. Beauregard Elec. Coop.*, 328 So. 2d 367 (La. 1976). In both cases, the court affirmed the decisions of the lower courts although finding it unnecessary to use the classification system. Two recent circuit court cases have accepted the abandonment of the classification system as the new Louisiana position. *Vidrine v. Missouri Farm Ass'n.*, 339 So. 2d 877 (La. App. 3d Cir. 1976); *Molaison v. West Bros.*, 338 So. 2d 726 (La. App. 1st Cir. 1976).

2. Marsh, *The History and Comparative Law of Invitees, Licensees, and*