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Motions in Limine

*Tom H. Davis**

A DEFENDANT'S ATTORNEY in a tort or personal injury case can fumble, stumble and fall—and win. A plaintiff's attorney can try his case perfectly and still lose. Since any charge of prejudicial tactics brought against the plaintiff usually will be more harmful than one brought against the defendant, it is the duty of the plaintiff's attorney to keep the case like "Caesar's wife," if he can.

One of the best ways to accomplish this is through a motion *in limine*. For those who are not familiar with this practice, it is a motion, heard in advance of jury selection, which asks the court to instruct the defendant, its counsel and witnesses not to mention certain facts *unless and until permission of the court is first obtained outside the presence and hearing of the jury.*[1]

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* Of the Austin, Texas, Bar.

[1] COMES NOW, plaintiff in the above entitled and numbered cause, and before trial and the selection of the jury moves the Court *in limine* to instruct the defendant and all its counsel as set forth below on the following grounds:

1.

Since it is immaterial to this suit whether or not:

(a) Plaintiff had a driver's license on the occasion in question;

(b) Plaintiff was issued a ticket as a result of the collision in question;

(c) Plaintiff has ever been convicted of the offense of driving while intoxicated;

(d) Defendant was not issued a ticket as a result of the collision in question;

the defendant is precluded from using any pleading, testimony, remarks, questions or argument which might inform the jury of such facts.

2.

Were any of the above facts made known to the jury, it would be highly improper and prejudicial to plaintiff, even though the Court were to sustain an objection and instruct the jury not to consider such facts for any purpose. This motion should also be granted because there is no other way the problems mentioned can be properly handled at the trial of this cause, and in all probability any such attempt would result in a mistrial.

WHEREFORE, plaintiff respectfully requests the Court to instruct the defendant and all its counsel not to mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly, any of the above mentioned facts, without first obtaining permission of the Court outside the presence and hearing of the jury, and further instruct the defendant and all its counsel not to make any reference to the fact that this motion has been filed and granted and to warn and caution each and every one of their witnesses to strictly follow these same instructions.

> An examination of the case digests shows that in the last twenty years there has been a decided increase in the percentage of jury cases wherein complaint has been made of prejudice suffered by reason of the misconduct of counsel in the examination of witnesses. Much of this misconduct has consisted of knowingly asking improper questions. In many cases the attorney complained of has persistently pursued a wholly unjustified and prejudicial course of interrogation, notwithstanding objections made and sustained, clearly calling to his attention, if such a thing could be deemed necessary, that the questions asked were without any plausible legal foundation . . . [109 A. L. R. at 1089.]

That was written in 1937. Since then the need for motions *in limine* has steadily increased.[2]

Besides the clear cut situations referred to in the above quotation, many times there is a legitimate difference of opinion between "logical relevancy" and "legal relevancy," which cannot be resolved without the court's ruling.

If prejudicial matters are brought before the jury, no amount of objection or instruction can remove the harmful effect, and the plaintiff is powerless unless he wants to forego his chance of a trial and ask for a mistrial. Once the question is asked the harm is done. Under the harmless error rule many of these matters would probably not be reversible error even though they have a subtle but devastating effect upon the plaintiff's case.

Perhaps the greatest single advantage to a motion *in limine* is not having to object in the jury's presence to evidence which is "logically relevant." Jurors cannot be expected to understand why they should not be allowed to consider *all* evidence which is related to the case, and will usually resent the fact that an objection kept them from hearing it.

Another advantage in the use of these motions is to allow the trial judge an opportunity to study the question and the authorities involved. If presented in advance of trial with a brief and with time to study it, the court will be more inclined to grant the motion.

One of the best arguments for use of a motion *in limine* is that the granting of the motion as worded above cannot be re-

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[2] Condra Funeral Home v. Rollin, 158 Tex. 478, 314 S. W. 2d 277 (1958); Burdick v. York Oil Co., 364 S. W. 2d 766 (Tex. Civ. App., 1963).

versible error.[3] It is only when the evidence is offered out of the presence of the jury and then excluded that possible reversible error occurs. The appeal is taken from the rejection of the evidence tendered, not the granting of the motion. This rule is no different than the rule concerning other evidence questions; that is, in order for a complaint to be made upon appeal, the excluded evidence must be in the record so the appellate court will know what it was and be in a position to determine the effect of its exclusion.

The power of the trial court to grant such a motion is inherent in its right to admit or exclude evidence and will probably not be specifically mentioned in the procedural rules. The *in limine* practice is rapidly growing in Texas[4] and has been at least suggested elsewhere.[5]

Examples of the type of evidence that can be excluded by a motion *in limine* are limited only by the particular facts of each case and by counsel's ingenuity. Some of the more common and obvious situations where the motion could be used fall within the "collateral source rule,"[6] such as medical expenses,[7] sick

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[3] Hartford Accident & Indemnity Co. v. McCardell, 6 Sup. Ct. J. 549, 369 S. W. 2d 331 (Tex. 1963); Aetna Casualty and Surety Co. v. Finney, 346 S. W. 2d 917 (Tex. Civ. App., 1961); Alamo Express, Inc. v. Wafer, 333 S. W. 2d 651 (Tex. Civ. App., 1960).

[4] Bridges v. City of Richardson, 163 Tex. 292, 354 S. W. 2d 366 (1962); Kromzer, Advantages to be Gained by Trial Motions for the Plaintiff, 6 So. Tex. L. J. 179 (1962).

[5] Crawford v. Hite, 176 Va. 69, 10 S. E. 2d 561 (1940), Cook v. Phila. Trans. Co., 414 Pa. 154, 199 A. 2d 446 (1964); Liska v. Merit Dress Delivery, Inc., 250 N. Y. S. 691 (Sup. Ct., 1964); 94 A. L. R. 2d 1087.

[6] O'Connor, The Collateral Source Rule and Full Special Damages, Trial and Tort Trends (1957), at p. 642; 22 NACCA L. J. 159 (1957); 46 Minn. L. R. 669 (1962); 95 A. L. R. 575 (1935); 18 A. L. R. 2d 659; 3 Matthew Bender, Personal Injury Newsletter, at p. 218 (1959).

[7] Paid by insurance:

Chapman v. Evans, 186 S. W. 2d 827 (Tex. Civ. App., 1945);
Graves v. Poe, 118 S. W. 2d 969 (Tex. Civ. App., 1938);
American Cooperage Company v. Clemons, 364 S. W. 2d 705 (Tex. Civ. App., 1963); annot., 13 A. L. R. 2d 355 (1950).

Furnished without charge:

(a) VA Hospital—City of Ft. Worth v. Barlow, 313 S. W. 2d 906 (Tex. Civ. App., 1958); 22 NACCA L. J. 163 (1957).

(b) Servicemen—Annot., 68 A. L. R. 2d 876 (1959); 20 NACCA L. J. 193 (1955); Bell v. Primeau, 104 N. H. 227, 183 A. 2d 729 (1962); 3 Matthew Bender, Personal Injury Newsletter, at p. 225 (1959).

leave and vacation time,[8] social security and pensions,[9] and withholding from salary.[10] By excluding mention of these matters, you not only add to the amount of damages which the jury will award, but you will also prevent yourself from getting in the prejudicial position of having asked the jury to award damages that you have not "actually lost."

Slight materiality on other issues should not make any of the above matters admissible as the prejudicial effect far outweighs any legal relevancy the evidence might have,[11] nor should

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[8] Sick leave paid for by insurance—Texas Cent. Ry. Co. v. Cameron, 149 S. W. 709 (Tex. Civ. App., 1912).

Sick leave paid for by employer:

(a) Voluntarily—Missouri Pac. Ry. Co. v. Jarrard, 65 Tex. 560 (1886); Houston Belt & Terminal Ry. Co. v. Johansen, 107 Tex. 336, 179 S. W. 853 (1915); McCullough Box & Crate Co. v. Liles, 162 S. W. 2d 1055 (Tex. Civ. App., 1942); 21 NACCA L. J. 125 (1956); Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (E. D. Ark. W. D. 1959).

(b) Credited against sick leave or vacation—Mikell v. LaBeth, 344 S. W. 2d 702 (Tex. Civ. App., 1961); Louisville & N. R. Co. v. Utz, 299 Ky. 765, 187 S. W. 2d 439 (1945); Calci v. Brown, 186 A. 2d 234 (R. I., 1962); annot., 52 A. L. R. 2d 1451 (1957).

(c) Serviceman—Bell v. Primeau, *supra* note 7.

Sick leave paid for by partnership—Dumas Milner Chevrolet Co. v. Morphis, 337 S. W. 2d 185 (Tex. Civ. App., 1960).

[9] During disability period only—Texas Cities Gas Co. v. Dickens, 156 S. W. 2d 1010 (Tex. Civ. App., 1941), affd. 140 Tex. 433, 168 S. W. 2d 208 (1943).

After employment ceases—

(a) Railroad retirement fund—Mosby v. Texas & Pac. Ry. Co., 191 S. W. 2d 55 (Tex. Civ. App., 1945); Missouri-Pacific R. R. Co. v. Willingham, 348 S. W. 2d 764 (Tex. Civ. App., 1961); New York, New Haven & Hartford Ry. Co. v. Leary, 204 F. 2d 461 (1st Cir., 1953).

(b) Social Security, pensions and governmental payments—A. H. Bull Steamship Co. v. Ligon, 285 F. 2d 936 (5th Cir., 1960); Price v. United States, 179 F. Supp. 309 (E. D. Va. 1959); Healy v. Rennert, 9 N. Y. 2d 202, 173 N. E. 2d 777 (1961); Labick v. Vicker, 186 A. 2d 874 (Pa. 1962); City of Pueblo v. Ratliff, 327 P. 2d 270 (Colo. 1958); annot. 75 A. L. R. 2d 885 (1961).

[10] Mo.-Kansas-Texas R. R. Co. v. McFerrin, 156 Tex. 69, 291 S. W. 2d 931 (1956); Buckner & Sons v. Allen, 289 S. W. 2d 387 (Tex. Civ. App., 1956); annot. 63 A. L. R. 2d 1393 (1959); Kainer v. Walker, 377 S. W. 2d 613 (Sup. Ct. Tex., 1964); Dixie Feed & Seed Co. v. Byrd, 52 Tenn. App. 619, 376 S. W. 2d 745 (1936); Moyer v. Merrick, 392 P. 2d 653 (Colo. 1964).

[11] On length of disability—Dumas Milner Chevrolet Co. v. Morphis, *supra* note 8; A. H. Bull Steamship Co. v. Ligon, *supra* note 9; Louisville & No. Ry. Co. v. Utz, *supra* note 8; Dibert v. Ross Pattern & Foundry Development Co., 152 N. E. 2d 369 (Ohio App., 1957); Calci v. Brown, *supra* note 8; Clark v. Piccillo, 75 N. J. Super. 123, 182 A. 2d 381 (1962).

On manner in which injury occurred—Green v. Texas & Pac. Ry. Co., 125 Tex. 168, 81 S. W. 2d 669 (1935). Eichel v. N. Y. Central R. R., 375 U. S. 253; 84 Sup. Ct. 316, 11 L. Ed. 2d 307, reversing 319 F. 2d 12 (2d Cir., 1963); Traders and Gen. Ins. Co. v. Reed, 376 S. W. 2d 591 (Tex. Civ. App. 1964).

such evidence be introduced for impeachment purposes since it is on a collateral matter.[12]

In death actions a motion should exclude the remarriage or engagement of the surviving spouse as well as the surviving spouse's income from employment,[13] life insurance, social security, pensions, Veterans Administration pensions, or other matters which would fall under the "collateral source rule." [14] The exclusion of remarriage or engagement of the surviving spouse should also prohibit the defendant's counsel from arguing to the jury in summation that "this nice looking, little girl certainly isn't going to have any trouble finding someone to take care of her."

The personal habits of the plaintiff or the decedent may also be excluded. For example, unless there is direct proof that the decedent or injured plaintiff was intoxicated at the time of the injury, his drinking habits are inadmissible.[15]

Only certain criminal convictions are admissible, usually those involving moral turpitude.[16] A check of the cases in your jurisdiction will disclose that there are many crimes that have been held not to involve moral turpitude. Of course, indictments and charges are never admissible, nor is the fact that your client received a traffic ticket in connection with the collision, or that the opposite party did not receive a traffic ticket.[17]

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[12] Can't impeach on a collateral matter—3 Wigmore on Evidence, Sec. 1001-1003 (3rd ed. 1940); Texas Employers' Ins. Ass'n. v. Yother, 306 S. W. 2d 730 (Tex. Civ. App., n. r. e., 1957); Texas Employers' Ins. Ass'n. v. Garza, 308 S. W. 2d 521 (Tex. Civ. App., 1957).

[13] Gulf C. & S. F. Ry. Co. v. Younger, 90 Tex. 387, 38 S. W. 1121 (1897); Texas Elec. Ry. v. Stewart, 217 S. W. 1081 (Tex. Civ. App., 1920); The City of Rome, In re Ocean S. S. Co. of Savannah, 48 F. 2d 333 (S. D. N. Y. 1930); 24 NACCA L. J. 229 (1959); annot. 30 A. L. R. 121 (1924).

[14] Texas & N. O. Ry. Co. v. Tiner, 262 S. W. 2d 769 (Tex. Civ. App., 1953); Welch v. Ada Oil Co., 302 S. W. 2d 175 (Tex. Civ. App., 1957); Lipscomb v. Houston & T. C. Ry. Co., 95 Tex. 5, 64 S. W. 923 (1901); Lehr v. City of New York, 219 N. Y. S. 2d 308 (1961); 25 NACCA L. J. 345 (1960); annot. 84 A. L. R. 2d 764 (1962).

[15] McCarty v. Gappelberg, 273 S. W. 2d 943 (Tex. Civ. App., 1954); Miller v. Chicago Transit Authority, 3 Ill. App. 2d 223; 121 N. E. 2d 348 (1954); Doyle v. City of New York, 281 App. Div. 821, 119 N. Y. S. 2d 71 (1953); Sanders v. George, 258 N. C. 776, 129 S. E. 2d 480 (1963).

[16] Texas Employers' Ins. Ass'n. v. Yother, *supra* note 12; Texas Employers' Ins. Ass'n. v. Garza, *supra* note 12; annot. 20 A. L. R. 2d 1421 (1951).

[17] Condra Funeral Home v. Rollin, 158 Tex. 478, 314 S. W. 2d 277 (1958); Allen v. Ellis, 191 Kan. 311, 380 P. 2d 408 (1963); 3 Matthew Bender, Personal Injury Newsletter (15), 141 (Oct. 10, 1960), and Vol. 6, No. 6, p. 44 (June 3, 1963); 28 Fordham L. R. 369 (1959); 25 Ins. Counsel J. 480 (Oct. 1948); 38 Tex. L. R. 336; Garland v. Standard Oil Co., 119 Ohio App. 291, 196 N. E. 2d 810 (1963).

Prior claims, prior suits and prior settlements are likewise inadmissible.[18] While the defendant, by pleading aggravation, may go into the details of the extent of the injury, the manner in which the injury occurred, whether by automobile accident or falling off of the front steps of the home, would be immaterial, as would the fact that a lawsuit was filed, a claim or a settlement was made, or the amount of the settlement. None of these matters have any relation to the extent of the injury, but can be very prejudicial to the plaintiff.

The opinions of investigating officers are not always admissible.[19] Most investigating officers are usually firm in their opinions, which carry a lot of weight, and the effect of their opinions can be decisive. A check of the cases in your jurisdiction will determine what opinions are not admissible. For instance, it has been held in Texas that a police officer may not give an opinion concerning the speed of a vehicle based upon the damage done to the vehicles.[20]

Many police departments have a space in their official report form for the officer to estimate the damage to the vehicles. Often this is a very low and conservative estimate since it is usually for statistical purposes only. If this estimate is brought out by the defendant, it can be very prejudicial when you are asking for three or four times more than the police officer estimated. Nearly all police officers, if asked, will admit that they are not qualified damage appraisers and are not qualified to give an opinion as to the value of the damage. However, unless the defendant is instructed in advance not to ask this question or bring out this information, once it is in its effect cannot be removed.

When, where and how the plaintiff engaged his attorney is also inadmissible and can be prejudicial. The fact that he went straight from the accident to an attorney is not material on any

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[18] St. Paul Fire & Marine Insurance Company v. Murphree, 163 Tex. 534, 357 S. W. 2d 744 (1962); Burger v. Van Severen, 188 N. E. 2d 373 (Ill. App., 1963).

[19] Flores v. Barlow, 354 S. W. 2d 173 (Tex. Civ. App., 1962); Chronister v. City of San Antonio, 337 S. W. 2d 223 (Tex. Civ. App., 1960); Figueroa v. Treece, 337 S. W. 2d 400 (Tex. Civ. App., 1960); Flores v. Missouri-Kansas-Texas Railroad Company, 365 S. W. 2d 379 (Tex. Civ. App., 1963); Morlan v. Smith, 380 P. 2d 312 (Kan. 1963); annot. 38 A. L. R. 2d 13 (1954); annot. 66 A. L. R. 2d 1048 (1959); annot. 69 A. L. R. 2d 1148 (1960).

[20] Flores v. Barlow, *supra* note 19; City of Austin v. Hoffman, 379 S. W. 2d 103 (Tex. Civ. App., 1964).

issue the jury will decide. Its only purpose would be to show that the plaintiff was litigious or "claim-minded," which in most jurisdictions is not a legitimate area of proof.[21] However, unless ruled out, these prejudicial matters may be brought in by the defendant.

It would also be to the plaintiff's advantage to prohibit the defendant's attorney from proving that the corporate defendant is a "one-man," or "family" corporation or even a local corporation. Since the plaintiff cannot prove the wealth of the defendant, likewise, the defendant cannot prove its "poverty." [22] The effect of this prejudicial proof is obvious and the defendant should be instructed in advance not to tender such proof.

In third party negligence cases it is not proper to show that the plaintiff was covered by or received workmen's compensation benefits.[23] Likewise, in a Jones Act case it is inadmissible to show that the plaintiff accepted payments under the Longshoremen's and Harbor Workers' Compensation Act.[24]

Another way in which motions in advance of trial are useful is in the situation where "good old" Joe, who has a wife, thirteen kids and a dependent, sick, widowed mother, injures your plaintiff while in the course of his employment for Big Dog Corporation. Oftentimes your suit will be against Big Dog Corporation alone and would not include "good old" Joe as a defendant. Under these circumstances the insurance company is very likely to bring in "good old" Joe as a third party defendant so that the jury will believe that any judgment they enter will be against "good old" Joe and that he will be the one that will ultimately have to pay it.

Under these circumstances a motion to sever should be made upon the following grounds: The joinder is prejudicial to plaintiff[25] and a third party defendant should not be brought in unless the defendant has a cause of action against him. Now, in

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[21] Houston & T. C. Ry. Co. v. Johnson, 103 Tex. 320, 127 S. W. 539 (1910); Martinez v. Williams, 312 S. W. 2d 742 (Tex. Civ. App., 1958); Southern Truck Leasing Corp. v. Manieri, 325 S. W. 2d 912 (Tex. Civ. App., 1959).

[22] Wilmoth v. Limestone Products Co., 255 S. W. 2d 532 (Tex. Civ. App., 1953); annot. 122 A. L. R. 1408 (1939).

[23] Myers v. Thomas, 143 Tex. 502, 186 S. W. 2d 811 (1945); annot. 77 A. L. R. 2d 1158 (1961).

[24] Tipton v. Socony Mobil Oil Co., Inc., 315 F. 2d 660 (5th Cir., 1963).

[25] Goodhart v. U. S. Lines Co., 26 F. R. D. 163 (S. D., N. Y. 1960); Manley v. Standard Oil Co. of Texas, 8 F. R. D. 354 (E. D. Tex., 1948); Bridges v. Wyandotte Worsted Co., 239 S. C. 37, 121 S. E. 2d 300 (1961).

our hypothetical case since Joe is in the course of his employment, he was obviously driving with permission and under the standard omnibus clause of the insurance policy is also an insured under the same policy that is protecting Big Dog Corporation. Since Big Dog Corporation is insured, it will not itself have to pay the judgment and consequently can sustain no loss, and therefore has no cause of action against Joe. Of course, the insurance company that is defending has no cause of action against Joe since he is its own insured.[26]

This motion to sever also has an additional advantage in that it makes Big Dog Corporation's liability policy material and, therefore, discoverable in that this information, as well as the limits, is necessary to establish the fact that Big Dog has no cause of action against "good old" Joe.

Even in those circumstances where you want Joe as a defendant, the cross-action by the employer should be "motioned out." The liability of the employee to the employer is a legal question and is a matter with which the jury is not legitimately concerned. Therefore, it is immaterial to the jury whether or not the employer has cross-acted over against the employee. Its only effect can be to prejudice the plaintiff's case and a motion should be granted instructing the employer not to read its pleading on the cross-action to the jury or to allow the jury to know that the employer is seeking a judgment over against the employee.

Another common situation in which similar motions can be very useful is in a suit for injuries to a minor. In such a suit the manner in which the minor rode or drove his vehicle prior to the collision,[27] or whether he was unlicensed, would not be material in the suit against the minor.[28] However, the defendant will often claim as a defense to the parents' suit for medical expenses and the damages which they have sustained by reason of the minor's injury that the parents were negligent in allowing the minor to drive or ride a bicycle, motor scooter or automobile, because they either knew or should have known that he was a careless, unlicensed, reckless driver. Even though

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[26] Buckholz v. Michigan Motor Freight Lines, 19 F. R. D. 407 (E. D. Mich., 1956).

[27] Mrs. Baird's Bakeries, Inc. v. Roberts, 360 S. W. 2d 850 (Tex. Civ. App., 1962); annot. Gahring v. Barron, 133 S. E. 2d 403 (Ga. App. 1963).

[28] Annot. 29 A. L. R. 2d 963 (1953).

the court would instruct the jury that such evidence was not to be considered insofar as the minor's case is concerned, the prejudicial effect could not be removed.

However, such an allegation is immaterial to the final determination of the lawsuit and should be "motioned out." Even assuming that the parents were negligent, even negligent *per se,* in allowing the minor to ride or drive a vehicle, nevertheless, as a matter of law their negligence is not a proximate cause of the collision unless the minor was negligent in some specific manner at the time of the collision. This law has been established under the negligent entrustment cases where recovery has been attempted against the employer or owner of the car for entrusting it to an unlicensed, careless or reckless driver. In those situations the courts have usually held that the negligent entrustment cannot be a proximate cause as a matter of law unless the driver was negligent at the time of the collision.[29]

In our parent-child situation, since the negligence of the child is a complete bar to the parents' recovery, the parents' negligence in entrusting the vehicle to the child could never be material to the outcome of the case. In other words, their negligence could not be a proximate cause unless the child was negligent at the time of the collision, and if the child was negligent at the time of the collision, the parents could not recover anyway.

In analogous situations,[30] plaintiffs have alleged that the employer was negligent in allowing the employee to drive its vehicle because he was a careless, reckless, dangerous driver, in the hope of proving the employee's bad driving record at the time of trial. However, in these cases the employer stipulated that at the time of the collision the employee was in the course of his employment and therefore it was responsible for his negligence. The employer therefore argued that since their negligent entrustment could not be a proximate cause of the collision unless the employee was negligent, and since they were liable

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[29] Mundy v. Pirie-Slaughter Motor Co., 146 Tex. 314, 206 S. W. 2d 587 (1947); Spratling v. Butler, 150 Tex. 369, 240 S. W. 2d 1016 (1951); McIntire v. Sellers, 311 S. W. 2d 886 (Tex. Civ. App., 1958); Carter v. Montgomery, 226 Ark. 989, 296 S. W. 2d 442 (1956); annot. 69 A. L. R. 2d 978 (1960).

[30] Ferris v. Stableford, 248 S. W. 2d 186 (Tex. Civ. App., 1952); Luvual v. Henke & Pillot, Div. of Kroger Co., 366 S. W. 2d 831 (Tex. Civ. App., 1963); City of Austin v. Hoffman, *supra* note 20; City of Houston v. Watson, 376 S. W. 2d 23 (Tex. Civ. App., 1964).

anyway if he was negligent, their negligent entrustment was not material to the case and such allegations and proof was therefore excluded. This same reasoning can be used in the parent-child case to exclude all evidence concerning the prior propensities of the child.

There are many other uses that could be made of motions *in limine* and similar motions in advance of trial. Each case will be different. It is hoped that these random examples have stimulated your thinking and given you some idea of the advantages that can be gained from the use of such motions.