

## Evidence of Character, Habit, and "Similar Acts" in Wisconsin Civil Litigation

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# EVIDENCE OF CHARACTER, HABIT, AND “SIMILAR ACTS” IN WISCONSIN CIVIL LITIGATION

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## INTRODUCTION

The subject of character-related evidence has haunted the law for centuries. Aptly described by the Supreme Court in a leading case as a “grotesque structure,”<sup>1</sup> its Byzantine subtleties have long bedeviled courts, eluded lawyers, and mystified law students.

This archaic system of rules has its origin in the common law. Somewhat surprisingly, recent statutory efforts to modernize the law of evidence did little to simplify or clarify their operation. The Wisconsin Rules of Evidence, based upon the Federal Rules of Evidence, accomplished little more than a restatement of the common law edifice. Although they jettisoned some of the more anachronistic features, these modern revisions incorporated the bulk of the complex mechanisms of the common law. Moreover,

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1. *Michelson v. United States*, 335 U.S. 469, 486 (1948).

these efforts created additional problems because the rules did not embrace the entire structure of the common law scheme. Some of the most intractable features and difficult problems of character evidence were entirely ignored, thus creating even more flux and uncertainty.<sup>2</sup>

Since their enactment in 1974, the trial bar and the courts have struggled with the implementation of the Wisconsin Rules of Evidence. The rules on their face are unclear and sometimes inconsistent. They are a challenge to apply correctly, even in the comfort of a library. Within the dynamic of trial, the effort is often futile.

The difficulties created by this situation have a multiplier effect on the law of evidence. When parties struggle to apply a decidedly imperfect body of law, the result is usually a convoluted and incomplete trial court record. It is from this record that the appellate court must conduct its evidentiary autopsy to determine whether the rules were accorded appropriate fealty. Since the trial record may simply mirror the confusion of the parties at trial, the appellate court's task of then applying an imperfect set of rules to a jumbled trial court record may result in an opinion which further exacerbates this situation.

The purpose of this article is to explore the subject of character-related evidence in civil litigation. It will survey the applicable rules and the Wisconsin cases interpreting the Wisconsin Rules of Evidence.

The decision to focus on civil applications is based on several factors. First, courts and scholarly commentaries have centered on the criminal application. Despite the rivers of ink spilled on the use of character-related evidence rules in criminal litigation, abuses and confusion still predominate.<sup>3</sup> The relative dearth of authority in the civil context may make it easier to put this house in order. Second, it appears that one reason for the inattention to character-related evidence in civil cases may arise from a failure to recognize the implications of these rules in the civil context. The civil cases evince a tendency to submerge character concerns into doctrines relating to "habit," "routine practice," and the admissibility of "similar accidents."<sup>4</sup>

A subsidiary goal of this article, then, will be to bring these implications to light and attempt to rationalize the admissibility of at least some of this evidence within the framework of the rules. In attempting this task, it is

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2. See, e.g., *infra* text accompanying notes 5-13.

3. See, e.g., Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 580 (1985).

4. Reed, *The Pushy Ox: Character Evidence in Pennsylvania Civil Actions*, 58 TEMP. L.Q. 623, 623 (1985).

recognized, as Judge Learned Hand suggested, that the "system may work best when explained least."<sup>5</sup>

The term "character-related evidence," as used in this article, embraces not only the various uses (permissible and impermissible) of character evidence, but also concepts which are closely associated, such as evidence of other accidents or injuries, habits, and routine practices. The first subject discussed is the meaning of "character" in the law of evidence. After exploring the confusion and vagaries surrounding this elemental concept, the focus will shift to the uses to which character may be put in civil trials. This includes the possible uses of character:

1. to show the trustworthiness of a witness;
2. as circumstantial evidence that the subject acted in conformity with the character trait;
3. as relevant to some proposition other than the inference from character to conduct in conformity; or
4. where character itself is an element of the claim or the defense.

The next section will discuss the use of evidence of other acts, wrongs, or accidents to prove (ostensibly) something other than the subject's character. In particular, the emphasis will be on the admissibility of evidence of "similar acts." Finally, there is an examination of the interplay between the concept of character and those concepts relating to "habit" and "routine practice."

## I. THE MEANING OF CHARACTER IN THE LAW OF EVIDENCE

Courts, commentators, and legislatures have neither defined the concept of "character" with any precision nor furnished a list of recognized traits.<sup>6</sup> The law of evidence uses "character" to broadly refer to a person's disposition or generalized propensity to behave in a certain manner.<sup>7</sup> Modern evi-

5. *Michelson*, 335 U.S. at 481 n.18.

6. See R. ALLEN & R. KUHN, *AN ANALYTIC APPROACH TO EVIDENCE* 230-32 (1989).

7. See C. MCCORMICK, *EVIDENCE* § 195, at 574 (3d ed. 1984); see also Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 *IOWA L. REV.* 777, 779 (1981).

The American Law Institute's Model Code of Evidence defined "character" as follows: "Character as used in these Rules means the aggregate of a person's traits, including those relating to care and skill and their opposites." AMERICAN LAW INSTITUTE, *MODEL CODE OF EVIDENCE* Rule 304 (1942).

Professor Uviller offered the following observations about the meaning of character:

In the simplified lexicon of evidence law, "character" may be understood to be a collection of "traits," each a self-contained packet of potential conduct consistent with previously observed reactions to events, people, or things. These behavioral fragments are organized according to our English vocabulary; the items of behavior composing each trait cluster about a common descriptive term such as "forgetful," "aggressive," or "honest."

dentiary codes have made no concerted attempt to further refine this murky definition. Character, then, is not formally identified in the law of evidence with any particular school of scientific or psychological thought.<sup>8</sup> It represents more the ruminations of fireside psychology than it does the product of the "mind sciences."<sup>9</sup>

Despite the lack of a rigorous definition, the case law is peppered with examples of character "traits." Courts have imbued human beings with traits of "lawfulness," "peacefulness," "violence," "trustworthiness," "honesty," and "goodness."<sup>10</sup> Left undiscussed is the nature and psychological source of these traits, or any insight into how or why these traits affect human behavior. It appears that these traits are simply a given; that is, the existence of "character" is one of the underlying epistemological assumptions of the law of evidence.<sup>11</sup> Regardless of what the mind sciences have

By our careless usage, many of these linguistic boxes have lost their integrity. A term thought to describe a discrete and persistent element of personality, such as "law-abiding" or "cautious," may arise from a wide range of behavioral events or attitudes, and affords only the crudest index for the prediction of a given act consistent with it. The semantic problem of precision and narrowness in the categorization of character traits may be an important feature in the reluctance of the law of evidence to appreciate the value of character evidence; as such it deserves further attention . . . ."

Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 849 (1982).

8. Its closest counterpart in modern psychology is the school of "trait" psychology. The field of psychology is thoroughly splintered into different "schools" each offering vastly different explanations for, and conceptions of, human behavior, perception and memory. See R. GATCHEL & F. MEARS, *PERSONALITY: THEORY, ASSESSMENT AND RESEARCH* 159 (1982) (discussing the various schools of trait psychology).

Recently, psychologists have attempted to assess the impact of "character" evidence on jury decision making. See Borgida, *Character Proof and Fireside Induction*, 3 LAW & HUM. BEHAV. 189 (1979).

9. When looking for insight into the meaning of character, one should begin with literature from the eighteenth and nineteenth centuries before perusing the pages of modern psychology texts. The history of "character" in the law of evidence has yet to be traced adequately and is certainly worthy of additional research. It appears that character played an increasingly important role in the eighteenth and nineteenth centuries, particularly in the business sector and in academic institutions. See P. HALL, *THE ORGANIZATION OF AMERICAN CULTURE, 1700-1900: PRIVATE INSTITUTIONS, ELITES, AND THE ORIGINS OF AMERICAN NATIONALITY* 90 (1984) (discussing the significance of "character" and "character training" in the development of large-scale business organizations in the 19th century: "Character by the 1820s had come to mean those aspects of personality that rendered an individual dependable and predictable, disciplined and internally controlled.").

10. See generally C. McCORMICK, *supra* note 7, ch. 17.

11. See W. TWINING, *THEORIES OF EVIDENCE: BENTHAM & WIGMORE* 12-18 (1985). One can speculate that perhaps part of the reason underlying the skepticism displayed by courts toward the mind sciences of late arises from a clash of epistemological paradigms. See, e.g., Gold, *Psychological Manipulation in the Courtroom*, 66 NEB. L. REV. 562 (1987). In short, the "psychology" which underlies the law of evidence may not always coincide with modern psychological

revealed, the law assumes that human beings possess character traits.<sup>12</sup> Moreover, there is an unverified assumption that people act, at least sometimes, in accordance with these character traits.

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research. This is explicable, in part, by the myriad of different schools of psychology. Faced with these conflicts, the courts sometimes react by ignoring the psychological studies and relying on "common-sense." See Camper & Loft[u]s, *The Role of Psychologists as Expert Witnesses in the Courtroom: No More Daniels in the Lion's Den*, 9 LAW & PSYCHOLOGY REV. 1 (1985); McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 21-27 (1987). This election may seem rather luddite in nature, but it may be reasonable given the lack of consensus on human thought and behavior in the field of psychology. See R. GATCHEL & F. MEARS, *supra* note 8.

This writer's tentative research suggests that "character" should be considered an axiom of the law of evidence regardless of its status in modern psychology. In this sense, the concept of "character" is a cultural and social phenomenon describing our proclivity as human beings to attach various labels to other individuals. It is a fact of everyday life that we generalize about other people and commonly solicit the "opinions" of those we respect regarding what they think of certain people. This is simply a very efficient way of processing information and making decisions. Regardless of whether human beings actually have "general dispositions" and conform their behavior to these dispositions with any regularity, the important thing is that our culture assumes this to be true. We seek out this information and act on it. Our confidence in its accuracy and reliability is often dependent upon our own opinion of the source. In short, "character" may very well be no more than the sum and substance of what other people think of us. Under this view, any distinction between the methods of proving character (reputation and opinion) and the character trait itself is illusory. See M. SAKS & R. HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 161-62 (1978).

To some degree this view may be seen in the development of the different modes of proving character. At common law, character could be proven solely through "reputation," which amounted to community gossip or opinion about the subject. Modern evidence codes recognize the validity of "proving" character through personal opinion as well, primarily because reputation is often no more than an ill-disguised personal opinion by the witness anyway.

Viewed in this light, the law's hostility toward the use of character evidence as a basis to infer conduct in conformity is well placed. Although character provides a quick and efficient means of measuring people in a social setting, it is resorted to primarily in the absence of other information on which to make a decision. Its suitability in social, business, or political settings does not mean that it is an appropriate basis on which to make a decision at a trial. Generalizations about character are helpful when deciding important matters such as whether to hire a given individual. Job references, for example, serve much the same function as character evidence. But our trial system deems it unacceptable to predicate findings of civil or criminal liability for an event on this kind of information alone. Moreover, the law of evidence has developed in such a way as to strictly curb even the limited use of this evidence. What may be acceptable and necessary in every day life may not be desirable in the courtroom, where other standards of rationality are thought to hold sway.

12. There are two inferences bound up in the use of "character evidence" as circumstantial evidence of conduct: (1) the inference from opinion, reputation or other act to "character," and (2) the inference from character to conduct in conformity. The first inference is particularly tenuous where specific instances form the only basis for the character trait. But difficulties with this first inference are usually overshadowed by the weakness of the second, which often provides an easier basis for excluding the evidence. Courts do not have to grapple with the difficult question of whether there is sufficient evidence that an individual possesses some character trait if the second inference (from character to conduct in conformity) is proscribed by the law, which is generally the situation. See *infra* notes 37-45 and accompanying text.

The absence of a workable definition of "character" has important collateral effects on the law of evidence. In criminal cases, the trial court may admit only evidence of "pertinent" character traits as circumstantial evidence of conduct.<sup>13</sup> Without a definition of "character," however, it is unclear what basis courts use to distinguish between the various "character" traits to arrive at the pertinent ones.

More importantly, in civil and criminal cases, evidence of "other acts, wrongs or crimes" may be admitted if relevant to show something other than conduct by the actor in conformity with a character trait. For example, a person's prior acts are often introduced to show that the person was aware of something related to the acts and not for any aspersions the evidence may cast on the individual's character.<sup>14</sup> But the vagaries surrounding the concept of character make it exceedingly difficult to rationally separate the permissible uses of the evidence from the impermissible use of the evidence to show a propensity to behave in a certain way.

In civil litigation the absence of a clear conception of character creates still other problems. The amorphous nature of character makes it difficult to distinguish from related constructs, such as habit or routine practice. Since habit evidence is admissible to prove conduct in a civil case, the ban against the use of character to prove conduct is often skirted by parading character evidence in the guise of habit evidence.<sup>15</sup>

In summary, "character" is an ill-defined and vague term. It may describe little more than our tendency as human beings to generalize about other people. We label others as "sloppy," "dishonest," "diligent," and "good." We recognize, however, that such generalizations are often unfair and poor indicators of what the person will do or has done on a given occasion. The extremely low probative value of this evidence, combined with its tendency to inject extraneous collateral matters, justifies the limited play it is given at trial.

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13. WIS. STAT. § 904.04(1) (1987-88). Only the defendant may introduce proof of his own pertinent character trait for purposes of proving conduct in conformity with that trait. The prosecution is then free to rebut the character evidence initiated by the defendant but only where the defendant initiated the proof of character. The same is true with respect to the character of a victim, except in homicide cases where the prosecution may introduce evidence of the victim's "peaceful" disposition to rebut evidence that the victim was the first aggressor. The mode of proof is controlled by Section 904.05.

14. See Comment, *Wisconsin's Uncharged Misconduct Evidence Rule: An Analysis of Section 904.04(2)*, 73 MARQ. L. REV. 319 (1990).

15. See *infra* text accompanying notes 87-93.

## II. CHARACTER EVIDENCE IN CIVIL LITIGATION

Character evidence may be admissible in civil cases depending upon the proposition it is used to prove. There are four potential uses of character evidence in a civil trial. They relate to: (1) the character of a witness for truthfulness; (2) the circumstantial use of character to prove conduct;<sup>16</sup> (3) the circumstantial use of character to prove something other than conduct; and (4) proof of character where character is "at issue."

### A. A Witness' Character for Truthfulness

Wisconsin evidence law permits the impeachment of a witness' character for truthfulness through different forms of evidence. Section 906.08 of the Wisconsin Statutes governs the use of reputation and opinion testimony as well as the use of specific instances of conduct which bear on the witness' character for truthfulness. The admissibility of prior criminal convictions offered to impeach is governed by Section 906.09. Each of these forms of evidence will be discussed in turn.

#### 1. Reputation, Opinion, and Specific Instances

Proof of character may be offered if relevant to the credibility of a witness. This subject is controlled by several provisions of the Wisconsin Rules of Evidence which apply in civil and criminal cases alike.

Section 906.08 allows the use of reputation or opinion testimony for the purpose of attacking or supporting the credibility of a witness. This involves the use of character witnesses; that is, witnesses who testify about the truthfulness of other witnesses.<sup>17</sup> A character witness will either offer a

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16. The character of a witness for truthfulness is a subset of the circumstantial use of character to prove conduct. It is discussed separately because the common law courts and modern evidence codes developed special rules which apply only to character for truthfulness and have accorded it wider admissibility in trials. See *infra* notes 17-36 and accompanying text.

17. Typically, the character witness is called to testify about the credibility of another witness (the subject), although a witness could in theory testify about his own reputation. The foundation for such testimony is fairly perfunctory, but occasionally courts and trial lawyers confuse reputation with opinion and create unnecessary problems. See, e.g., *State v. Cuyler*, 110 Wis. 2d 133, 139, 327 N.W.2d 662, 665 (1983) (trial court and attorneys confused reputation with opinion testimony, erroneously believing that only the former was admissible).

The foundation for testimony about the reputation of another witness for truthfulness requires a showing that the witness is familiar with the subject in some social setting (home or workplace), that other people have "discussed" the subject's pertinent trait, and that the witness overheard their discussion. See Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 513-18 (1939).

The foundation for opinion testimony about the truthfulness of the subject witness requires a showing that the character witness knows the subject personally and well enough to express a personal opinion about the subject's truthfulness. Since specific instances of conduct may only be



personal opinion about the subject witness' character for truthfulness or testify about the subject's reputation in the community for truthfulness.<sup>18</sup>

More problematic is the use of specific instances of conduct to prove the witness' "untruthful" character. Section 906.08 limits inquiries about specific instances to cross-examination. Extrinsic evidence is not permitted to impeach the witness' testimony.<sup>19</sup> In short, the cross-examiner must take the witness' answer.<sup>20</sup>

Moreover, the specific instances of conduct must be relevant to a character trait for truthfulness. This character trait may be that ascribed to the witness testifying, or to the subject witness whose character for truthfulness is at issue.<sup>21</sup> At common law, a witness' credibility could be impeached with any bad act by the witness, even if the bad act had no direct bearing on

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inquired into on cross-examination, they may not be used on direct examination under the guise of qualifying the personal opinion. See FED. R. EVID. 405, Advisory Committee's Note.

18. Section 906.08 of the Wisconsin Statutes is worded in terms of character for "truthfulness." The term should not, however, be accorded talismanic significance. Questions about the subject's "honesty" or "believability" are closely related and virtually indistinguishable. The same is not true of inquiries about "goodness" or "lawabidedness," which carry different connotations. The point is that the testimony should bear on the subject's capacity and propensity to tell the truth.

19. "Extrinsic evidence" is undefined in the Wisconsin Rules of Evidence. It refers simply to testimony by a witness other than the one being cross-examined, or to the introduction of documents. In short, it refers to evidence other than that gleaned from the cross-examination of the witness. See C. McCORMICK, *supra* note 7, § 33, at 73:

The process of impeachment may be employed in two different stages. First, the facts discrediting the witness or his testimony may be elicited from the witness himself upon cross-examination. Certain kinds of attack are limited to this stage; it is said, "You must take his answer." Second, in some situations, the facts discrediting the witness are proved by extrinsic evidence, that is, the assailant waits until the time for putting on his own case in rebuttal, and then proves by a second witness or by documentary evidence, the facts discrediting the testimony of the witness attacked.

*Id.* (citations omitted).

Extrinsic evidence is barred by Section 906.08 only where it is offered as bearing on the witness' character for truthfulness. It may be received where other modes of impeachment are used. For instance, Section 906.13 contemplates the use of extrinsic evidence to prove that the witness has made a prior inconsistent statement. Extrinsic evidence may always be used to show a witness' bias. See *McClelland v. State*, 84 Wis. 2d 145, 155, 267 N.W.2d 843, 848 (1978).

20. Although the cross-examiner must ultimately take the answer and may not resort to extrinsic evidence to impeach, this does not mean that the witness can be asked only once about the incident. The trial court has the discretion to allow the cross-examiner to press the witness in an attempt to get the witness to back down from the initial denial, or to paint the denial itself as incredible or suspect. WIS. STAT. § 906.11; see 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 608[05], at 608-30 (1988).

21. For instance, assume Witness A testifies that in her opinion Witness B is a trustworthy person. On cross-examination Witness A may be asked about specific incidents in her own life which are pertinent to her character for truthfulness. She may also be questioned about specific incidents of Witness B's conduct which are relevant to Witness B's character for truthfulness.

honesty.<sup>22</sup> Section 906.08 requires, however, that the act be “probative” of truthfulness, meaning that it must have some bearing on a propensity to tell the truth. Particular instances of lying, cheating, or other acts of dishonesty are within the orbit of the rule.<sup>23</sup>

The requirement that the cross-examiner must take the answer, and thus cannot offer extrinsic evidence of the specific act, creates a peculiar situation. Where the witness denies the occurrence of the particular event, the question alone insinuates the matter to the jury. The trier of fact might well speculate that some truth lurks behind the question, regardless of the witness’ negative response or instructions to the effect that statements of counsel are not evidence. To prevent abuses, it is suggested that trial courts require a showing, outside the presence of the jury, that a good faith basis exists to inquire regarding the specific instance.<sup>24</sup> This procedure will preclude baseless forays attempting to accomplish little more than to either “get lucky” or unfairly sully the witness before the jury.

## 2. Impeachment by Prior Criminal Conviction

A witness’ character for truthfulness can also be attacked through proof of prior convictions pursuant to Section 906.09. Although this form of impeachment exists in all jurisdictions, Wisconsin’s approach is so unique that Wigmore dubbed it a “queer rule.”<sup>25</sup> In essence it is a “counting rule” by which the jury is informed only of the fact that the witness has been convicted of a crime and the number of prior convictions. No further information concerning the criminal record or the nature of the crimes is imparted to the jury, except where the witness is evasive about either the existence or number of convictions.

The procedure followed in Wisconsin works as follows: A party intending to impeach a witness with evidence of prior criminal convictions must first bring the matter to the court’s attention outside the presence of the jury. The trial court must then hold a hearing to determine the existence and extent of the criminal record and the admissibility of any convictions for impeachment under Section 906.09.<sup>26</sup> Specifically, the trial judge

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22. C. MCCORMICK, *supra* note 7, § 42, at 90.

23. 3 J. WEINSTEIN & M. BERGER, *supra* note 20, ¶ 608[05], at 608-45 (listing examples).

24. See *Michelson v. United States*, 335 U.S. 469, 481 n.18 (1948).

25. *State v. Rutchik*, 116 Wis. 2d 61, 76 n.9, 341 N.W.2d 639, 646 n.9 (1984) (quoting 3A J. WIGMORE, EVIDENCE § 987, at 910 (Chadbourn rev. 1970)).

26. WIS. STAT. § 906.09(3). The hearing is mandatory. *Gyrion v. Bauer*, 132 Wis. 2d 434, 438, 393 N.W.2d 107, 109 (Ct. App. 1986) (“We conclude that § 906.09(3) prohibits the introduction of any evidence with respect to criminal convictions until the trial court has ruled on the admissibility of the evidence.”).

must be satisfied that in fact there is sufficient evidence establishing the witness' prior criminal conviction.<sup>27</sup> The judge must then determine which convictions will be allowed for impeachment purposes.

There is no requirement that the prior convictions themselves have a bearing on the witness' truthfulness. Wisconsin law embraces the idea that people convicted of crimes are, as a class, deemed less worthy of belief than those with no criminal record. The rule may also emanate from the public policy concern that a witness with a criminal background should not be allowed to hold himself out to a jury as having led a blameless life. This follows from the observation that a jury, unless otherwise informed, will ordinarily assume that a witness has no prior record. Thus, the rule seems to also function as a protection against unwarranted inferences of good character.<sup>28</sup>

The assumption built into Section 906.09 is that the longer the record, the less truthful the individual.<sup>29</sup> This reasoning applies regardless of the nature of the prior conviction. For example, a prior homicide or burglary conviction may be used to impeach a witness; it is not necessary to demonstrate any particular link between the prior conviction and the individual's character for truthfulness. In order to safeguard against the misuse of this evidence, the jury is told only of the existence and number of convictions.<sup>30</sup>

Under Section 906.09, then, the nature of the crime is important only with respect to the passage of time between the conviction and the time of testimony. Since Wisconsin law posits a direct relationship between the fact of conviction and a person's character for truthfulness, it seems to follow that there is an indirect relationship between the passage of time and the

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27. The existence of a criminal record and its admissibility to impeach should be considered preliminary questions of admissibility for the trial judge to decide by a preponderance of the evidence. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); WIS. STAT. § 901.04(1).

28. A parallel is found in Section 906.08. The proponent of a witness cannot introduce evidence of the witness' character for truthfulness until that quality has been controverted by the opponent. In part, this rule is based on the notion that a jury will assume the witness' basic veracity until contrary information is brought to its attention. See C. MCCORMICK, *supra* note 7, § 49, at 115.

29. *Nicholas v. State*, 49 Wis. 2d 683, 688, 183 N.W.2d 11, 14 (1971).

The fact of prior convictions and the number thereof is relevant evidence because the law in Wisconsin presumes that one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted. In addition, the number of prior convictions is also held to be relevant evidence on the issue of credibility because the more often one has been convicted, the less truthful he is presumed to be. This presumption obtains in both civil and criminal litigation.

*Id.* (citation omitted).

30. The danger of misuse involves the risk that the jury will use the testimony for something other than assessing the witness' veracity. In particular, the fear is that the trier of fact will infer that the witness has a propensity for engaging in bad or harmful conduct.

nature of the conviction. For example, misdemeanor offenses carrying nominal dispositions such as a fine or a weekend in jail would seem to lose whatever probative value they have after a passage of eight or ten years with no intervening contacts. A conviction for a serious felony which carries a prison sentence, such as armed robbery, retains its probative value for a much longer period of time.<sup>31</sup> Where multiple convictions exist, and the court is determining whether they can be used for impeachment, consideration should be given not only to the nature of the convictions, the passage of time between the convictions and the time of the testimony, but also to the frequency of the convictions. The final count of convictions is a product of the trial court's discretion based on the particular facts of the case.

Once the trial court determines the number of convictions that can be used, and while still outside the jury's presence, it should instruct the witness and the parties about the permissible limits of impeachment. Wisconsin law contemplates two questions on this subject: (1) "Have you ever been convicted of a crime?"; and (2) "How many times have you been convicted?" In short, the only relevant inquiries involve the existence and the number of convictions as determined by the trial court. The witness should be told by the judge how to answer these questions so that the testimony

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31. Obviously, this exercise of discretion lacks mathematical precision and is subject to the fluid balancing test of Section 904.03 of the Wisconsin Statutes. Although the prime consideration is the passage of time, the court should also consider the nature of the conviction in light of the lapse of time. As a rule of thumb, the less serious the offense, the more attenuated over time is its value as impeaching evidence. This approach seems justified in light of the converse proposition, recognized in *Nicholas*, 49 Wis. 2d at 688, 183 N.W.2d at 14, that the more convictions, the less trustworthy the witness.

When assessing the passage of time, it should be remembered that Wisconsin's Section 906.09, unlike Rule 609 of the Federal Rules of Evidence, does not set forth any time limits for gauging the admissibility of prior convictions. Rule 609(b) subjects convictions which are older than 10 years to special scrutiny:

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

This is fully justified since, under federal impeachment practice, the jury is informed of the nature of the conviction. See *infra* note 35 and accompanying text. Given the critical differences in the wording of Wisconsin's Section 906.09 and Rule 609 of the Federal Rules of Evidence, as well as the disparate impeachment practices, neither the federal case law precedent on this point nor the ten-year rule should control the administration of Section 906.09.

before the jury does not become sidetracked into collateral inquiries about the nature of the criminal record.<sup>32</sup>

The rule allows the impeaching party to go beyond the two questions if the witness' response to them is "wrong" or so equivocal as to appear deceptive.<sup>33</sup> In this event, the cross-examiner is allowed to explore the nature and date of the conviction in the presence of the jury for the limited purpose, in theory, of fleshing out the correct number of convictions. Upon request, the jury should be instructed that the prior convictions cannot be used for any purpose other than impeachment.

This procedure applies in civil and criminal trials. Certain problems have recurred in the civil context, however, which seem to indicate that the practice is followed more rigorously in criminal trials than in civil cases. These problems occur where the parties fail to conduct a subsection 906.09(3) hearing and the cross-examiner went beyond the two permissible questions primarily because a dispute arose over the proper number of prior convictions.<sup>34</sup>

If proper procedures are followed this collateral inquiry should almost never occur. The purpose of the subsection 906.09(3) hearing is to resolve such matters. Once the judge determines the number of convictions which may be used to impeach the witness, the judge should tell the witness how to answer the two questions. Similarly, the parties are then placed on notice with respect to what information can be put before the jury. If the witness answers the two questions as directed by the judge, this ends the inquiry.

Clearly, the Wisconsin "counting rule" is radically different from the federal practice. Under the corresponding federal rule, impeachment by prior conviction involves disclosing the nature of the conviction to the jury.<sup>35</sup> The judge then instructs the jury that the prior conviction may be

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32. *Rutchik*, 116 Wis. 2d at 66, 341 N.W.2d at 642.

33. *Nicholas*, 49 Wis. 2d at 689, 183 N.W.2d at 14.

34. *Voith v. Buser*, 83 Wis. 2d 540, 544, 266 N.W.2d 304, 306 (1978); *Gyrion*, 132 Wis. 2d at 437, 393 N.W.2d at 109. The need for a subsection 906.09(3) hearing is particularly critical in civil cases, because the existence of the witness' criminal record may turn on the recollection of the witness and diligence of counsel in turning up supporting documentatios. In criminal cases the process is usually expedited because police officers can run record checks on witnesses. Without this "luxury" in civil cases, the court must closely scrutinize the evidence that is presented.

35. In *Green v. Bock Laundry Mach. Co.*, 490 U.S. \_\_\_, 109 S. Ct. 1981, 1992-93 (1989), the Court held that a witness' felony conviction occurring within ten years of the date of testimony is automatically admissible for impeachment purposes. This evidence is not subject to any balancing test set forth in Rules 609 or 403 of the Federal Rules of Evidence. Following the opinion in *Green*, the Supreme Court amended Rule 609 to allow application of the Rule 403 balancing test to all witnesses (other than the criminal defendant). 110 S. Ct. CXXXI (effective December 1, 1990).

used only to assess the witness' credibility and not for any other purpose. This model of prior crimes impeachment ordinarily demands that some linkage be shown between the nature of the conviction and the character trait for trustworthiness. Wisconsin's categorical approach obviates the need for such a showing because the jury is not informed of the nature of the conviction in the usual case.

Any form of impeachment by prior criminal conviction raises the risk that the jury might use the evidence for improper purposes. The Wisconsin practice may, however, more effectively reduce the risk precisely because the jury is deliberately kept ignorant about the nature of the criminal record. The counting rule is calculated to alert the jury to the fact that the witness has a criminal past, but literally leaves the jury guessing about the nature of the crimes. The jury's palpable ignorance of the criminal record carries its own warning against using the evidence for forbidden purposes. The counting rule is an especially effective compromise where the prior conviction concerns conduct which is closely related to the controversy being tried.<sup>36</sup>

### *B. Character as Circumstantial Evidence of Conduct in Civil Cases*

The law of evidence reflects society's penchant for attaching character labels to individuals. An inevitable by-product of this labelling process is the temptation to infer that the individual has acted (or will act) in conformity with that character trait on other occasions. For example, we often speak of people who are "poor drivers" or who are "careless." From this generalized disposition the inference can be made that the subject drove poorly or acted carelessly on a given occasion.

Although seductively easy to draw, the inference is often a weak one. A poor driving record does not mean inexorably that every accident the subject is involved in, or even a majority of them, is his fault.<sup>37</sup> The danger is that the trier of fact might give this evidence more weight than it deserves, particularly in the absence of other compelling evidence bearing on the specific matter under litigation. It has also been observed that this kind of evidence might serve to dilute the burden of proof, making it "easier" for

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36. See, e.g., *Voith*, 83 Wis. 2d at 546, 266 N.W.2d at 304 (civil assault action sparked by a quarrel over a credit card in a store; held that it was error to inform the jury that the defendant had been convicted of a criminal offense involving a credit card twenty-three years earlier; "[t]he prior conviction, improperly admitted, could only have the effect of prejudicing the jury by indicating a propensity to commit a crime involving the misuse of a credit card.").

37. For a discussion of "carelessness" and accident proneness, see C. McCORMICK, *supra* note 7, § 189, at 554.

triers of fact to decide against a party with a tarnished background.<sup>38</sup> Finally, the courts have been justifiably concerned about the amount of time and resources that may be invested inquiring into an area bearing such marginal probative value.<sup>39</sup>

For these reasons, Section 904.04 precludes the use of character evidence in civil cases as circumstantial proof that the person acted in conformity with that character trait on a particular occasion.<sup>40</sup> This use of character evidence is restricted solely to criminal cases under the scenarios described in subsection 904.04(1).<sup>41</sup> In civil cases, the sole exception concerns a witness's character for truthfulness, as discussed in the preceding section.

There is, however, some authority from other jurisdictions which supports the circumstantial use of character to prove conduct in civil cases where the underlying action concerns a fraud or other quasi-criminal conduct.<sup>42</sup> Although the Wisconsin courts have not had the opportunity to

38. R. LEMPERT & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 162 (2d ed. 1983).

39. When character is placed in contention, the door is opened to a parade of witnesses with opinions or knowledge, real or imagined, of the subject's reputation in the community. Besides the time that is devoted to this testimony on direct examination, the cross-examiner may wish to delve into unsavory specific instances of contrary behavior by the subject. *See* WIS. STAT. § 904.05(2). Not only does this divert the attention of the trier of fact, but court time will inevitably be spent hashing out the permissible boundaries of such a cross-examination, since the proponent will most likely object to any such assault.

40. C. MCCORMICK, *supra* note 7, § 189, at 556 ("The prevailing pattern now is to exclude all forms of character evidence in civil cases where the evidence is employed merely to support an inference that conduct on a particular occasion was consistent with a person's character."); 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 404[03], at 404-22 (1989) ("Rule 404 . . . adopts the orthodox position of rejecting evidence of character in civil actions offered as a basis for inferring an act."); 22 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5234, at 365 (1978) ("Rule 404(a) should be interpreted to bar the use of character evidence in any case where the ultimate fact to be proved requires an inference from the character of the person to her conduct 'in conformity therewith on a particular occasion.'").

41. WIS. STAT. § 904.04(1) states:

(1) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(a) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(b) *Character of victim.* Except as provided in § 972.11(2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(c) *Character of witness.* Evidence of the character of a witness, as provided in §§ 906.07, 906.08 and 906.09.

42. 22 C. WRIGHT & K. GRAHAM, *supra* note 40, § 5236, at 387:

squarely address this issue, the weight of authority strongly suggests that civil litigants cannot use this inference regardless of the nature of the underlying claim.<sup>43</sup> This conclusion is consistent with Wisconsin cases antedating the rules of evidence and other authority suggesting that Section 904.04 continues to reflect those earlier holdings.<sup>44</sup>

In summary, proof of reputation, opinion testimony, and specific instances of conduct are inadmissible in all civil actions as proof of character and the inference that the subject behaved in accordance with that character trait.<sup>45</sup>

### C. *Proof of Character as Relevant to Something Other Than Conduct in Conformity*

Section 904.04 does not bar all circumstantial uses of character in civil cases. It precludes only the circumstantial use of character to prove con-

A more intriguing question is whether the word "accused" refers only to a defendant in a criminal action or whether it can also be interpreted to apply to a party in a civil action who is accused of engaging in criminal conduct. There are a growing number of cases at common law that would permit a civil litigant to use his own good character to defend against such accusations. Some writers have assumed that the use of the word "accused" was designed to limit the scope of Rule 404(a)(1) to criminal cases. Though not an unreasonable assumption, it seems debatable when it is noted that in some of the other rules in which the word is used the drafters have also added an explicit limitation to criminal cases. Moreover, while the Advisory Committee Note makes a powerful argument against the use of character evidence in civil actions, it is rather coy about the scope of that argument. On the other hand, the use of the word "prosecution" and the intent of the drafters to codify the common law will probably lead most courts to conclude that the rule cannot be interpreted to incorporate the minority rule permitting the use of character evidence when criminal conduct is in issue in a civil case.

*Id.* (footnotes omitted).

43. 2 J. WEINSTEIN & M. BERGER, *supra* note 40, ¶ 404[03], at 404-25 ("It is not possible, particularly in view of the Advisory Committee's note, to read Rule 404(a)(1) and (2) as permitting evidence of character in a civil case if the conduct involved would be a crime."). The pertinent Wisconsin rules are virtually identical to their federal counterparts. *See* WIS. STAT. § 904.04.

44. The Judicial Council Committee's note to Section 904.04 observes that "[t]he general ban on character evidence to prove that a person acted in conformity therewith on a particular occasion is consistent with Wisconsin cases. . . ." The note cited *Eisenberg v. Continental Casualty Co.*, 48 Wis. 2d 637, 646, 180 N.W.2d 726, 730 (1970) (quoting 32 C.J.S. EVIDENCE § 426, at 37-38 (1964)), to support the general rule that:

[a] party is not entitled to introduce evidence of his good character, in the first instance, merely because his adversary has, by the pleadings or the nature of the action, charged him with committing a legal wrong, or even an act for which he might be subjected to a criminal prosecution, as, for example, . . . fraud. . . .

*Id.*

45. The only exception concerns the character of a witness for truthfulness. *See supra* notes 16-36 and accompanying text.



duct in conformity with the trait. The rule does not prohibit the use of character to prove something other than a propensity to behave in a certain way. Of course, this other purpose must be relevant.

For instance, in an action for assault and battery, the defendant may show that at the time of the assault he was aware of plaintiff's reputation for violence. The defendant's knowledge of plaintiff's combative nature or prior acts of violence may be relevant to prove that the defendant acted out of fear of the plaintiff and in self-defense; it would not be admissible to prove that the plaintiff had a violent disposition and was therefore more likely to be the first aggressor. Thus, the plaintiff's reputation may be offered to prove the *defendant's* state of mind, but not to prove that the *plaintiff* was a violent person and therefore more likely the first aggressor.<sup>46</sup>

This example presents the problem of limited admissibility of evidence. Although fully admissible for one purpose, such as providing the defendant's state of mind, the danger is that the jury will misuse it as proof of the plaintiff's conduct on a particular occasion. The rules attempt to accommodate these concerns through the use of limiting instructions and the

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46. *Lowe v. Ring*, 123 Wis. 107, 113, 101 N.W. 381, 383 (1904). *Lowe* involved a civil battery case in which evidence of prior violent behavior by the plaintiff was admitted on the issue of self-defense:

It is the general rule that evidence of a party's character is not admissible in civil actions for damage unless his character is directly in issue — as in slander, seduction, and other cases — “even though the cause is one for which a criminal prosecution may be brought, or where the offense set up in justification involves a crime”. . . . This general rule does not go to the extent of excluding such evidence for all purposes. As stated in [a prior case], plaintiff's general reputation as a man of quarrelsome and violent disposition, if within the knowledge of a defendant before an affray, is competent evidence to go to the jury upon the issue of self-defense.

*Id.* at 113-14, 101 N.W. at 383 (citations omitted); see 2 J. WEINSTEIN & M. BERGER, *supra* note 40, ¶ 404[03], at 404-22 (Rule 404's ban on the use of character evidence does not apply where it is relevant to something other than proof of the actor's conduct through the character inference); 22 C. WRIGHT & K. GRAHAM, *supra* note 40, § 5239, at 459 (“The general rule of exclusion applies only when the evidence is offered to prove (1) ‘the character of a person,’ and (2) ‘that he acted in conformity therewith.’ Both elements are required.”); see also *Meke v. Nicol*, 56 Wis. 2d 654, 661, 203 N.W.2d 129, 133 (1973) where the court noted:

The primary question before the jury was whether defendant had actually intended to shoot the plaintiff and, if so, whether he was acting in self-defense. This intent must be collected by the jury from the circumstances of the case. On the other hand, evidence of the general character or reputation of the parties in an action for assault and battery may not be introduced merely for the purpose of raising a presumption favorable to one party or unfavorable to the other.

*Id.* (citations omitted).

In self-defense cases, civil and criminal, neither the character of the victim nor the defendant is an “essential element” of the defense (or claim) such that character is “at issue.” See *infra* notes 49-55 and accompanying text; see also *Werner v. State*, 66 Wis. 2d 736, 744 n.6, 226 N.W.2d 402, 406 n.6 (1975).

court's power to exclude the evidence under Section 904.03 if convinced that the probative value of the evidence for the legitimate purpose is substantially outweighed by the dangers of misuse.<sup>47</sup>

Thus, the principle of multiple admissibility of evidence (i.e., that evidence may be relevant to more than one proposition) and its corollary, the idea of limited admissibility, function to permit the use of character evidence to establish something other than the actor's propensity.<sup>48</sup> The most common example of limited admissibility in this setting is found where character is at issue.

#### D. Character at Issue in the Litigation

Character evidence is also admissible to prove a trait which is an essential element of the claim or defense. Here character is not used as circumstantial evidence of the subject's conduct on another occasion, but is itself directly in issue under the applicable substantive law.<sup>49</sup> Put still another way, "character" is one of the ultimate facts which the jury must determine in order to decide the validity of the claim or defense. Where the evidence is directly relevant to prove character in this sense, Section 904.04 is wholly inapplicable. The relevance of the evidence stems from a character trait itself being a "fact that is of consequence" under Section 904.01.

The prime example of character at issue is the competency of a driver in an action for injuries caused by the negligent entrustment of a motor vehicle.<sup>50</sup> Other examples include the qualifications of a physician in an action

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47. Section 901.06 deals with the limited admissibility of evidence. It provides that the opposing party is entitled to limiting instruction upon request. The problem is that often these instructions are of little, if any, value. See 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5063, at 308-09 (1977).

48. *Id.* § 5063.

49. *McMorris v. State*, 58 Wis. 2d 144, 148, 205 N.W.2d 559, 561 (1973) ("[I]n civil cases it has been recognized that a person's possession of a particular character trait may be an operative fact which under the substantive law determines the legal rights and liabilities of the parties and, where that character trait is in issue, that trait of character may be open to proof, including a showing of specific acts."); FED. R. EVID. 404, Federal Advisory Committee's Note ("Character may be itself an element of a crime, claim, or defense. . . . Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver."); 22 C. WRIGHT & K. GRAHAM, *supra* note 40, § 5235, at 368 ("This means that under the substantive law and the pleadings in the case, character is an element of the cause of action, crime or defense and thus an ultimate fact to be proved rather than simply circumstantial evidence of some ultimate fact.").

50. FED. R. EVID. 404, Federal Advisory Committee's Note; see *Bankert v. Threshermen's Mut. Ins. Co.*, 110 Wis. 2d 469, 474, 329 N.W.2d 150, 152 (1983) (negligent entrustment claim involving parental liability for damages caused by minor driver; the court observed that liability could arise where the entrusted driver was "incompetent"). "Incompetence" in one's driving calls

against a hospital for the negligent hiring of the doctor;<sup>51</sup> the character of the deceased in a wrongful death action where plaintiff seeks loss of consortium;<sup>52</sup> the "want of chastity" in an action for seduction; and, plaintiff's bad character in defamation actions relating to statements about plaintiff's character.<sup>53</sup>

In theory, the character evidence is received solely on the essential element. If received for this limited purpose it cannot be used as circumstantial evidence of conduct, assuming there has been a timely objection or

into question the driver's ability to safely drive the vehicle under all circumstances, which leads to generalizations about drivers as good/bad, safe/unsafe.

51. *Johnson v. Misericordia Community Hosp.*, 99 Wis. 2d 708, 737, 301 N.W.2d 156, 171 (1981) (action against a hospital which had a duty "to exercise reasonable care to permit only competent medical doctors the privilege of using [its] facilities;" the court also permitted a variety of detailed inquiries into the particular doctor's training, experience, and reputation in the medical community as it bore on his competence and on the hospital's knowledge).

Character may also be at issue in an action predicated on the negligent supervision of an employee. See the cases collected at 22 C. WRIGHT & K. GRAHAM, *supra* note 40, § 5235, at 352 (1989 Supp.).

52. *Strelecki v. Firemans Ins. Co. of Newark*, 88 Wis. 2d 464, 480, 276 N.W.2d 794, 801 (1979) (wrongful death action in which plaintiff sought damages for her pecuniary loss and the loss of society and companionship resulting from her husband's death; applying Sections 904.01 and 904.03, the court held that "evidence regarding [the deceased's] personal conduct dealing with his periodic hospitalization for alcoholism, his fighting and assaulting his wife, mother and son, his extramarital activities, his attempts to molest his daughter, his suicidal tendencies and lack of marital sex with [his wife]" were relevant to the claim for loss of society and companionship; certain other misdeeds by the deceased were found to have been irrelevant to this claim, but their introduction was harmless).

There is some dispute about whether character is actually at issue in a wrongful death action involving damage claims for losses other than that of society and companionship. 22 C. WRIGHT & K. GRAHAM, *supra* note 40, § 5235, at 370.

[W]here evidence of the character of the deceased is offered as proof of the likelihood that he would have supported the plaintiff in a wrongful death action, Rule 404 does not apply because the evidence is not offered to prove 'that he acted in conformity therewith on a particular occasion.' But this is not, as some writers have implied, an example of character in issue; the issue is plaintiff's damage, not the character of the deceased.

*Id.* (footnotes omitted); see also C. MCCORMICK, *supra* note 7, § 188, at 553 n.2.

Although the net result is that character evidence is admissible under either view, the distinction is critical. Section 904.05 permits the proponent to use specific instances of conduct, as well as reputation and opinion witnesses, to prove character where character is at issue. It precludes, however, the use of specific instances of conduct to show character where character is used as circumstantial evidence of conduct, including as proof of future financial support. Thus, the difference is found in the permissible forms of proof.

53. For the authorities cited for the propositions regarding actions for seduction and for defamation of plaintiff's character, see *McMorris*, 58 Wis. 2d at 148-49 n.5, 205 N.W.2d at 561 n.5 (dicta).

request to limit the use of the evidence. The risk of jury misuse remains, but the danger is allayed somewhat by the use of limiting instructions.<sup>54</sup>

For instance, assume that in a medical malpractice action the plaintiff sues the treating physician for having negligently caused certain damages. Plaintiff also files a claim against the hospital which employed the defendant doctor for having negligently granted privileges to an incompetent physician (the defendant doctor). The latter claim requires proof, as an element of plaintiff's prima facie case, that the hospital knew or should have known that the defendant doctor was incompetent when privileges were extended. This may entail opinion or reputation testimony about the doctor's lackluster ability to practice medicine. Specific instances of substandard practice may also be admitted to prove the doctor's incompetence and the hospital's notice.<sup>55</sup>

Consequently, proof by opinion, reputation, and specific instances of substandard practices will be admitted solely for the limited purpose of proving the competence issue in the claim against the hospital. It cannot, at least in theory, be used against the defendant doctor as proof of negligence on the particular occasion. Where the two claims are joined together in a single trial, the distinction between the permissible and impermissible use of the evidence will no doubt blur in the minds of jurors. It is perhaps more likely that they will use it for the improper purpose than the permissible purpose, since the former may be more in harmony with how people typically use such information in everyday life. Nevertheless, the court will assume that the jury can and will follow a limiting instruction directing them to use the evidence only for the permissible purpose. The risk that the jury might misuse the evidence is often outweighed by the cost of separate trials.

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54. This is an example of the doctrine of limited admissibility. See WIS. STAT. § 901.06. Of course the evidence is received for this limited purpose only if opposing counsel objects or moves for a limiting instruction in a timely manner. The failure to do either allows that the evidence to be received for any relevant purpose.

55. The example in the text is based on *Johnson*, 99 Wis. 2d at 708, 301 N.W.2d at 156. Section 904.05 governs the permissible methods of proving character where permitted by the law of evidence. Where character is "at issue," the rule allows the proponent to prove the trait through all three recognized methods of character proof: reputation, opinion, and specific instances. The opponent is accorded the same latitude in attacking the existence of the trait.

### III. EVIDENCE OF SIMILAR ACCIDENTS, OTHER CRIMES, WRONGS OR ACTS IN CIVIL CASES

#### A. *Other Act Evidence: General Considerations*

Subsections 904.04(2) and Section 904.03 control the admissibility of evidence concerning other crimes, wrongs, or acts. Admission of this type of evidence is the most frequently litigated question arising under the rules.<sup>56</sup> Although the vast majority of the appellate cases are criminal, subsection 904.04(2) also applies to civil actions, such as where a plaintiff attempts to use evidence of similar accidents in a products liability action.

Subsection 904.04(2) performs a dual function. First, it precludes the use of such acts as "character evidence" to prove a person's propensity to behave in a certain way; in short, it reiterates the general ban against the use of an inference from character to conduct in conformity therewith. Its second function is to clarify the proposition that such evidence may be used for any other relevant purpose.<sup>57</sup> This second function, while simple to state, is exasperatingly difficult to administer.

The first sentence of subsection 904.04(2) describes the forbidden propensity inference and precludes its use, subject implicitly to the exceptions set forth elsewhere in the rule and in situations where character is at issue.<sup>58</sup> The next sentence articulates the second function of the rule; other act evidence is admissible if its relevance does not turn on the forbidden inference. Subsection 904.04(2) also lists a series of evidentiary propositions which do not violate the propensity rule, such as using other acts to prove motive, opportunity, preparation, etc. The listing is only illustrative, not exhaustive.<sup>59</sup> Courts are not required to pigeonhole or "jam" the other act evidence into one of the enumerated categories. As long as the evidence is relevant and otherwise admissible apart from the circumstantial inference from character to conduct, Section 904.04 sanctions its use.<sup>60</sup>

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56. See Comment, *supra* note 14, at 320.

57. The admissibility of this evidence must pass scrutiny under Section 904.03 and any other applicable rules of evidence.

58. Specifically, subsection 904.04(1) sets forth the circumstances under which the inference from character to conduct may be used in criminal cases.

59. *State v. Shillcut*, 116 Wis. 2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984) (court held that the listing of circumstances under subsection 904.04(2) is not exclusionary but, rather, illustrative.).

60. See C. MCCORMICK, *supra* note 7, § 183, at 538; 22 C. WRIGHT & K. GRAHAM, *supra* note 40, § 5240, at 471 ("Evidence of other crimes, wrongs, or acts is admissible if it is not offered to prove the conduct of the actor by way of an inference as to his character, without regard to

The language of subsection 904.04(2) describes evidence of other "crimes, wrongs, or acts."<sup>61</sup> The incident need not have resulted in a conviction or civil judgment, nor must it have been a "bad" act.<sup>62</sup> The other act may have occurred prior or subsequent to the incident which is being litigated.<sup>63</sup> Moreover, the other act may be that of a party, a witness, or a third person. The prime criterion for admission is relevance.

Regardless of the nature of the other act, basic principles of relevancy demand some proof that the other act actually occurred. This presents a question of conditional relevancy. In assessing the sufficiency of the proof showing the occurrence of the other act, the judge's role is one of determining whether there is sufficient evidence from which a reasonable jury could find that the other act occurred.<sup>64</sup>

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whether or not it fits within one of the listed categories."). McCormick noted that the range of permissible purposes is "almost infinite." C. MCCORMICK, *supra* note 7, § 190, at 448.

The second sentence of Rule 404(b) of the Federal Rules of Evidence is worded differently than subsection 904.04(2). It begins instead with the phrase: "It may, however, be admissible for other purposes . . ." FED. R. EVID. 404(b). Congress changed the wording of the federal rule in order to place "greater emphasis" on admissibility of this evidence. FED. R. EVID. 404, Report of House Committee on the Judiciary, at 284 (West 1989). The difference in wording has made no discernible difference in the interpretation of the respective rules.

61. Section 904.04(2) is concerned with specific events or incidents which are isolated in time and place. It seems ill-suited for analyzing general attitudes or states of mind, such as a murder suspect's "jealousy" of his dead wife. *See State v. Wyss*, 124 Wis. 2d 681, 712, 370 N.W.2d 745, 760 (1985). The admissibility of "general attitudes or states of mind" should instead focus on relevancy (Section 904.01), discretionary admissibility (Section 904.03), and whether "character" has been placed implicitly into dispute (subsection 904.04(1)).

62. *Whitty v. State*, 34 Wis. 2d 278, 293, 149 N.W.2d 557, 564 (1966), *cert. denied*, *Whitty v. Wisconsin*, 390 U.S. 959 (1968) ("It is not necessary that prior-crimes [sic] evidence be in the form of a conviction; evidence of the incident, crime or occurrence is sufficient."). The other act need not involve anything illegal or wrongful. *State v. Rosenfeld*, 93 Wis. 2d 325, 331-32, 286 N.W.2d 596, 599 (1980) (where the defendant attempted unsuccessfully to bribe a town board member into initiating an anti-public housing resolution, the trial court properly admitted evidence that ten months later another board member, with no connection to the defendant, introduced the same resolution; this act showed that the town board had cognizance over such matters, as required by the bribery statute).

63. Although this evidence is sometimes referred to as "prior" acts evidence, nothing in the language or logic of the rule limits it to events antedating the matter in dispute. The touchstone is relevance. *See, e.g., Barrera v. State*, 99 Wis. 2d 269, 298 N.W.2d 820 (1980), *cert. denied*, *Barrera v. Wisconsin*, 451 U.S. 972 (1981).

64. In *Huddleston v. United States*, 485 U.S. 681, 692 (1988), the Court held:

In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. In the instant case, the evidence that petitioner was selling the televisions was relevant under the Government's theory only if the jury could reasonably find that the televisions were stolen.

Such questions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b) . . . . In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence.

Once satisfied that there is sufficient evidence of the other act's occurrence, the trial court must assess the act's admissibility under subsection 904.04(2) and Section 904.03. This entails a three-step analysis:

1. Is the other act relevant (i.e., is it probative of the proposition it is offered to prove)?<sup>65</sup>
2. Does this use of other act evidence run afoul of the forbidden inference (i.e., is it relevant to something other than an inference running from character to conduct in conformity)?<sup>66</sup>
3. Is the probative value of the other act evidence substantially outweighed by the considerations set forth in Section 904.03?<sup>67</sup>

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The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact — here, that the televisions were stolen — by a preponderance of the evidence.

*Id.* (citations omitted). This standard was adopted in *State v. Schindler*, 146 Wis. 2d 47, 53-54, 429 N.W.2d 110, 113 (Ct. App. 1988).

65. The first step involves an ordinary relevancy analysis under Section 904.01. The proponent must identify the proposition that the other act is offered to prove, show that it is "of consequence" to the action, and that the evidence has some tendency to make the proposition more (or less) likely. Whether evidence is relevant rests within the discretion of the trial court.

66. The second step requires that the trial court determine whether the proffered use of the evidence violates the propensity rule. The proponent must convince the judge that the other act evidence has relevance apart from its tendency to shed light on the subject's character. One must remember that other act evidence will almost always be relevant to the subject's character and the inference that he acted in conformity therewith. The real questions are whether it is also probative of some other proposition that is of consequence to the action and, if so, whether it is being used for that purpose.

There is a tendency manifest in the case law to collapse the first and second steps into a single inquiry. The failure to carefully separate the two often devolves into a result-oriented approach in which a "non-character" proposition, such as intent, is invoked simply to rationalize the admission of the evidence. Absent is any close scrutiny into the relevancy of the evidence apart from the inference that the subject behaved in accordance with a character trait. *See* 22 C. WRIGHT & K. GRAHAM, *supra* note 40, § 5239, at 427-68.

67. The trial court must balance the probative value of the evidence against the dangers of unfair prejudice, confusion of the issues, or misleading the jury, and considerations of undue delay and waste of time.

In this context "unfair prejudice" refers to the risk that the jury will draw the forbidden inference despite a limiting instruction. *See State v. Fishnick*, 127 Wis. 2d 247, 261-62, 378 N.W.2d 272, 280 (1985) where the court noted:

The legal prejudice of which we speak here is the potential harm in a jury's concluding that because an actor committed one bad act, he necessarily committed the crime with which he is now charged. A trial court must determine whether a jury will prejudice a defendant's guilt or innocence in an action because of his prior bad act.

*Id.* (citations omitted).

Any decision will turn on the particular evidentiary context before the court, but of primary concern is whether the proposition for which the evidence is offered is in substantial dispute. *See* WIS. STAT. § 904.04, Judicial Council Committee's Note (1974) (other act evidence "should be excluded if the motive, opportunity, intent, etc., is not substantially disputed. . .").

This three-step analysis applies to all uses of other act evidence in civil and criminal cases, regardless of the proposition the evidence is used to establish.<sup>68</sup> The proponent of the evidence bears the burden of convincing the trial judge that the test has been satisfied.<sup>69</sup> The trial court's analysis should be carefully explained and placed on the record.<sup>70</sup> Upon request, a limiting instruction should be given to the jury, preferably at the time the evidence is introduced.

Neither the rule nor the case law construing it require the proponent to give pretrial notice of an intent to use other act evidence. The absence of any such notice may, however, be a factor in determining if the evidence should be allowed under Section 904.03. The court should also consider whether the other act was subject to discovery. Where opposing counsel is surprised by the evidence, a continuance may be necessary to effectively

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68. It applies even where the other act is only "implicit" in the evidence. *State v. Draize*, 88 Wis. 2d 445, 276 N.W.2d 784 (1979) (drunk driving prosecution; the state introduced testimony that, when defendant took the breath test, defendant remarked that he had taken one before; held that this implied the existence of a prior arrest for the same conduct, thus raising the question of other crimes evidence; any error, however, was harmless).

Some cases setting forth the test for admissibility speak in terms that suggest that the analysis is mandatory whenever other act evidence is put before the jury. *State v. Pharr*, 115 Wis. 2d 334, 343-44, 340 N.W.2d 498, 502 (1983). Other cases have, however, found a waiver where opposing counsel failed to object to the evidence. *Wjss*, 124 Wis. 2d at 719, 370 N.W.2d at 763; *Kwosek v. State*, 60 Wis. 2d 276, 282, 208 N.W.2d 308, 311 (1973) (waiver of Section 904.03 objection where counsel failed to object specifically on that ground).

The nature of this evidence strongly favors the position that, at least in criminal cases, the test should be applied regardless of an objection, unless both parties stipulate to its admissibility. Although the failure to object normally means that there is a "waiver" of any error, an appellate court may still have to review the admissibility of the other act evidence through the avenues of plain error, a claim of ineffective assistance of counsel, or by deciding whether a new trial should be ordered in the interest of justice. See generally Comment, *supra* note 14, at 324-25. In civil cases, a failure to object should be treated as a waiver of any right to object to this evidence.

69. The three-step test analysis presents a preliminary question of the admissibility of evidence; the test is to be applied by the trial judge, not the trier of fact. See WIS. STAT. § 901.04(1).

70. The Wisconsin Supreme Court has frequently reminded trial courts of their obligation to fully explain their decisions on the record, and has explained the consequences of a failure to do so. See *Pharr*, 115 Wis. 2d at 343, 340 N.W.2d at 502 ("[W]e hold that, where the trial court fails to set forth its reasoning in exercising its discretion to admit evidence, the appellate court should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion.").



rebut it or place the incident in its proper context.<sup>71</sup> This "waste of time" may not be worth the probative value of the evidence.<sup>72</sup>

The other act evidence may be admitted at any point during the trial once the court is satisfied that the three-step test has been met. Although the use of this evidence is not categorically restricted to the rebuttal phase of the trial, its relevance often will not crystalize until both sides have presented their case-in-chief. Pretrial conferences in civil actions, as well as other discovery tools, may assist in identifying what issues will surface at trial, and may facilitate the court's decision on the admissibility of the evidence. The timing of the introduction of this evidence rests within the trial court's broad discretion.<sup>73</sup>

### B. Other Act Evidence in Civil Cases

Perhaps because the issue is most frequently encountered in criminal cases, it is often overlooked that the three-step analysis described above applies in civil cases as well.<sup>74</sup> Wisconsin cases fall into a pattern seen in other

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71. It is suggested that the pretrial order be formulated to require the disclosure of a party's intent to use other act evidence. The order should mandate that the other acts be specifically described, and the source of the proof identified. It should also require that counsel explain the relevance of the evidence in light of the three-step analysis described above. Such a requirement might forestall weak or frivolous proffers of evidence and better enable the trial court to formulate its ruling on admissibility. Moreover, if counsel cannot explain what he or she is trying to accomplish with the evidence, why should the task devolve to the trial or appellate court?

72. The standard of review on appeal is one of abuse of discretion. The trial court's decision and analysis should be placed on the record. *Fishnick*, 127 Wis. 2d at 257, 378 N.W.2d at 278 ("But the record must reflect that discretion was exercised, including evidence that the trial judge undertook a reasonable inquiry and examination of the facts as the basis for his decision."); 22 C. WRIGHT & K. GRAHAM, *supra* note 40, § 5250, at 544.

73. The trial court has considerable discretion in controlling the flow and timing of evidence during the trial. See WIS. STAT. § 906.11(1); *State v. Harris*, 123 Wis. 2d 231, 365 N.W.2d 922 (Ct. App. 1985) (discussing other authority that permits the prosecution to use the other act evidence in its case-in-chief if it is used to show that the defendant committed the crime, but otherwise restricts such evidence to the rebuttal case where it is used to show only knowledge or intent); *State v. King*, 120 Wis. 2d 285, 354 N.W.2d 742 (Ct. App. 1984) (clarifying that other act evidence may be admitted in either the case-in-chief or the rebuttal case, depending upon its relevancy to the disputed issues). Although *King* and *Harris* are criminal cases, the logic of their holdings carries over into civil litigation which implicates the same concerns.

74. See 22 C. WRIGHT & K. GRAHAM, *supra* note 40, § 5239, at 443. For instance, the admissibility of prior accidents is frequently analyzed as a general relevance problem without recognition that it implicates subsection 904.04(2). Often there is no citation or discussion of the rule in dealing with this issue. The failure to explicitly consider subsection 904.04(2) may skew the analysis, as where, for example, prior accidents are admitted as "routine practice" evidence. In addition, the virtue of the three-step analysis is that it fosters the making of a complete record for appellate purposes. Finally, resort to subsection 904.04(2) might alleviate some of the strain placed on the rules governing habit and routine practice, which have been stretched to the breaking point.

jurisdictions. There is a tendency to treat "other accidents" as a special problem in relevancy without an explicit recognition that this evidence poses issues identical to those found in the "other crimes" cases in criminal litigation.<sup>75</sup> Moreover, there is a marked inclination to resort to "habit" or "routine practice" as a convenient way of justifying the admissibility of this evidence. The first tendency is unjustified by the rules of evidence; the second has created considerable mischief in the case law.

Subsection 904.04(2) provides that evidence of other accidents, injuries, or acts generally is admissible provided its relevance does not turn on an inference from character to conduct. In the civil setting, the rule represents an expansion of the common law doctrine of *res inter alios acta*, which in its strictest application precluded any evidence other than that involving the parties and the event in dispute<sup>76</sup>. Subsection 904.04(2) allows the use of other act evidence whenever it can be done without violating the forbidden inference. Obvious applications of the rule in civil litigation include evidence regarding the sale of other comparable properties to prove value, or the introduction of other accidents in personal injury cases.

Where a party seeks to introduce evidence of other accidents or mishaps, the court has insisted generally that they be similar to the event in question. This evidence is most often used to prove the existence of (1) an unreasonable risk, (2) a defective or dangerous condition, or (3) the cause of the injuries.<sup>77</sup> Section 904.04 precludes the use of this evidence to establish a character trait for negligent behavior or lack of due care.<sup>78</sup>

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75. R. ALLEN & R. KUHN, *supra* note 6, at 272.

76. WIS. STAT. § 904.04(2); see 22 C. WRIGHT & K. GRAHAM, *supra* note 40, § 5239, at 443. In discussing the application of Rule 404(b) of the Federal Rules of Evidence, the authors write: Although these illustrations involve criminal cases, it should be noted that the common law rule was equally applicable in civil cases. Rule 404(b) has a similar scope, since nothing in the rule limits it to criminal cases. The common law rule tended to be overshadowed in civil cases by the broader, but spurious, doctrine of "res inter alios acta" which purported to bar evidence of events other than the one at issue. That doctrine was not codified in the Evidence Rules, although the clause in Rule 404(b) referring to the use of "other acts" to prove propensity covers some of the ground formerly occupied by the notion of "res inter alios acta." The "res inter alios acta" rule was not limited to the use of other incidents to prove propensity; it would be equally applicable to use for one of the excepted purposes listed in Rule 404(b). Therefore, the net result of the Evidence Rules is to increase the admissibility of evidence of other acts in civil litigation.

*Id.* (citations omitted).

77. C. McCORMICK, *supra* note 7, § 200, at 587-90; see *Hart v. State*, 75 Wis. 2d 371, 392 n.9, 249 N.W.2d 810, 819 n.9 (1977) (suggesting that there may be a character trait for "due care or lack thereof," but not a "habit" with respect to such behavior). It should be cautioned that this language in *Hart* is dicta; the issue was not briefed and the court's discussion was limited to a short footnote.

78. See *supra* notes 37-45 and accompanying text.

Furthermore, the similarity requirement demands only a showing of "substantial similarity," not an exact replication of events.<sup>79</sup> In short, the main concern is that the other incident be relevant to something other than a general disposition or propensity to engage in harmful conduct.

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79. In *Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 9-10, 186 N.W.2d 258, 262-63 (1971), the supreme court stated:

On the issue of establishment of a dangerous defect, appellant asserts it was error for the trial court to admit evidence that seven other employees had been burned by the same concrete mix on the same day on the same job. Reliance is upon 1 JONES, EVIDENCE (5th ed.), sec. 185, at 324, sec. 185, where it is stated:

Since evidence of other similar conditions or occurrences under similar circumstances involves proof of collateral matters, a good deal of discretion is necessarily vested in the trial judge on the question of whether the evidence should be admitted. The usual considerations of undue distraction or prejudice, surprise, or undue consumption of time are inherent. . . .

A full quote from Jones on this point should include the paragraph, on page 323, stating that:

Evidence of other accidents or similar occurrences at the same time or under similar conditions and circumstances may be admissible to show the probability of the defect in question, that the injury was caused by the defect and that the person responsible knew or should have known of the existence of the defect.

While this court has held testimony as to other persons falling on a dance floor inadmissible as raising collateral matters and not proving the dangerous character of a dance floor, here, where the issue revolved around whether exposure to ordinary concrete would or could cause burns, and where both witnesses for appellant and respondent testified that even continued exposure to ordinary concrete had not caused second and third-degree burns, we would find no abuse of discretion in the trial court's holding relevant and admissible testimony that seven others were burned on the same day by the same concrete mix. Both the purpose for which the evidence of other injuries similarly caused and the nature of the negligence claimed are to be considered in determining whether discretion has been abused.

*Id.* at 9, 186 N.W.2d at 262-63 (citations omitted); *see also* *Lobermeier v. General Tel. Co. of Wisconsin*, 119 Wis. 2d 129, 150, 349 N.W.2d 466, 476 (1984) (in an action against a telephone company for injuries caused by the improper grounding of a telephone, the trial court properly admitted ten other incidents of similar character: "As plaintiff points out, the similarity between the ten accidents and the facts of the instant case is obvious. All ten phones were improperly grounded and hit by lightning which resulted in injury to the user of the phone. All of the phone installations were those of [the defendant]."). The court in *Lobermeier* also justified the admission of this evidence on the ground that it constituted a routine practice under Section 904.06. *Id.* at 151, 349 N.W.2d at 477. *See infra* notes 102-110 and accompanying text; *City of Franklin v. Badger Ford Truck Sales, Inc.*, 58 Wis. 2d 641, 656, 207 N.W.2d 866, 873 (1973) (product liability action brought by city against the seller and the manufacturers of the chassis and the wheels of a fire truck for damages incurred when the truck tipped over: "[E]vidence that like products were free from, or were subject to, defective or injurious condition is generally admissible[.]" but discretion is vested in trial judges to determine whether introduction of such evidence would involve undue distraction, undue consumption of time or undue introduction of entirely collateral issues (footnotes omitted)).

The absence of other accidents, when offered to prove the nonexistence of the defect or the causal nexus, is subject to the same test.<sup>80</sup> The difficulty presented by such evidence, however, is in showing that the conditions were sufficiently similar to warrant the inference that if, for example, the defect was present, then other accidents would have occurred. Like inferring guilt from silence, the absence of reports of prior accidents may open the door to an endless round of speculation, and may be excluded by operation of Section 904.03.

Prior accidents or occurrences may also be used to show that a party had notice of a dangerous condition. Such knowledge may be relevant in actions sounding in negligence, strict liability, or under a safe place statute. When other act evidence is used solely to show notice or knowledge, the need for similarity between the events is not as compelling as it is where the evidence is used to establish a cause or a condition.<sup>81</sup>

Closely related is the use of other act evidence to prove a party's state of mind where intent, willfulness, or malice is in issue. For example, in one case a teacher brought an action against a student for battery and the student's parents for their failure to control him. Plaintiff put in evidence that the student was involved in five prior fights as probative of his malicious intent under a claim for punitive damages. The trial court instructed the jury that the evidence of the prior fights was to be considered only as it had a bearing on the student's intent, and not to establish the likelihood that he assaulted the teacher.<sup>82</sup>

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80. See *D.L. v. Huebner*, 110 Wis. 2d 581, 329 N.W.2d 890 (1983) (a products liability action sounding in negligence and strict liability). In *Huebner*, the defendant manufacturer complained that the trial court erred by excluding evidence of the good safety records of similar products. The supreme court held that:

[e]vidence denying the happening of an event has been called "negative evidence," and is, as Huebner Implement argues, admissible. That the evidence negates the occurrence of an event, such as evidence that there was no hole in the highway, or that there were no similar accidents with similar wagons, rather than affirms the occurrence of an event does not render the testimony inadmissible. To be admissible, however, the witness must be in a position to testify on the basis of personal knowledge or experience that the event did not occur.

*Id.* at 622, 329 N.W.2d at 909 (citations omitted); see also *C. McCORMICK*, *supra* note 7, at 591.

81. *C. McCORMICK*, *supra* note 7, § 200, at 590. The author states:

Since all that is required is that the previous injury or injuries be such as to call defendant's attention to the dangerous situation that resulted in the litigated accident, the similarity in the circumstances of the accidents can be considerably less than that which is demanded when the same evidence is used for one of the other valid purposes.

*Id.*

82. *Anello v. Savignac*, 116 Wis. 2d 246, 251, 342 N.W.2d 440, 442 (Ct. App. 1983) (although the court of appeals upheld the admission of this evidence, it cited only Section 904.04

Related problems arise with respect to evidence that concerns "the prior part of a continuing act."<sup>83</sup> The most frequently recurring example involves testimony about a driver's speed or maneuvers some distance before the accident scene.<sup>84</sup> Factors such as the speed or control of a vehicle can be modified with a turn of the wheel or a pump of the brake. The concern is that evidence of the subject's driving sometime prior to the accident may have relevance only through the subject's character as a driver.<sup>85</sup> The same is not true of conditions such as drowsiness or intoxication, which can persist for miles or over a period of hours.

Since this kind of evidence is closely related, spatially and temporally, to the subject of the litigation, deciding whether to label it as "other acts" is not very useful. The prime concern is whether the evidence is relevant to anything other than showing that the subject was a bad driver. Such cases present considerations of relevance which must turn on the particular facts of the case.

These applications of the rule mirror the considerations found in the criminal cases which grapple with the same problems. The few civil cases on point should be supplemented with the criminal precedent whenever the issues are closely aligned.<sup>86</sup>

#### IV. EVIDENCE OF HABIT AND ROUTINE PRACTICE

##### A. General Considerations

Subsection 904.06(1) provides that evidence of a person's habit or an organization's routine practice is relevant to prove that the person or organization acted in conformity with the habit or practice. The rule does not provide for per se admissibility. Even though relevant, the evidence may be excluded because of other considerations, such as those found in Section 904.03.

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of the Wisconsin statutes, and stated that it proved the pugilistic pupil's malicious intent; no further analysis was offered).

83. 2 J. WEINSTEIN & M. BERGER, *supra* note 40, ¶ 406[01], at 406-11 (discussed in the context of habit evidence).

84. These cases are collected and discussed in *State v. Hart*, 75 Wis. 2d 371, 384, 249 N.W.2d 810, 816 (1977).

85. It is less than clear that we have any discernable character trait for driving (e.g., "good" versus "bad" drivers) which is distinguishable from the more general trait for carefulness.

86. *See, e.g., Christianson v. Lease Assoc., Inc.*, 87 Wis. 2d 123, 128-29, 273 N.W.2d 776, 779 (1978) (in a suit for treble damages resulting from falsification of an automobile odometer statement where defendant claimed "mistake," the trial court properly exercised its discretion in admitting evidence of another "discrepancy" in a different odometer statement issued by defendant on the same date).

Problems surface immediately because the rule offers no definitions of either "habit" or "routine practice." Consequently, it becomes difficult to distinguish evidence of habit and routine practice, which is admissible, from the use of character to show conduct in conformity, which is proscribed in civil cases. Thus, it is imperative to distinguish habit from character, but the distinction is not always easy to draw. One of the most frequently quoted attempts to do so was made by McCormick:

People sometimes speak of a habit for care, a habit for promptness, or a habit of forgetfulness. They may say that an individual has a bad habit of stealing or lying. Evidence of these "habits" would be identical to the kind of evidence that is the target of the general rule against character evidence. Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness. Habit, in the present context, is more specific. It denotes one's regular response to a repeated situation. If we speak of a character for care, we think of the person's tendency to act prudently in all the varying situations of life — in business, at home, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of responding to a particular kind of situation with a specific type of conduct. Thus, a person may be in the habit of bounding down a certain stairway two or three steps at a time, of patronizing a particular pub after each day's work, or of driving his automobile without using a seatbelt. The doing of the habitual act may become semi-automatic, as with a driver who invariably signals before changing lanes.<sup>87</sup>

Wisconsin courts have apparently adopted this distinction and recognized on at least one occasion that the real problem is that what is often inadmissible character evidence is slipped before the jury bearing the label of "habit."<sup>88</sup>

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87. C. McCORMICK, *supra* note 7, § 195, at 574-75.

88. *Hart v. State*, 75 Wis. 2d 371, 249 N.W.2d 810 (1977). In a prosecution for homicide by negligent use of a motor vehicle, the trial court admitted evidence of defendant's driving pattern shortly before the collision:

There was some discussion in the trial court as to whether the pre-accident testimony was proper to show habit under § 904.06, Wis. Rules of Evidence, though neither the circuit court nor the state in its brief rely upon such a theory. Habit, in this sense, is a "regular response to a repeated specific situation." McCORMICK, EVIDENCE, § 195 (2d ed. 1972). We doubt the existence of a "habit" of due care or lack thereof. We believe we are dealing with character evidence, though the courts are not always careful to preserve the distinction between the two terms, and they can and do appear to overlap at times.

*Id.* at 392-93 n.9, 249 N.W.2d at 819 n.9.

The cases and commentary discussing habit and routine practice use the terms in two different, sometimes conflicting ways. First, the narrow psychological denotation describes a classic conditioned response: a semi-automatic reaction repeated almost unvaryingly in the face of certain specific circumstances. Second, a broader, probabilistic conception addresses the frequency and specificity of the occurrence of an act. That is, the more often a person or organization has behaved in a certain way in a particular context in the past, the more likely it is that the individual or organization will behave the same way when confronted with the same circumstances on another occasion.<sup>89</sup>

These two notions are of more than academic interest because they are reflected in the case law and point up some of the difficulties in distinguishing habit from character. As described below, it appears that in civil cases, Section 904.06 is resorted to as a way of avoiding the conundrum that grips character evidence in criminal cases.<sup>90</sup> By plugging into Section 904.06, the analysis sidesteps difficult questions about the nature of "character" and the admissibility of other acts under subsection 904.04(2). Although the desire to avoid this quagmire is understandable, the same rules apply in civil cases and the confrontation is necessary even if distasteful.

In order to correct this problem, courts must first give discernable rigor to the meanings of "habit" and "routine practice." It is suggested that when the issue involves the conduct of a particular human being, the behavior should be analyzed to determine whether it is a "habit;" here, the psychological perspective should govern. The trial court should be satisfied that the behavior in question actually implicates a semi-automatic, virtually unconscious response to a specific set of circumstances. Examples are the use of directionals when turning a car or putting on a wristwatch in the morning. Conduct such as lecherous advances by a landlord toward female tenants in a sexual harassment lawsuit, even on four or five different occasions, points more towards a reprehensible character flaw than it does a prurient Pavlovian response to female tenants.<sup>91</sup> The narrow psychological

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89. 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5273, at 24 (1980).

90. Compare *Hart*, 75 Wis. 2d at 392 n.9, 249 N.W.2d at 819 n.9 (where the court "doubted" the existence of a habit for due care but acknowledged that this behavior might constitute a character trait) with *Chomicki v. Wittekind*, 128 Wis. 2d 188, 196, 381 N.W.2d 561, 564 (Ct. App. 1985) (which implied that defendant, a landlord, had a "habit" or was engaged in the "routine practice" of sexually harassing female tenants based on four similar incidents within a two year period). For the inadmissibility of proof showing character for due care, see C. MCCORMICK, *supra* note 7, § 5189, at 554.

91. *Chomicki*, 128 Wis. 2d at 188, 381 N.W.2d at 561. Plaintiff sued the defendant landlord for sexual harassment. The court upheld the admission of this evidence as "routine practice,"

perspective is the only principled way of assuring that the rule barring the circumstantial use of character to prove conduct is not absorbed by the rule allowing the use of habit.<sup>92</sup>

When assessing the conduct of an organization, the focus should be on whether it is a "routine practice" and the probabilistic perspective should govern.<sup>93</sup> This approach is a more liberal standard favoring admissibility than is the psychological approach, as it requires less in the way of specificity of the conduct or frequency of its occurrence. The focus is on the customs, practices, and rules which are followed in the normal functioning of the organization, such as the routing of various business decisions or the handling of mail. At issue is not what a particular human being did on a given occasion, but what the organization normally or regularly does with respect to some recurring conduct. Administrative efficiency alone motivates the regularity of a great deal of group behavior. Such routine practices are more susceptible to proof than are individual habits and it seems less likely that jurors would overvalue such evidence.

### B. *Habit of Persons*

Section 904.06 confirms the relevance of an inference from a person's habit to the conclusion that he acted in conformity with it on a particular occasion. At the outset the trial court must determine whether the proffered behavior rises to the level of a habit and is not ill-disguised character evidence. In making this assessment, the trial court should focus on the specificity and frequency of the behavior.

For instance, a bad driving record may qualify the driver as a "habitual traffic offender" under the traffic laws, but this appellation alone carries no evidentiary significance. Driving is a volitional, fully conscious form of

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apparently because this occurred within the context of defendant's business activities. This seems wide of the mark. The evidence may, however, have been admissible under subsection 904.04(2) on the issue of defendant's intent toward plaintiff.

92. It should also be observed that even if a party is allowed to use character circumstantially to prove conduct, Section 904.05 limits the proponent to reputation and opinion testimony. Specific instances cannot be used to establish the character trait. On the other hand, Section 904.06 allows the proponent to establish a habit through specific instances as well as through opinion testimony. Thus, the illegitimate use of habit to prove what is really character (if anything at all) also circumvents rules governing the form of the proof.

93. See *infra* notes 94-110 and accompanying text (where it is suggested that the psychological approach should control when considering whether a specific human being has a "habit" of some sort). Although organizations and institutions comprise groups of human beings, the focus is not on the behavior of a specific, identifiable individual within the organization, but on the pattern of conduct manifest by the entity itself. On the question of whether a corporation or any organization possesses a "character," see 22 C. WRIGHT & K. GRAHAM, *supra* note 40, § 5233, at 360.



conduct embracing a variety of behaviors, such as speed, control, and driving patterns. It is not in and of itself a semi-conscious, nearly reflexive response repeated in the presence of a specific set of circumstances. A "terrible" driving record is relevant to the driver's actions on a particular occasion only through an inference from a character trait for due care or competence as a driver.<sup>94</sup> This is distinguishable from specific driving related behavior such as the use of safety belts, which may properly constitute a habit. In short, it is imperative that the trial court consider whether the proffered behavioral trait constitutes a habit. This determination should be kept separate from the different question of whether the behavioral trait itself can be proven to exist.

The importance of these distinctions is seen in a case involving a declaratory judgment action over the ownership of certain money found in a car.<sup>95</sup> One claimant asserted that the money belonged to her deceased husband, who she claimed had years earlier hidden the money (over \$2,000 in cash) in the car. Accordingly, she offered the testimony of her son, who said that he saw his father "hide money in the car." The trial court excluded the testimony.<sup>96</sup>

The supreme court held that this testimony should have been admitted as evidence of habit. It rejected the contention that the testimony failed to show a sufficient number of instances warranting the finding of habit, stating that this went to the sufficiency of the evidence, not admissibility.<sup>97</sup>

This holding is perplexing for several reasons. It is not clear how "hiding the money in a car" can constitute a habit, especially in the absence of any proof as to the frequency of the behavior. Unlike wearing a wristwatch or using directionals while driving, it is not apparent that people reflexively stash money under the seats or in the glove compartment nearly every time they get into the car.<sup>98</sup> In short, hiding money in the car is not at all like

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94. *Hart*, 75 Wis. 2d at 392 n.9, 249 N.W.2d at 819 n.9.

95. *French v. Sorano*, 74 Wis. 2d 460, 247 N.W.2d 182 (1976).

96. It is unclear from the facts given in the opinion whether the testimony referred to one occasion or more than one. The court held that no offer of proof was necessary to preserve this error because it was "obvious" that the witness "was going to testify that he had observed his father hide money in the car." *Id.* at 466-67, 247 N.W.2d at 186.

97. However, the court found that the error was not prejudicial. It should also be noted that the case was tried before a judge sitting as trier of fact. Although in theory this makes no difference, in practice, rules of evidence are customarily relaxed in bench trials, particularly as to relevance. See M. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 103.6, at 23 (2d ed. 1986). In a jury trial, Section 904.03 may have warranted exclusion because of the danger that the jury might over-value the evidence.

98. Just because someone does something strange, and does it more than once, does not mean it is a "habit." Ultimately in determining whether certain behavior constitutes a habit, the trial judge must rely on his or her experiences, common-sense and views on human nature.

adjusting the rearview mirror or turning on the car radio before starting the car.<sup>99</sup> Given the claim that the deceased had such a bizarre habit, the proponent of the habit should have been required to establish the frequency of the conduct.<sup>100</sup> Absent such testimony, the trial court was justified in refusing to find that an individual had any such habit. Even if the behavioral trait does qualify as a habit, it may still be excluded if it is irrelevant or if its probative value is substantially outweighed by other considerations.<sup>101</sup>

### C. Routine Practices Versus "Other Acts" Analysis

A number of civil cases have discussed the admissibility of an organization's routine practice in order to prove that the entity behaved in accordance with that practice. These cases reveal how important it is for lawyers to think through exactly what it is they are trying to prove with the evidence in question.<sup>102</sup> Just because a certain fact pattern recurs does not mean that it constitutes a habit or routine practice. The evidence may very well be admissible, but it is admissible under the rules governing the introduction of other act evidence, not those rules relating to routine practice evidence.

Evidence of routine practice or custom to show conduct in conformity is proper only where the behavior is such that it naturally recurs within the organization. A routine practice involves a finding that there is sufficient evidence to conclude that whenever the organization is confronted with A, it does, or very likely does, B. Conduct such as the routing of mail is one

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99. See, e.g., *State v. Dwyer*, 143 Wis. 2d 448, 422 N.W.2d 121 (Ct. App. 1988), *aff'd*, 149 Wis. 2d 850, 440 N.W.2d 344 (1989) (where defendant challenged the admissibility of his confession to police, held that the trial court acted within its discretion when it refused to admit testimony by defense witness that six months earlier the same officer who interrogated defendant had also threatened to send him to jail unless he confessed; the evidence failed to show the existence of either a habit or routine practice by the officer).

100. The distinction which must be drawn is whether this is a true habit, as understood in Section 904.06, or only quirky behavior, sporadically engaged in by the deceased. Just because a witness chooses to characterize some behavior as a "habit" does not mean the court is duty bound to admit it under Section 904.06. It is the court which must be satisfied that the behavior constitutes a habit, not the witness. See WIS. STAT. § 901.04(1).

101. *French*, 74 Wis. 2d at 465, 247 N.W.2d at 185 ("appellant's testimony that her husband had the practice of carrying large amounts of money, that her husband always locked his car, and that her husband's father also had the habit of hiding money was irrelevant and thus, inadmissible").

102. For example, Section 904.06 is not implicated where the custom is used simply to set the standard of care. Since the evidence is not being used to show conduct in conformity, its admissibility is governed by general principles of relevance. See 2 J. WEINSTEIN & M. BERGER, *supra* note 40, ¶ 406[02], at 406-14 to -15. To state it differently, evidence of custom to establish the standard of care is used to show what should have been done, not what was done.

obvious example.<sup>103</sup> Another example concerns the practice of informing prospective employees about various company policies at the time they are hired.<sup>104</sup> Moreover, this kind of evidence may be used to prove the absence of something. For instance, a nurse may testify that when taking a history from a patient she asks about any present pain or other symptoms and then records the complaints in her chart. This testimony may then be relevant to prove the absence of such symptoms, or the patient's failure to mention them, where the chart is silent as to any specific complaints by the patient.<sup>105</sup>

The point is that the routine practice should be a regular and recurring activity. It may be proven through opinion testimony or by specific instances. Although no magic number of proven instances is necessary to establish a practice as "routine," the trial court is not obligated to accept the witness' conclusion that a given course of conduct is routine.<sup>106</sup> It must be remembered that the probative value of this evidence is derived in large measure from the fact that the business or other organization requires regularity in the conduct of its business and that deviations are subject to internal scrutiny or sanction; therefore, one can infer that the entity will generally follow its regular procedures.<sup>107</sup> Any deviation generally goes to the weight of the evidence and is a proper issue for resolution by the trier of fact.

The concept of "routine practice" has, in some instances, been stretched to the point of breaking. In particular, one should not lose sight of the importance of the "regularity" component. Just because something occurs more than once does not mean it is therefore "routine" or "customary." The temptation to draw this erroneous inference is especially tempting in cases involving prior, similar accidents.

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103. C. McCORMICK, *supra* note 7, § 195, at 577. In general, the best example of an appropriate approach toward "routineness" is provided by the hearsay exception for records of regularly conducted activities. WIS. STAT. § 908.03(6).

104. *See, e.g.,* Micke v. Jack Walters & Sons Corp., 70 Wis. 2d 388, 234 N.W.2d 347 (1975) (breach of oral employment agreement where the issue was whether plaintiff, a former salesman, was entitled to commissions on projects that had not been paid for at the time of his termination; defendant claimed that this was not the policy and offered testimony that all salesmen were informed of this when hired; the court held that plaintiff was properly permitted to call one witness to testify that this was not the policy and another who apparently testified that when he, the witness, was hired by defendant as a salesman, he was not informed of the alleged policy regarding commissions).

105. This example involves a situation which may show the nurse's habit or the institution's regular practice in connection with charting.

106. *See* WIS. STAT. § 901.04(1).

107. C. McCORMICK, *supra* note 7, § 195, at 577.

For instance, in one case, plaintiff brought suit against a telephone company for injuries received from an improperly grounded phone.<sup>108</sup> The injuries occurred when plaintiff, while holding the improperly grounded phone, received an electrical shock caused by lightning transmitted through the receiver. The court upheld the admission of ten other such incidents as proof of negligence and causation. It specifically held that the evidence was admissible under Section 904.06.<sup>109</sup>

Although ten similar accidents is a shockingly high number of accidents and certainly relevant to negligence and the question of cause, it is difficult to see how they constituted a "routine practice." Corporations may routinely route their mail, but one hopes that they do not routinely electrocute or otherwise maim their customers. It should be recognized that the ten prior accidents were probative of the probability of a defect in the phone system that plaintiff's injury was caused by this defect, and that defendant was aware, or should have been aware, of the defect entirely apart from whether its negligence was "routine." In short, the admissibility of this evidence should have been channeled through subsection 904.04(2) and Section 904.03, not routine practice under Section 904.06. Such an analysis allows the trial court to focus not on whether the conduct is routine, which is a side-issue at best, but on the propositions for which the evidence is properly admissible: the probability of a defect, the causal relation between the defect and the injury, and whether defendant was aware of the defect.<sup>110</sup> In summary, the label "routine practice" should not be applied as a substitute for thinking about hard evidentiary problems.

### CONCLUSION

Character-related evidence continues to bedevil the law of evidence despite the advent of the Wisconsin Rules of Evidence. Much of this difficulty is endemic to the subject and persists because the rules adopted most of the confusion found in the common law.

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108. *Lobermeier v. General Tele. Co. of Wisconsin*, 119 Wis. 2d 129, 150, 349 N.W.2d 466, 476 (1984).

109. The court cited only subsection 904.06(2), which controls the modes of proving habit or routine practice. In reaching this conclusion, the court must have implicitly reasoned that the ten incidents constituted "routine" conduct by the defendant. *Id.* at 151, 349 N.W.2d at 477.

110. It is interesting to note that the court's discussion in *Lobermeier* does include a quotation from *Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 186 N.W.2d 258 (1971) and other cases involving the admissibility of similar accidents. See *Lobermeier*, 119 Wis. 2d at 150, 349 N.W.2d at 476. The reference to Section 904.06 appears to be almost an afterthought, which is explicable by virtue of the large number of prior incidents involved in this case. Again, the evidence is quite probative of negligence and cause apart from whether it constitutes "routine" behavior.

Most of the problems that plague the use of character-related evidence in criminal trials also arise in civil litigation. Understandably, there has been a tendency in the civil cases and commentary to avoid the difficulties that have arisen in the criminal context. This has taken the form of carving out what purport to be special doctrines involving the admission of "similar accidents" or evidence of "habit" or "routine practice." When one looks beneath the surface, however, one finds the same ambiguities and confusion in the civil cases as are found in the criminal.

The answer then is not to rename the problems, but to address them in a coherent fashion. Although this article does not attempt a solution, it is hoped that some insight is gained through the observation that character-related evidence presents many of the same proof problems in criminal and civil cases. By isolating these common proof problems the courts and commentators may be better able to offer advice about possible solutions.