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### An Evidentiary Oddity: "Careful Habit" – Does the Law of Evidence Embrace This Archaic/Modern Concept?, 43 Ohio N.U. L. Rev. 293 (2017)

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**An Evidentiary Oddity: “Careful Habit” – Does the Law of  
Evidence Embrace This Archaic/Modern Concept?**

MARC D. GINSBERG\*

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## I. INTRODUCTION

The concept of the “careful habit” is intriguing.<sup>1</sup> The law of evidence vigorously distinguishes between character evidence (largely inadmissible) and habit evidence (presumptively admissible).<sup>2</sup> Character is understood as a propensity to act in a certain fashion, otherwise known as a person’s disposition.<sup>3</sup> Habit is understood as non-volitional, repetitive, specific conduct, in response to stimuli over a rather lengthy period of time.<sup>4</sup> “Carefulness” is known by the law as a character trait.<sup>5</sup> Carefulness should not be confused with habit, yet confusion has occurred in multiple jurisdictions for some time.<sup>6</sup> This paper seeks to explore the development of the curious and anomalous concept of the “careful habit” in the law of evidence and, ultimately, recommends its elimination.<sup>7</sup>

A few words are appropriate here about my interest in this subject. Law review topics arise in at least two ways: (1) the result of extensive research and reflection on the subject of interest; (2) fortuitously. The latter applies to this paper. A former colleague-mentor of mine, a law school Associate Dean and evidence scholar,<sup>8</sup> stopped by my office. He suggested that I review a recent appellate opinion which addressed the evidentiary concept of the “careful habit.”<sup>9</sup> As an evidence professor who writes on the law of evidence, I found this opinion quite curious. Could the law of evidence actually recognize “careful habit” as admissible under any circumstance?

Why is the concept of careful habit so baffling? Of course, the point of departure may be that rules of evidence distinguish between character traits and habit—character traits are typically inadmissible, while the law of

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1. See, e.g., *Powell*, 7 N.E.3d at 707-08.

2. FED. R. EVID. 404; FED. R. EVID. 406.

3. See *Sharpe v. Bestop, Inc.*, 730 A.2d 285, 286 (N.J. 1999).

4. *Id.* at 286.

5. See, e.g., *Woodson v. Porter Brown Limestone Co.*, 916 S.W.2d 896, 908 (Tenn. 1996) (referring to “trait of carefulness”); see also *Ring v. Rogers*, 927 P.2d 152, 153-54 (Or. 1996); *State v. Higbie*, 847 A.2d 401, 404 (Me. 2004); *State v. Enakiev*, 29 P.3d 1160, 1163 (Or. 2001).

6. See *infra* Part IV.

7. See *infra* Part VI.

8. Ralph Ruebner is a recently retired Associate Dean, professor, and evidence scholar at The John Marshall Law School (Chicago). His scholarship includes: RALPH RUEBNER & KATARINA DURCOVA, *ILLINOIS EVIDENCE: ILLINOIS RULES OF EVIDENCE, STATUTES, AND CONSTITUTION: A COMPENDIUM FOR CRIMINAL LITIGATION* (2012); Ralph Ruebner & Timothy Scahill, *Crawford v. Washington, the Confrontation Clause, and Hearsay: A New Paradigm for Illinois Evidence Law*, 36 LOY. U. CHI. L.J. 703 (2005); Ralph Ruebner, Katarina Durcova & Amy Taylor, *Why Illinois Should Adopt Federal Rule of Evidence 803(18) to Allow the Learned Treatise Exception to the Hearsay Rule*, 39 S. ILL. U. L.J. 275 (2015); Ralph Ruebner & Katarina Durcova, *Survey of Illinois Law: Waiver of the Attorney-Client Privilege and Work Product Protection*, 37 S. ILL. U. L.J. 825 (2013).

9. See generally *Powell*, 7 N.E.3d at 675.

evidence embraces habit.<sup>10</sup> These basic evidentiary principles are found in Federal Rules of Evidence (FRE) 404 and 406, as follows:

**Rule 404. Character Evidence; Crimes or Other Acts**

**(a) Character Evidence.**

**(1) *Prohibited Uses.*** Evidence of a person's character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

**(2) *Exceptions for a Defendant or Victim in a Criminal Case.*** The following exceptions apply in a criminal case:

**(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

**(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

**(i)** offer evidence to rebut it; and

**(ii)** offer evidence of the defendant's same trait; and

**(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

**(3) *Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

**(b) Crimes, Wrongs, or Other Acts.**

**(1) *Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

**(2) *Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence

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10. FED. R. EVID. 404; FED. R. EVID. 406.

of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.<sup>11</sup>

#### **Rule 406. Habit; Routine Practice**

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.<sup>12</sup>

Of course, it is FRE 404(a)(1) and (b)(1) which prohibit the introduction of character evidence.<sup>13</sup> FRE 404 is essentially an exclusionary rule.<sup>14</sup> Law professor Frederick Schauer notes, “[M]ost of the exclusionary rules are designed with the jury in mind and with the goal of increasing the accuracy and efficiency of fact finding under circumstances of jury decision making.”<sup>15</sup> A prominent federal district judge, and law professor, more skeptically explained that “[m]any rules of evidence can be understood only in terms of the judge's need to rigidly control a group of ignorant illiterates—the jury.”<sup>16</sup> Before examining the careful habit, character and habit evidence will be explored.<sup>17</sup>

## II. CHARACTER

Philosophical literature explains that character traits refer to “dispositions of a person” which “are relatively permanent features . . . .”<sup>18</sup> Psychoanalytic scholarship urges that:

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11. FED. R. EVID. 404.

12. FED. R. EVID. 406.

13. FED. R. EVID. 404.

14. *See id.*

15. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 168 (2006).

16. Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 225 (1966).

17. *See infra* Parts II, III.

18. Richard B. Brandt, *Traits of Character: A Conceptual Analysis*, 7 AM. PHIL. Q. 23, 24, 27 (1970).

- “character traits require the isolation and identification of relatively stable patterns of behavior specific to a given individual; from these it is possible to infer character traits.”<sup>19</sup>
- “A character trait is not directly observable; it is inferred. In fact, what is observable in the adult are certain stable, repetitive behavior patterns.”<sup>20</sup>

At least one philosopher has argued that it is wrong to infer “that actions are due to distinctive robust character traits rather than to aspects of the situation” and, essentially, debates the existence of character traits.<sup>21</sup>

Rule 404 does not define character, perhaps a curious feature of a federal rule which focuses on character.<sup>22</sup> Nevertheless, it is understood that character, for evidentiary purposes, means “that the person has an ingrained propensity to act in a certain way.”<sup>23</sup> Additionally, it has been explained that “‘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.”<sup>24</sup>

Whichever definition or explanation of “character” one prefers, the law of evidence typically prohibits the introduction of character trait evidence when it is offered to prove that a person acted in conformity with the character trait.<sup>25</sup> Why? A simple example provides the answer: two automobiles, driven by A and B, collide in a traffic-controlled intersection. Driver A has been involved in previous traffic accidents and has received traffic citations for poor driving—failure to conform to the traffic laws. Driver A tends to drive carelessly. Driver A’s propensity, in this regard, is inadmissible to prove negligence in the intersection collision litigation. Driver A’s prior carelessness does not prove that Driver A caused the intersection collision. In fact, Driver B may have caused the collision.

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19. Francis Baudry, *Character: A Concept in Search of an Identity*, 32 J. AM. PSYCHOANALYTIC ASS’N 455, 457 (1984).

20. *Id.* at 457. It should be noted that the reference to stable, repetitive behavior patterns seems to more closely align with “habit” as reflected in FRE 406, to be discussed later in this paper. FED. R. EVID. 406.

21. Gilbert Harman, *The Nonexistence of Character Traits*, 100 PROCEEDINGS ARISTOTELIAN SOC’Y 223, 223-24 (2000).

22. FED. R. EVID. 404. FRE 404 is not the only Federal Rule of Evidence that omits a definition of an important concept, leaving the commentators to provide a definition in the comments following the rule. See FED. R. EVID. 406 (failing to define habit); FED. R. EVID. 801 (failing to define “assertion,” which is a necessary component of a hearsay statement).

23. Glen Weissenberger, *Character Evidence Under the Federal Rules: A Puzzle with Missing Pieces*, 48 CIN. L. REV. 1, 2 (1979); see MCCORMICK ON EVIDENCE 403 (Kenneth S. Broun ed., 7th ed. 2014) [hereinafter MCCORMICK ON EVIDENCE].

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

25. See FED. R. EVID. 404.

Many years ago the Court of Appeals of New York in *Zucker v. Whitridge*,<sup>26</sup> well-stated this point in a case involving a pedestrian who was struck and fatally injured by a train.<sup>27</sup> In its discussion of character evidence, the *Zucker* court quoted a pronouncement by Justice Chester in *Parsons v. Syracuse, Binghamton & N.Y. R.R. Co.*<sup>28</sup> as follows:

A man who is careful on one occasion may be careless on another. The circumstances at one time may be such as to induce prudence while they might not another time. But the worst feature of this class of evidence is that it presents issues for trial not tendered by the pleadings, and which the opposing party is not prepared to meet. If this evidence was competent for the plaintiff it would be just as competent for the defendant to prove that on prior occasions the plaintiff's intestate had been careless . . . It would also be competent for the plaintiff to dispute such testimony and to show that on prior occasions he had been careless. Thus the issues would be largely multiplied, and no party going to trial would know in advance what he would have to meet.<sup>29</sup>

What is the harm of allowing Driver B to “prove” Driver A’s careless character trait? It has been explained that there are two justifications for this exclusionary rule: (1) the evidence may be too influential on the jury, and (2) “the prevention of nullification prejudice,”—the idea that the jury will use character evidence to reach a verdict despite evidence suggesting a different result.<sup>30</sup> Another equally cogent explanation is that: “character evidence carries a very high *intuitive* value . . . [t]his raises the distinct possibility that the jury will greatly overvalue character evidence as a predictor of conduct, and make an inaccurate assessment of the facts.”<sup>31</sup>

Finally, it has been noted that “the jury is supposed to base its judgment on evidence of what the relevant actors in the case *did*, not what sort of people they *are*.”<sup>32</sup> Therefore, since carefulness or carelessness are clearly

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26. 98 N.E. 209 (N.Y. 1912).

27. *Id.*

28. 117 N.Y.S. 1058 (N.Y. Sup. Ct. 1909), *aff'd*, 145 A.D. 900 (N.Y. App. Div. 1911), *rev'd*, 98 N.E. 331 (N.Y. 1912).

29. *Zucker*, 98 N.E. at 212 (quoting *Parsons*, 117 N.Y.S. at 1059).

30. Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1914, 1928-29 (2012) (quoting Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 745 (1998)); see Miguel A. Mendez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 223-24 (1996).

31. David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM L. REV. 305, 311 (1995).

32. Samuel R. Gross, *Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance*, 49 HASTINGS L.J. 843, 846 (1998).

character traits,<sup>33</sup> evidence of these traits to prove conduct in conformity therewith should be inadmissible.<sup>34</sup>

### III. HABIT

Habit, undefined in FRE 406, has been explained as "one's regular response to a repeated situation."<sup>35</sup> However, the term is better described as "a person react[ing] to a certain situation with the frequency of a response that approaches invariability."<sup>36</sup> Another apt description of habit evidence is "evidence of responses, often semi-automatic, to relatively narrow specific situations."<sup>37</sup>

The "legal" or evidentiary explanation of habit is bolstered by psychology.<sup>38</sup> Psychologists have explained habit as follows:

- "Habits enable the performance of "our actions in a rather mindless fashion."<sup>39</sup>
- "Most habitual behavior arises and proceeds efficiently, effortlessly, and unconsciously."<sup>40</sup>
- "Habits . . . comprise a goal-directed type of automaticity."<sup>41</sup>
- "[H]abits [are] goal-directed automatic behaviors that are mentally represented. And because of frequent performance in similar situations in the past, these mental representations and the resulting action can be automatically activated by environmental cues."<sup>42</sup>

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33. JOHN H. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE 66 (1935).

34. *Id.*

35. MCCORMICK ON EVIDENCE, *supra* note 23, § 195 at 418.

36. *See* FED. R. EVID. 406; MCCORMICK ON EVIDENCE, *supra* note 23, § 195 at 418; GLEN WEISSENBERGER & JAMES J. DUANE, WEISSENBERGER'S FEDERAL EVIDENCE 182 (7th ed. 2011) (quoting MCCORMICK ON EVIDENCE, *supra* note 23, § 195 at 418).

37. ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 191 (3d ed. 2011).

38. *See* Wendy Wood & David T. Neal, *A New Look at Habits and the Habit-Goal Interface*, 114 PSYCHOL. REV. 843, 843 (2007).

39. Henk Aarts, Bas Verplanken & Ad van Knippenberg, *Predicting Behavior from Actions in the Past: Repeated Decision Making or a Matter of Habit?*, 28 J. APPLIED SOC. PSYCHOL. 1355, 1358 (1998).

40. *Id.*

41. *Id.*

42. *Id.* at 1359.



– “[A]ny type of repetitive behavior requires less and less mental effort and conscious attention, and may therefore eventually become habitual.”<sup>43</sup>

Habit, therefore, is distinct from character.<sup>44</sup> Habit evidence is not evidence of a character trait and does not seek to prove conduct in conformity with a character trait.<sup>45</sup> Carefulness is a character trait, not a habit.<sup>46</sup> The careful habit is a misnomer, a contradiction of terms.<sup>47</sup> How did the careful habit become embraced by the jurisprudence of any jurisdiction? Is there a method by which to convince courts that the careful habit is a legal fiction which should cease to exist? The remainder of this paper focuses on these questions.<sup>48</sup>

#### IV. CAREFUL HABIT

##### *A. Context*

In the late 1800’s and early 1900’s, courts referred to careful habit in defining the negligence related to duty of care and presumably when referring to a person’s handling of banking matters.<sup>49</sup> However, I selfishly suggest in a negligence claim arising from an injury or death, the most important use of careful habit was (and is) to provide proof of carefulness when there were no eyewitnesses to the alleged negligent event.<sup>50</sup>

A classic example of such an event is an injury suffered by a railroad employee while at work or by another individual at a railroad crossing.<sup>51</sup>

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43. *Id.* at 1369.

44. PARK ET AL., *supra* note 37, at 191.

45. *Id.*

46. See WEISSENBERGER & DUANE, *supra* note 36, at 182.

47. See PARK ET AL., *supra* note 37, at 191 (“Habit evidence is often offered in civil cases to show a careful or careless habit. In such instances, the evidence must actually demonstrate a habit, and not just a general tendency toward care or its opposite.”).

48. See *infra* Part IV.

49. *Memphis & Little Rock R.R. v. Sanders*, 43 Ark. 225, 229 (1884); *Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Palmer*, 33 S.W. 199, 201 (Ky. 1895) (using the careful habit terminology to improperly instruct a jury); *Louisville & Nashville R.R. Co. v. McCoy*, 81 Ky. 403, 409 (1883); *Paige v. Paige*, 56 Pa. Super. 261, 266 (1914); see *Heward v. Slagle*, 52 Ill. 336, 340 (1869) (referring to the deceased’s careful habits and ability to amass money); *In re Estate of Fisher*, 102 N.W. 797, 798 (Iowa 1905) (“[T]he prosperous financial condition of the deceased, and his careful habits . . .”).

50. *Parsons*, 117 N.Y.S. at 1058.

51. See *Chi., Rock Island & Pac. Ry. Co. v. Clark*, 108 Ill. 113, 116-17 (1883); *Gibson v. Maine Cent. R.R.*, 74 A. 589, 589 (N.H. 1909); see also Francis H. Hare, *Actions for Personal Injuries and Death of Railroad Workers*, 17 ALA. L. REV. 201, 201 (1965); Henry Lawlor, *History of the Law Involving Collisions at Railroad Grade Crossings and the Right of Passengers in Vehicles to Recover as Affected by the Acts of the Operator*, 8 L. SOC’Y J. 573, 573 (1939).

Historically, these scenarios are not unusual or surprising.<sup>52</sup> In fact, they may have been rather routine occurrences.<sup>53</sup> It has been noted that: "In the late 1800's, the installation and utilization of railroads allowed for rapid westward and industrial expansion. However, their toll on human life was enormous. During this period, it has been estimated that a man was killed for each mile of track laid."<sup>54</sup>

Other scholarship has noted a similarly unfortunate history, reporting that railroad injuries victimized "passengers, . . . persons riding in carriages at railroad intersections, . . . livestock wandering on railroad tracks, and . . . farmers whose crops were set on fire by sparks."<sup>55</sup> Even more specifically:

In 1893, . . . one in 28 railroad workers was injured during the course of the year and one in 320 killed. For trainmen alone the odds were even worse. . . . one in nine was injured and one in every 115 killed. Injuries incurred while coupling cars represented 44% of the total casualties.<sup>56</sup>

It has been urged that "[t]he root cause of the safety problem was the hasty construction of new lines by undercapitalized firms who wished to take advantage of land grants."<sup>57</sup> This cause yielded a multitude of problems, including "sharp curves, poorly-constructed wooden bridges, steep grades, light rolling stock, . . . inadequate road bed[,] . . . flimsily constructed wooden carriages[,] and the threat of fire from coal-heating stoves and kerosene lighting."<sup>58</sup>

This remarkable and regrettable history of railroad safety and resulting injuries may very well have created the circumstances which gave birth to the careful habit as an evidentiary concept.<sup>59</sup> This paper takes the position that the law of evidence should have never recognized careful habit, and the aforementioned railroad history surely does not explain how the concept

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52. John L. Henshaw et al., *The Employer's Responsibility to Maintain a Safe and Healthful Work Environment: An Historical Review of Societal Expectations and Industrial Practices*, 19 EMP. RESP. RTS. J. 173, 175 (2007).

53. *Id.* at 175.

54. *Id.* (quoting R.L. Meyer, *Pre Council Accidents Were All in a Day's Work*, SAFETY AND HEALTH MAG., Jan. 1987, at 20, 20-22).

55. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1742-43 (1981).

56. CHARLES McDONALD, THE FEDERAL RAILROAD SAFETY PROGRAM – 100 YEARS OF SAFER RAILROADS 6 (1993), <http://www.wrcscorp.com/resources/frasafety.pdf> (footnotes omitted).

57. IAN SAVAGE, THE ECONOMICS OF RAILROAD SAFETY 20 (1998), <http://faculty.wcas.northwestern.edu/~ipsavage/103-manuscript.pdf>.

58. *Id.*

59. *Chi., Rock Island & Pac. Ry.*, 108 Ill. at 116-17.

continues to exist, even in jurisdictions with formal codes of evidence.<sup>60</sup> Why should the absence of eyewitness testimony provide the basis for the admissibility of evidence which should not be admissible? This paper explores jurisdictions and federal courts which have recognized the anomalous careful habit and recommends that this evidentiary concept should simply cease to exist.<sup>61</sup>

### B. Illinois

The Illinois law of careful habit in a negligence context may very well have begun with two, early Supreme Court of Illinois opinions: *Chicago, Burlington & Quincy R.R. v. Gregory*,<sup>62</sup> in 1871 and *Chicago, Rock Island & Pac. Ry. Co. v. Clark*,<sup>63</sup> in 1883.<sup>64</sup> Both cases involved severe injuries to and the death of railroad employees.<sup>65</sup> The *Gregory* opinion at least alludes to the concept of careful habit evidence.<sup>66</sup> The *Clark* opinion addresses the topic with greater specificity.<sup>67</sup> Both of these opinions are worth mentioning.<sup>68</sup>

In *Gregory*, the estate of a deceased railroad locomotive fireman brought a claim against the defendant railroad following a locomotive's collision with the fireman.<sup>69</sup> The Supreme Court noted that a condition for recovery was proof "that the party injured was in the exercise of due and proper care, and that the injury was not the result of his own negligence and want of proper precaution."<sup>70</sup> There were no eyewitnesses to the event.<sup>71</sup> However, the Illinois Supreme Court stated that "[u]p to within a moment of the accident, [the fireman] was shown to have been in the exercise of due care, and in his proper place . . . ."<sup>72</sup> Then, almost magically, the Supreme

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60. See *Powell*, 7 N.E.3d at 708. The "careful habit" continues to exist in Illinois by common law, and jury instruction. See ILL. PATTERN JURY INSTRUCTIONS CIVIL § 10.08 (ILL. SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CIV. CASES 2011), <http://www.illinoiscourts.gov/circuitcourt/CivilJuryInstructions/10.00.pdf> (recognizing the distinction between character evidence, IRE 404 and habit evidence, IRE 406).

61. See *infra* Sections IV.B-G.

62. 58 Ill. 272 (1871).

63. 108 Ill. 113 (1883).

64. *Chi., Burlington & Quincy R.R.*, 58 Ill. at 272; *Chi., Rock Island & Pac. Ry.*, 108 Ill. at 118.

65. *Chi., Burlington & Quincy R.R.*, 58 Ill. at 274-75; *Chi., Rock Island & Pac. Ry.*, 108 Ill. at 116.

66. *Chi., Burlington & Quincy R.R.*, 58 Ill. at 277.

67. *Chi., Rock Island & Pac. Ry.*, 108 Ill. at 117-18.

68. See Leon Green, *Illinois Negligence Law II: Contributory Negligence*, 39 ILL. L. REV. 116, 126 & n.35 (1945) (citing *Chi., Burlington & Quincy R.R.* and *Chi., Rock Island & Pac. Ry.* for the relaxed rule that, "[Permits] proof of the habits of the deceased and his normal exercise of care . . . only . . . where there are no eye witnesses.").

69. *Chi., Burlington & Quincy R.R.*, 58 Ill. at 274-75.

70. *Id.* at 277.

71. *Id.* at 278.

72. *Id.* at 279.

Court again commented upon the requirement of proof of freedom from contributory fault and found that this proof may derive from circumstantial evidence and that the evidence was sufficient "to warrant the conclusion that the deceased was in the exercise of due care and caution."<sup>73</sup> What was that circumstantial evidence?

Apparently, that evidence was the "customary and usual" conduct of "some firemen at least . . . to show the manner in which such duties were usually performed, and to rebut any inference of negligence on the part of the deceased, in the performance of his duties."<sup>74</sup> Of course, the tendency or propensity to act in a certain fashion implicates a character trait.<sup>75</sup> If *Gregory* provides the origin of careful habit evidence in Illinois, it seems to focus on the careful habits of a particular class of railroad employees, not the careful habits of the deceased.<sup>76</sup>

*Clark* concerned a railroad brakeman who, in 1879, was severely injured during car coupling activities and died from his injuries.<sup>77</sup> Clark's wife, as administratrix, sued the railroad for negligence and obtained a judgment in her favor.<sup>78</sup> The appellate court affirmed the judgment.<sup>79</sup>

The Illinois Supreme Court noted that, at trial, the court "admit[ted] evidence of the habits of deceased as to care, prudence and sobriety," which was used to demonstrate his freedom from contributory negligence.<sup>80</sup> Mrs. Clark had been required to plead and prove freedom from contributory fault. The Supreme Court stated that since "no person was present, or knew how the accident occurred," evidence (of the deceased's habits) provided the necessary proof.<sup>81</sup> The court, without citation to authority, commented, "If he was habitually prudent, cautious and temperate, it tended to prove he was so at the time of the injury, which, with the instinct of self-preservation, would be evidence for the consideration of the jury in determining whether he was in the exercise of care."<sup>82</sup> Similarly, again without citation to authority, the court acknowledged that under these circumstances (no

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73. *Id.*

74. *Chi., Burlington & Quincy R.R.*, 58 Ill. at 286.

75. *See Chi., Rock Island & Pac. Ry.*, 108 Ill. at 117-18.

76. *See generally Chi., Burlington & Quincy R.R.*, 58 Ill. at 272.

77. *See Chi., Rock Island & Pac. Ry.*, 108 Ill. at 116. For a discussion of the perils facing railroad workers, including brakemen, in the 1800's and the early 1900's, see John J. Esch, *Should the Safety of Employees and Travellers on Railroads Be Promoted by Legislation?*, 179 N. AM. REV. 671, 672-73 (1904); see generally MARK ALDRICH, *DEATH RODE THE RAILS—AMERICAN RAILROAD ACCIDENTS AND SAFETY 1828-1965* (2006).

78. *Chi., Rock Island & Pac. Ry.*, 108 Ill. at 116.

79. *Id.* at 117.

80. *Id.* "Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 416-17 (4th ed. 1971).

81. *Chi., Rock Island & Pac. Ry.*, 108 Ill. at 117.

82. *Id.*

witnesses) the defendant would be entitled to introduce contrary evidence on these characteristics.<sup>83</sup> If plaintiff's or defendant's evidence would be misleading, "the party against whom it is admitted . . . is entitled to have it limited, by instruction, to the purpose for which it is admissible."<sup>84</sup>

Of course, the evidence offered by Mrs. Clark that the trial court admitted was classic character evidence—evidence of Mr. Clark's character traits offered to prove that he acted in conformity with these traits. Why would the Illinois Supreme Court recognize careful habits as admissible evidence? Many years after *Clark*, some commentary suggested that the admissibility of careful habit evidence may have been a consequence of the Illinois Dead Man's Act.<sup>85</sup> However, the enactment of that statute predated the *Clark* opinion, and the Supreme Court did not refer to the statute.<sup>86</sup> Therefore, it may be fair to suggest that the reasoning underlying the court's recognition of the careful habit is, arguably, a mystery.

Compounding the mystery is the likelihood that the Illinois Supreme Court was familiar with character evidence and its general inadmissibility in negligence cases.<sup>87</sup> Only three years after *Clark*, the Supreme Court issued its opinion in *Holtzman v. Hoy*,<sup>88</sup> a medical negligence case.<sup>89</sup> Here, the Supreme Court approved the trial court's disallowance of the following question posed to the defendant-physician's witness: "I will ask you what his (Dr. Holtzman's) reputation is in the community, and amongst the profession, as being an ordinarily skillful and learned physician . . . ."<sup>90</sup> The Supreme Court, without referring specifically to the character traits of skillfulness or carefulness, provided the classic explanation for the exclusion of character evidence by stating, "[I]ts bearing upon the issue is too remote, and in many, if not in most, of cases, it would tend to mislead the jury, rather than enlighten them."<sup>91</sup> The court's opinion made clear that

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83. *Id.*

84. *Id.* at 117-18; see FED. R. EVID. 105.

85. See Recent Cases, *Evidence—Wrongful Death—Admissibility of Plaintiff's Evidence on Deceased's Careful Habits—[Illinois]*, 5 U. CHI. L. REV. 502, 502 (1938); Michael J. Polelle, *The Admissibility of Other Misconduct in Civil Cases*, 97 ILL. B. J., July 2009, at 364, 367; Bernard W. Moltz, *The Illinois Dead Man's Statute—Its Effect on the Personal Injury Trial*, 16 DEPAUL L. REV. 374, 386-87 (1967).

86. See Adrienne D. Whitehead, *New Life to the Dead Man's Act in Illinois*, 5 LOY. U. CHI. L.J. 428, 428 (1974) (noting that the statute was enacted in 1872); William T. Gibbs, *A Quick Guide to the Illinois Dead Man's Act*, 96 ILL. B. J., July 2008, at 352, 353 ("[T]he Dead Man's Act has been on the books in Illinois since 1867.").

87. See *Chi., Rock Island & Pac. Ry.*, 108 Ill. at 118.

88. 118 Ill. 534 (1886).

89. *Id.* at 535.

90. *Id.* at 535-36.

91. *Id.* at 537.

the central issue was whether the defendant-physician provided proper care in the specific treatment of the patient.<sup>92</sup>

On the assumption that the Supreme Court was aware of the problems with and the typical proscription of character evidence, perhaps the Supreme Court was more specifically interested in and concerned with plaintiff's burden to prove freedom from contributory negligence in the absence of eyewitness testimony.<sup>93</sup> Certainly, the admissibility of careful habit evidence would "alleviat[e] the burden plaintiffs would otherwise have in wrongful death cases without eyewitnesses."<sup>94</sup> Why would the Illinois Supreme Court desire to make plaintiff's burden to prove freedom from contributory fault less onerous? Why not simply require plaintiff to use circumstantial evidence in an attempt to carry this burden of proof?<sup>95</sup>

*Clark* was not simply a historical accident.<sup>96</sup> In 1889 the appellate court followed *Clark* in *McNulta v. Lockridge*,<sup>97</sup> a case involving a collision between a locomotive engine and a sleigh, and again was a tragic event without any eyewitnesses.<sup>98</sup> The trial court admitted evidence "that the deceased was familiar with the crossing, had frequently driven over it, and was of a careful habit."<sup>99</sup> This evidence led to an inference of the propriety of the deceased's conduct.<sup>100</sup> The appellate court opinion suggests that the court properly admitted careful habit evidence properly before the jury.<sup>101</sup>

The Supreme Court of Illinois addressed this topic again in 1898, in *Illinois Cent. R.R. Co. v. Ashline*.<sup>102</sup> Here, a train struck and killed the deceased.<sup>103</sup> On appeal, the railroad urged "that the [trial] court erred in the admission of evidence that the deceased was a man of careful habits."<sup>104</sup> In referencing if doubt existed to whether there were eyewitnesses to the incident, the Illinois Supreme Court noted that it was "inclined to think the evidence admissible."<sup>105</sup>

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92. *Id.* at 536.

93. *Holtzman*, 118 Ill. at 535, 537. For excellent explanations of the history and development of contributory negligence, see Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 152 (1946) (noting that contributory fault issues were common in railroad injury cases); Fleming James, Jr., *Contributory Negligence*, 62 YALE L.J. 691, 691-95 (1953); Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 697 (1978).

94. Polelle, *supra* note 85, at 367.

95. See Moltz, *supra* note 85, at 388.

96. See generally *Chi., Rock Island & Pac. Ry.*, 108 Ill. at 113.

97. 32 Ill. App. 86 (Ill. App. Ct. 1889).

98. *Id.* at 88, 96.

99. *Id.*

100. *Id.*

101. *McNulta*, 32 Ill. App. at 96.

102. 49 N.E. 521 (Ill. 1898).

103. *Id.* at 521.

104. *Id.* at 522.

105. *Id.*

As a result of Illinois's adoption of comparative negligence, Professor Schroeder in the Loyola University Chicago Law Journal in 1998, thoroughly chronicled the history of the Illinois careful habit, commencing in 1883 with *Clark*.<sup>106</sup> In a hopeful and, perhaps, predictive tone, Professor Schroeder wrote, "Under these circumstances, it is difficult to see any reason, except blind adherence to precedent, for Illinois courts to continue to allow the use of one kind of character evidence, careful habits evidence, while barring other kinds of character evidence."<sup>107</sup>

Regrettably, careful habit evidence has not yet disappeared from Illinois jurisprudence.<sup>108</sup> *Powell v. Dean Foods Co.*<sup>109</sup> provides the ammunition necessary to reveal judicial confusion with this concept and demonstrates why the demise of careful habit evidence is long overdue.<sup>110</sup> In *Powell*, three persons were killed in an automobile-tractor-trailer collision.<sup>111</sup> Special administrators of the victims' estates filed wrongful death actions against four defendants: the truck driver, the owner of the trailer, the truck driver's employer, and the owner of the tractor.<sup>112</sup> The jury returned verdicts in favor of the special administrators.<sup>113</sup> The jury found the automobile driver-victim "40% contributorily negligent in causing the collision" and the verdict in favor of the automobile driver's estate was proportionately reduced.<sup>114</sup>

At trial, the trial court gave the careful habits jury instruction,<sup>115</sup> which provided as follows:

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106. William A. Schroeder, *Evidence of Habit and Routine Practice*, 29 LOY. U. CHI. L.J. 385, 392-93 (1998); see Robert Bayer, Comment, *Illinois' Amended Dead Man's Act: A Partial Reform*, 1973 U. ILL. L. F. 700, 701 (1973); Clarence W. DeMoss, Comment, *Proving Due Care in a Wrongful Death Action*, 1956 U. ILL. L. F. 642, 642-43 (1956).

107. Schroeder, *supra* note 106, at 407.

108. See *Isbell v. Union Pac. R.R. Co.*, 745 N.E.2d 53, 58 (Ill. 2001) (referencing trial testimony by deceased's father about son's "careful habits when driving over railroad tracks"); *Gann v. Oltesvig*, 491 F. Supp. 2d 771, 779-80 (N.D. Ill. 2007) (approving use of Illinois Pattern Jury Instruction 10.08); *Strutz v. Vicere*, 906 N.E.2d 1261, 1267 (Ill. 2009) (discussing careful habits relevance); *Dickerson v. Midwest Emergency Dep't Servs., Inc.*, No. 5-09-0315, 2011 WL 10483373, at \*\*12-13 (Ill. App. Ct. July 12, 2011) (referring to varying Illinois appellate decisions on careful habit); *Eskew v. Burlington N. & Santa Fe Ry. Co.*, 958 N.E.2d 426, 441 (Ill. App. Ct. 2011) (discussing trial court jury instructions on careful habits, noting that court "[N]eed not determine the continued validity of the rule of necessity described above because the testimony regarding Eskew's careful habits was admitted without objection."); *Powell*, 7 N.E.3d at 708 (discussing propriety of Illinois Jury Pattern 10.08 with the special concurrence referring to careful habit as "misnomer," stating that it should be discarded and the dissent acknowledging the concept and believing that careful habit instruction was not erroneously given).

109. 7 N.E.3d at 675.

110. See generally *id.* (stating the rule for habit evidence incorrectly in the majority and dissenting opinions).

111. *Id.* at 681.

112. *Id.*

113. *Id.*

114. *Powell*, 7 N.E.3d at 681.

115. ILL. PATTERN JURY INSTRUCTIONS CIVIL § 10.08 (ILL. SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CIV. CASES 2011), <http://www.illinoiscourts.gov/circuitcourt/CivilJuryInstructions/>

If you decide there is evidence tending to show that the [decedent] [plaintiff] [defendant] was a person of careful habits, you may infer that he was in the exercise of ordinary care for his own safety [and for the safety of others] at and before the time of the occurrence, unless the inference is overcome by other evidence. In deciding the issue of the exercise of ordinary care by the [decedent] [plaintiff] [defendant] you may consider this inference and any other evidence upon the subject of the [decedent's] [plaintiff's] [defendant's] care.<sup>116</sup>

The "Notes on Use" for Illinois Pattern Jury Instructions (IPI) (Civil) 10.08, provide, in relevant part, that: "This instruction can be given in a negligence or willful and wanton action based on the Wrongful Death Act when there are no witnesses to the occurrence, other than the defendant, covering the entire period in which the decedent must be in the exercise of ordinary care."<sup>117</sup>

The "Comment" for IPI (Civil) 10.08 indicates that the Supreme Court of Illinois previously adopted Federal Rule of Evidence 406, governing the use of habit evidence.<sup>118</sup> Of course, as earlier explained in this paper, the Federal Rules of Evidence distinguish between character evidence, which is generally inadmissible, and habit evidence, which is typically admissible.<sup>119</sup> As previously discussed, carefulness is a character trait, not a habit.<sup>120</sup>

An additional reflection on the use of pattern jury instructions is appropriate here. Fifty years ago, Professor Stevens cogently explained the purpose of pattern jury instructions, as follows:

The development of pattern jury instructions should lead to a further improvement in the administration of justice. Under existing practices proposed instructions and requests to charge are normally submitted to the judge at the close of the evidence. All too frequently the attorneys, understandably, wait until the very last minute to make their requests. As a result, the trial judge, under pressure to get the case to the jury so that he can take another assignment, has little time to give the submitted instructions the

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10.00.pdf.

116. *Id.*

117. ILL. PATTERN JURY INSTRUCTIONS CIVIL § 10.08 notes on use (ILL. SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CIV. CASES 2011), <http://www.illinoiscourts.gov/circuitcourt/CivilJuryInstructions/10.00.pdf>.

118. ILL. PATTERN JURY INSTRUCTIONS CIVIL § 10.08 (ILL. SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CIV. CASES 2011), <http://www.illinoiscourts.gov/circuitcourt/CivilJuryInstructions/10.00.pdf>.

119. *See supra* Part I.

120. *See supra* Part II.



careful attention they deserve, and very little time and stenographic help to prepare his written instructions for delivery to the jury. Pattern jury instructions, where available and used, will help to eliminate, at least in part, this present weak spot in the trial of jury cases.<sup>121</sup>

Pattern jury instructions must be given when applicable to a specific type of case, and can only be helpful if they accurately reflect the law.<sup>122</sup> However, when a pattern instruction, such as IPI (Civil) 10.08, erroneously confuses two distinct categories of evidence, its use does not advance the administration of justice.<sup>123</sup>

In *Powell*, the surviving defendant-truck driver testified at trial as an adverse witness, during which he described the accident.<sup>124</sup> The “Notes on Use” for IPI (Civil) 10.08 provide that the “instruction can be given in a negligence or willful and wanton action based on the Wrongful Death Act when there are no witnesses to the occurrence, other than the defendant, covering the entire period in which the decedent must be in the exercise of ordinary care.”<sup>125</sup>

The *Powell* appellate court reversed the judgment for plaintiffs due to the trial court erroneously admitting evidence of the truck driver’s prior bad acts. The appellate court also addressed the issue of whether the trial court erroneously gave the “careful habits” instruction after plaintiffs admitted that [the automobile driver] was at least 25% of the proximate cause of the accident.”<sup>126</sup> Plaintiffs urged that the instruction was appropriate insofar as “none of the witnesses at trial testified as to the complete movement of [the driver’s] car from the stop sign and into the intersection.”<sup>127</sup>

The appellate court recognized that IPI (Civil) 10.08 “informed the jurors that if evidence had been presented that the decedent was a person of careful habits, then it could infer that she exercised ordinary care at the time of the accident.”<sup>128</sup> Nonetheless, it then emphasized that the trial court abused its discretion in giving the careful habits instruction it was

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121. George Neff Stevens, *Pattern Jury Instructions: Some Suggestions on Use and the Problem of Presumptions*, 41 WASH. L. REV. 282, 285-86 (1966) (footnote omitted).

122. *Schultz v. Ne. Ill. Reg’l Commuter R.R. Corp.*, 775 N.E.2d 964, 972 (Ill. 2002).

123. ILL. PATTERN JURY INSTRUCTIONS CIVIL § 10.08 (ILL. SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CIV. CASES 2011), <http://www.illinoiscourts.gov/circuitcourt/CivilJuryInstructions/10.00.pdf>.

124. *Powell*, 7 N.E.3d at 683.

125. ILL. PATTERN JURY INSTRUCTIONS CIVIL § 10.08 notes on use (ILL. SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CIV. CASES 2011), <http://www.illinoiscourts.gov/circuitcourt/CivilJuryInstructions/10.00.pdf>.

126. *Powell*, 7 N.E.3d at 707.

127. *Id.*

128. *Id.*

inconsistent with the admission that the deceased driver was contributorily negligent.<sup>129</sup> However, the appellate court did not state that Illinois law no longer recognized the concept of the careful habit.<sup>130</sup>

The special concurring opinion appropriately questioned "the continued viability of the concept of 'careful habits' evidence and thus the use of IPI Civil (2006) No. 10.08 in any case."<sup>131</sup> The two bases of this position were the adoption of comparative negligence in Illinois and, significantly, "that the term 'careful habits' is actually a misnomer. . . . more akin to character evidence as opposed to habit evidence."<sup>132</sup> Here, the special concurrence was precisely correct, further noting that "being a careful driver is not a response to a repeated *specific* situation but rather a more generalized description of a person's character trait. As character evidence I believe it should be inadmissible under our Rule 404(a)."<sup>133</sup> The special concurrence in *Powell* clearly appreciated that careful habits as an evidentiary concept has no place in Illinois law.<sup>134</sup>

The *Powell* dissent adds to the mystique of careful habits.<sup>135</sup> Here, it urged that Federal Rule of Evidence 406, governing habit evidence, is applicable "even if eyewitness testimony is available" and no inconsistency arises with the trial court's admission of the deceased driver's contributory negligence and the careful habits jury instruction.<sup>136</sup> The difficulty with the dissent's position is that it confuses careful habits, which is truly a reference to an inadmissible character trait, with typically admissible habit evidence as embraced by FRE 406.<sup>137</sup>

*Powell* reveals that Illinois law for more than 130 years has embraced careful habits as an anomalous evidentiary concept.<sup>138</sup> The *Powell* special concurrence quite properly questioned the viability of this concept.<sup>139</sup> The Illinois Rules of Evidence generally prohibit the introduction of character evidence, such as evidence of carefulness, and permits the introduction of habit evidence.<sup>140</sup> Accordingly, careful habit does not exist as a legitimate

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129. *Id.* at 709.

130. *Id.* at 707-09.

131. *Powell*, 7 N.E.3d at 712 (Palmer, J., concurring).

132. *Id.* at 712 (Palmer, J., concurring).

133. *Id.* at 713 (Palmer, J., concurring).

134. *Id.* at 712-13 (Palmer, J., concurring) ("[T]he concept [is] no longer viable and further that IPI Civil (2006) No. 10.08 should be discarded.").

135. *See id.* at 726 (Gordon, J., dissenting) (confusing "careful habit," which is inadmissible, and "habit evidence").

136. *Powell*, 7 N.E.3d at 725 (Gordon, J., dissenting).

137. *See id.* at 725-27 (Gordon, J., dissenting).

138. *See generally id.* (majority and dissenting opinions both confusing the concept of "careful habits" evidence).

139. *Id.* at 712-13 (Palmer, J., concurring).

140. ILL. R. EVID. § 404(a); ILL. R. EVID. § 406.

evidentiary concept and should be eliminated from the Illinois law of evidence.<sup>141</sup>

Two additional Illinois appellate opinions are worthy of comment insofar as they confuse conventional habit evidence by references to careful habit.<sup>142</sup> The opinions involve claims of hospital/nursing and dental/medical negligence, respectively—topics far removed from the typical negligence actions from which careful habit evidence is derived.<sup>143</sup>

The first opinion, *Hajian v. Holy Family Hospital*,<sup>144</sup> involved a hospital/nursing negligence claim.<sup>145</sup> At trial, the defendant nurse testified to her habit of providing certain care which “contained sufficiently detailed and specific facts.”<sup>146</sup> The appellate court noted that Illinois adopted Federal Rule of Evidence 406 and, significantly, stated that, “The party seeking admission of the habit evidence must first establish a proper foundation to show conduct that becomes semiautomatic, invariably regular and not merely a tendency to act in a given manner.”<sup>147</sup> The appellate court then noted the propriety of the IPI 10.08 Careful Habits instruction, which provides as follows:

If you decide there is evidence tending to show that the [decedent] [plaintiff] [defendant] was a person of careful habits, you may infer that he was in the exercise of ordinary care for his own safety [and for the safety of others] at and before the time of the occurrence, unless the inference is overcome by other evidence. In deciding the issue of the exercise of ordinary care by the [decedent] [plaintiff] [defendant] you may consider this inference and any other evidence upon the subject of the [decedent's] [plaintiff's] [defendant's] care.<sup>148</sup>

Of course, this was not the proper habit evidence instruction, as a proper instruction would have been fashioned from FRE 406 and Illinois case law

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141. See *Powell*, 7 N.E.3d at 712-13 (Palmer, J., concurring); see also ILL. R. EVID. § 404(a); ILL. R. EVID. § 406.

142. See generally *Hajian v. Holy Family Hosp.*, 652 N.E.2d 1132 (Ill. App. Ct. 1995) (improperly instructing on habit evidence in a hospital/negligence claim); *Dickerson*, 2011 WL 10483373 (improperly instructing on habit evidence in respect to hospital patient history).

143. See *Hajian*, 652 N.E.2d at 1140; see also *Dickerson*, 2011 WL 10483373, at \*\*12-13.

144. 652 N.E.2d at 1132.

145. See *id.* at 1134.

146. *Id.* at 1140.

147. *Id.* (emphasis added).

148. *Id.*; ILL. PATTERN JURY INSTRUCTIONS CIVIL § 10.08 (ILL. SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CIV. CASES 2011), <http://www.illinoiscourts.gov/circuitcourt/CivilJuryInstructions/10.00.pdf>.

which adopted it.<sup>149</sup> A careful habit is simply a character trait, such as carefulness; it is not a habit for purposes of FRE 406.<sup>150</sup>

The second opinion is an unpublished product of the appellate court in *Dickerson v. Midwest Emergency Dep't Servs.*<sup>151</sup> Here, the court considered classic custom and habit testimony in medical negligence litigation—testimony regarding “taking and recording patient histories” and testimony “regarding . . . customs or habits in conducting and recording physical examinations of patients.”<sup>152</sup> This type of testimony is common insofar as health care professionals may not recall specific patient encounters, but can state what would have occurred based upon their habitual interaction with patients in specific circumstances.<sup>153</sup> This constitutes basic FRE 406 habit evidence.<sup>154</sup>

In *Dickerson*, the plaintiffs argued the trial court erred in admitting evidence.<sup>155</sup> The appellate court first referred to the adoption “of Federal Rule of Evidence 406 as Illinois Rule of Evidence 406” and then referred to careful habits evidence, which is entirely unrelated to habit evidence.<sup>156</sup> The appellate court’s reference to careful habits evidence simply reflects the confused state of Illinois’ law of evidence.<sup>157</sup>

### C. Missouri

Missouri jurisprudence recognizes careful habit as an evidentiary concept “where there are no eyewitnesses to a fatal event . . . to prove the decedent’s freedom from contributory negligence.”<sup>158</sup> Interestingly,

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149. For a recent opinion noting the earlier adoption of FED. R. EVID. § 406, see generally *People v. Ealy*, 53 N.E.3d 109 (Ill. App. Ct. 2015).

150. See *supra* Part IV.A.

151. *Dickerson*, 2011 WL 10483373.

152. *Id.* at \*12.

153. See *id.* at \*\*12-13.

154. See FED. R. EVID. 406.

155. *Dickerson*, 2011 WL 10483373, at \*1.

156. See *id.* at \*12.

157. The Illinois law of evidence, even after the adoption of the Illinois Rules of Evidence on January 1, 2011, remains somewhat of a curiosity. For example, Illinois has rejected *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) as the basis of IRE 702, in favor of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63, 80-81 (2002). Illinois currently does not recognize the present sense impression as an exception to the hearsay rule. Jeffrey A. Parness, *Survey of Illinois Law: The Ins and Outs of the New Illinois Evidence Rules*, 35 S. ILL. U. L.J. 689, 689 (2011). Illinois has not recognized a learned treatise exception to the hearsay rule. Ruebner, Durcova & Taylor, *supra* note 8, at 275. Despite IRE 803(6), the records of regularly conducted activity exception to the hearsay rule, Illinois Supreme Court Rule 236, Admission of Business Records in Evidence, remains in place. ILL. SUP. CT. R. 236. Unlike FRE 801, under the IRE prior inconsistent statement under oath, as non-hearsay, applies only in criminal cases. ILL. R. EVID. 801(d).

158. 22 WILLIAM A. SCHROEDER, MISSOURI PRACTICE, MISSOURI EVIDENCE § 406:1 (4th ed. 2016).

Missouri's recognition of this concept apparently is reliant on Illinois law.<sup>159</sup> In 1957, the Supreme Court of Missouri, in *Gerhard v. Terminal R.R. Ass'n. of St. Louis*,<sup>160</sup> considered whether a deceased motorist was contributorily negligent when his automobile struck the curbing on a bridge, crashed through a railing, and fell to the ground.<sup>161</sup> At trial, the jury returned a verdict for the plaintiff, and the defendant appealed.<sup>162</sup>

The Supreme Court of Missouri focused on the location of the accident, and concluded that the accident occurred on the Illinois side of the Mississippi River. The court determined that Illinois substantive law applied to the dispute.<sup>163</sup> Illinois law required that a plaintiff must "allege, prove and submit the exercise of due care on his part as an essential, integral element of his claim."<sup>164</sup> The Supreme Court, citing Illinois authority,<sup>165</sup> stated, "In cases where no eyewitness to a fatal event is available, the jury may consider, along with the evidence, the natural instinct of men to avoid injury and the plaintiff is permitted to prove the ordinarily careful habits of decedent as tending to prove his freedom from contributory negligence."<sup>166</sup> The Supreme Court, however, noted that there were eyewitnesses to the accident, and careful habits evidence was not appropriate.<sup>167</sup> *Gerhard* simply acknowledged that Illinois law recognized careful habits evidence.<sup>168</sup> Nevertheless, *Gerhard* has arguably provided the basis for the recognition of this concept in Missouri.<sup>169</sup>

In 1967, a Missouri court of appeals in *Walker v. Massey*<sup>170</sup> examined the granting of a new trial in a wrongful death claim.<sup>171</sup> The claim involved a vehicular accident in Missouri for which no eyewitnesses were present.<sup>172</sup> The jury returned a verdict for the plaintiff, but the trial court granted a new trial because the "plaintiffs' decedent was guilty of contributory negligence as a matter of law."<sup>173</sup>

During the trial, the plaintiffs introduced careful habits evidence, without objection, by stating "that their decedent obtained his driver's

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159. *Gerhard v. Terminal R.R. Ass'n of St. Louis*, 299 S.W.2d 866, 872 (Mo. 1957).

160. 299 S.W.2d at 866.

161. *Id.* at 867.

162. *Id.*

163. *Id.* at 869.

164. *Id.* at 870.

165. *Gerhard*, 299 S.W.2d at 872 (citing *Elliott v. Elgin, Joliet & E. Ry. Co.*, 59 N.E.2d 486 (Ill. 1945)).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 869.

170. 417 S.W.2d 14 (Mo. Ct. App. 1967).

171. *Id.* at 16.

172. *Id.*

173. *Id.*

license the day after his sixteenth birthday; that, during the period of about fifteen months from that date to the time of his tragedy, he had not been involved 'in any accident or traffic violation'; and that 'he was a very careful driver.'"<sup>174</sup> Certainly, the testimony regarding the absence of accidents or traffic violations and carefulness is classic, inadmissible character trait evidence.<sup>175</sup> The plaintiffs offered it to prove conduct in conformity with a character trait.<sup>176</sup>

The court of appeals referred to *Gerhard*, the aforementioned Missouri opinion relying on Illinois law, and *Elliott v. Elgin, Joliet & Eastern Ry. Co.*,<sup>177</sup> an Illinois opinion, as authority for the admissibility of careful habits evidence to prove freedom from contributory negligence when there were no eyewitnesses to the accident.<sup>178</sup> The court then found "it unnecessary to express any opinion as to the legal validity of that proposition," in referring to careful habits evidence, as the evidence was introduced and admitted without objection.<sup>179</sup>

A third opportunity to address careful habits evidence occurred in *Hawkins v. Whittenberg*.<sup>180</sup> Here, the Missouri Court of Appeals reviewed a directed verdict for the defendant in a wrongful death action brought against the defendant automobile driver.<sup>181</sup> The accident involved an intersection collision, which resulted in the death of a pedestrian.<sup>182</sup> The theory of the claim was the "defendant's negligence in failing to keep a careful lookout."<sup>183</sup> At issue on appeal was the trial court's rejection of "plaintiff's offer of proof with respect to a habit of [the pedestrian]."<sup>184</sup> The court of appeals noted the offer of proof as follows: "My offer of proof would be that I have two witnesses that would testify that they had known this woman over a lifetime and had walked with her on numerous occasions and not upon one of those occasions did she ever cross the street other than at a crosswalk."<sup>185</sup> Plaintiff urged that the offer of proof constituted proof of a "'careful habit of crossing streets only at intersections' and 'within a crosswalk if one were available.'"<sup>186</sup> Of course, this offer of proof simply

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174. *Id.* at 24.

175. *Walker*, 417 S.W.2d at 24.

176. *Id.*

177. 59 N.E.2d at 486.

178. *Id.*

179. *Id.*

180. 587 S.W.2d 358, 363 (Mo. Ct. App. 1979).

181. *Id.* at 359.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Hawkins*, 587 S.W.2d at 363.

186. *Id.*

related to character evidence.<sup>187</sup> There was no reference to specific circumstances, nor a reference to repeated crossings of the same intersection at the same streets.<sup>188</sup> The offer of proof was not specific enough to prove habit.<sup>189</sup>

The court of appeals then referred to *Gerhard*, which recognized careful habits evidence in a wrongful death claim in which no eyewitnesses were present.<sup>190</sup> It is not at all clear that the court of appeals enthusiastically embraced the concept of careful habits evidence, for the court ultimately affirmed the trial court's judgment on the directed verdict due to a lack of evidence on the defendant's alleged failure "to keep a careful lookout."<sup>191</sup> It has been urged that "Missouri law governing the use of habit evidence to prove conduct consistent with the alleged habit is unclear and unsettled."<sup>192</sup> Missouri's apparent but uncertain recognition of careful habit evidence adds to the confusion, as Missouri is a pure comparative negligence jurisdiction.<sup>193</sup>

#### D. Kansas

In 1971, the United States Court of Appeals for the Tenth Circuit, in *Frase v. Henry*,<sup>194</sup> recognized careful habits evidence in a most curious fashion.<sup>195</sup> *Frase* involved wrongful death and survival actions arising from an auto collision.<sup>196</sup> In that case there were no eyewitnesses to the accident and no survivors.<sup>197</sup> At issue on appeal was the propriety of trial testimony "that appellee's deceased was a good driver."<sup>198</sup> The court of appeals recounted the trial testimony in this regard as follows:

Witness Mrs. Bodge testified that she had ridden with appellee's deceased and she thought he was a good driver who did not drive over the speed limit but usually drove five miles per hour under the limit. Witness Frase also testified that appellee's deceased was a

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187. *See id.*

188. *See id.*

189. *See id.*

190. *Hawkins*, 587 S.W.2d at 363.

191. *Id.* at 361, 364.

192. SCHROEDER, *supra* note 158, at § 406:1.

193. Eli K. Best & John J. Donohue III, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 U. CHI. L. REV. 945, 949 (2012).

194. 444 F.2d 1228 (10th Cir. 1971).

195. *See id.* at 1232.

196. *Id.* at 1229.

197. *Id.*

198. *Id.* at 1231.

good driver, cautious, obeyed the rules of the road, and in the recollection of this witness never drove over 60 miles per hour.<sup>199</sup>

The court then appropriately defined "character" and "habit," both thoroughly discussed earlier in this paper.<sup>200</sup> Remarkably, the court evaluated the aforementioned trial testimony and stated:

testimony regarding the deceased's care in driving, his practice of driving under the speed limit, and his regard to the rules of the road is testimony which devolved into specific aspects of the deceased's conduct. Such testimony showed more than a general description to be careful and showed a regular practice of meeting a particular kind of situation with a specific type of conduct. The testimony is all the more cogent because of the lack of an eyewitnesses account of what transpired that morning . . . .<sup>201</sup>

The court of appeals noticed the absence of Kansas jurisprudence construing Kansas' evidentiary statutes pertaining to character and habit evidence.<sup>202</sup> Yet, as previously mentioned, the court of appeals clearly recognized the distinction between character and habit evidence.<sup>203</sup> The trial testimony did not reflect the indicia of habit evidence—that was simply character evidence.<sup>204</sup> Essentially, the court of appeals deferred to "the trial judge's wide discretion in receiving evidence" and found the "judge's view . . . highly persuasive as to what the law of the State of Kansas is or would be," and affirmed the judgment for the plaintiff.<sup>205</sup> *Frase* is truly an extraordinary opinion and contributes to the unfortunate jurisprudence of careful habits.<sup>206</sup> Kansas is a modified comparative negligence jurisdiction which perhaps may lead its courts to determine that it is unnecessary to resort to careful habits evidence in applying its model of comparative fault.<sup>207</sup>

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199. *Frase*, 444 F.2d at 1231-32.

200. *See supra* Part I.

201. *Frase*, 444 F.2d at 1232.

202. The Supreme Court of Kansas was, at least, somewhat familiar with character evidence. *Id.*; *Gardner v. Pereboom*, 416 P.2d 67, 73 (Kan. 1966).

203. *Frase*, 444 F.2d at 1232.

204. *Id.*

205. *Id.*

206. *See id.*

207. Best & Donohue, *supra* note 193, at 950.



*E. Nebraska*

In 1954, the Supreme Court of Nebraska, in *Peake v. Omaha Cold Storage Co.*,<sup>208</sup> appeared to recognize the careful habits evidentiary concept.<sup>209</sup> *Peake* concerned a property damage claim arising from a truck collision.<sup>210</sup> At trial, the jury returned a verdict for the plaintiff.<sup>211</sup> The defendant's motions for judgment notwithstanding the verdict and for new trial were denied, which culminated in the defendant's appeal.<sup>212</sup>

On appeal, the defendant argued that the trial court erred in refusing to permit "the wife and daughter of the driver of the defendant's truck to testify as to his general, normal, and usual habits, that is, to stop at stop signs and comply with the law in such respect."<sup>213</sup> This proposed testimony was not specific enough to qualify as true habit testimony.<sup>214</sup> It simply constituted character evidence, essentially offered to prove that the defendant complied with the traffic laws when driving.<sup>215</sup>

The Supreme Court of Nebraska referred to the law of careful habits evidence recognized in some jurisdictions when there is an absence of eyewitness testimony.<sup>216</sup> Here the driver of the plaintiff's truck gave trial testimony regarding the accident.<sup>217</sup> The court held "that the rejection of the testimony of [the wife and daughter] did not constitute prejudicial error."<sup>218</sup> According to the court, the driver of the plaintiff's truck statements essentially constituted eyewitness testimony, resulting in the inadmissibility of careful habits evidence.<sup>219</sup> It should be noted that Nebraska, like Kansas,

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208. 64 N.W.2d 470 (Neb. 1954).

209. *See id.* at 480 (observing that it is a recognized principle in some jurisdictions that testimony of "careful habit" is admissible in the absence of eyewitness testimony describing an accident in attempting to prove negligence, but concluding that such testimony is irrelevant in light of other testimony).

210. *Id.* at 473.

211. *Id.*

212. *Id.*

213. *Peake*, 64 N.W.2d at 480.

214. *See* Schroeder, *supra* note 106, at 388 (stating that some jurisdictions define habit as a person's "regular practice of responding to a particular kind of repeated situation with a *specific* type of conduct." Unvarying regularity is the key. A mere tendency to act in a particular manner is not a habit, although it may be a manifestation of a character trait." (emphasis added) (footnote omitted)). The testimony provided in *Peake* was a broad statement of the driver's tendency to obey traffic laws—it did not amount to specific instances of regularity.

215. *See Peake*, 64 N.W.2d at 480 (describing the wife and daughter's testimony as being asserted to show that the driver of the defendant's truck generally complied with traffic laws).

216. *Id.*

217. *Id.*

218. *Id.* at 481.

219. *Id.* at 480-81.

is a modified comparative negligence jurisdiction,<sup>220</sup> which should militate against any perceived need to rely on careful habit evidence.<sup>221</sup>

#### *F. New Hampshire*

The Supreme Court of New Hampshire may have recognized careful habits evidence in its 1909 opinion in *Gibson v. Maine Cent. R.R.*<sup>222</sup> *Gibson* involved a young man who was hit by a train while bicycling at a railroad crossing.<sup>223</sup> The Supreme Court of New Hampshire distinguished *Gibson* from *Smith v. Bos. & M.R.R.*,<sup>224</sup> a case involving evidence of "habitual prudence," by virtue of the trial testimony.<sup>225</sup>

The court made this distinction based on its reference to the cross-examination of three witnesses, which yielded the following testimony:

"A. No sir; he rode ordinarily and with usual caution, I think."

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"A. He was a very careful rider."

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"Q. Was he a careful boy?"

A. Well, as much as I have seen of him, he was."<sup>226</sup>

This testimony clearly refers only to the character trait of carefulness.<sup>227</sup> Another witness, on direct examination, testified that he had observed the deceased riding his bicycle over a street crossing as trains approached.<sup>228</sup> That evidence "led to the inference that in his opinion the . . . boy had a

220. Best & Donohue, *supra* note 193, at 950.

221. See Schroeder, *supra* note 106, at 407-08 (stating Illinois also utilizes a comparative negligence standard, and that, "[a]s a result, evidence of careful habits may help the plaintiff win a larger award, but it will rarely be necessary to a recovery. . . . [T]he adoption of Rule 406 would not . . . determine the relevance or admissibility of careful habits evidence, such evidence is of little probable value . . .").

222. 74 A. at 589.

223. *Id.*

224. 47 A. 290 (N.H. 1900).

225. *Gibson*, 74 A. at 589.

226. *Id.* at 589-90.

227. See *id.* at 589 (stating that while the essential element of "habitual prudence" was clearly present in the *Smith* case, the only evidence of care came from the eyewitness testimony on cross and direct examination); see also Schroeder, *supra* note 106, at 389 ("'Character' refers to 'the nature of a person, his disposition generally, or his disposition in respect to a general trait such as honesty, peacefulness or truthfulness. . . . '[I]f we think of character for care, we think of the person's tendency to act prudently in all the varying situations of life.'").

228. *Gibson*, 74 A. at 589.

habit of carelessness . . . .”<sup>229</sup> The court then stated that because “there was not sufficient evidence of a careful habit, there was nothing from which it could be inferred that the deceased were careful.”<sup>230</sup> Perhaps the court was actually referring to the lack of classic habit evidence, by comparing the aforementioned character evidence to the more specific testimony of a witness who had previously seen the deceased on a bicycle crossing the tracks as trains were approaching.<sup>231</sup> If so, the Supreme Court of New Hampshire should be applauded for not confusing habit evidence with character evidence. If, however, the court did not intend this, *Gibson* simply constitutes another chapter in the strange story of careful habits evidence.<sup>232</sup> It is hopeful that this chapter is closed now that New Hampshire is a modified comparative negligence jurisdiction.<sup>233</sup>

### G. Rhode Island

In 1879, without particular explanation, the Supreme Court of Rhode Island recognized the evidentiary habit of “heedlessness” in *Cassidy v. Angell*.<sup>234</sup> In that case, the plaintiff’s decedent was found fatally injured in a highway construction site.<sup>235</sup> The court’s opinion reveals no eyewitnesses were present.<sup>236</sup> In noting that the plaintiff was required to prove freedom from contributory negligence, the court stated that “[o]n the other hand, the habits of the person as to temperance, heedlessness, &c., may be considered . . . .”<sup>237</sup> Heedlessness has been defined as “a course of conduct amounting to more than negligence and amounting to a degree of fault which is only a degree removed from an intentional assault.”<sup>238</sup> It has also been defined as “gross negligence.”<sup>239</sup> Temperance has been defined as “moderation” or “total abstinence,” presumably relating to alcohol consumption.<sup>240</sup> Both are

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229. *Id.* at 589-90.

230. *Id.*

231. *Id.* at 589.

232. *See Smith*, 47 A. at 291 (analyzing witness testimony asserting that the deceased plaintiff typically rode his horse prudently and carefully); *see also Gibson*, 74 A. at 589 (analyzing testimony about the deceased plaintiff’s propensity to ride his bicycle carefully as an ordinary rider would); *Peake*, 64 N.W.2d at 480 (discussing whether testimony would be permitted to assert that the driver of the defendant’s truck typically complied with all traffic laws).

233. *See Best & Donohue*, *supra* note 193, at 949.

234. 12 R.I. 447 (1879).

235. *Id.*

236. *Id.* at 447-48.

237. *Id.* at 448.

238. Henry Hart & Malcom W. Tisdell, *Contributory Negligence and Assumed Risk as Applied to the Texas “Guest Statute”*, 4 BAYLOR L. REV. 505, 511 (1952).

239. John B. Spiers, *Contributory Negligence as a Defense to Gross Negligence*, 2 BAYLOR L. REV. 76, 81 (1949).

240. *See Paul A. Carter, Temperance, Intemperance, and the American Character; or, Dr. Jekyll and Mr. Hyde*, 14 J. SOC. HIST. 481, 482 (1981) (book review).

quite clearly character traits.<sup>241</sup> Heedlessness, I suspect, would constitute a "careless habit."<sup>242</sup> *Cassidy* is a very old opinion.<sup>243</sup> Rhode Island is a pure comparative negligence jurisdiction.<sup>244</sup> Therefore, it is unlikely that careful habit evidence will reappear in its jurisprudence.<sup>245</sup>

#### H. Oklahoma

In 1952, the Supreme Court of Oklahoma recognized careful habits in *Gillette Motor Transport v. Kirby*.<sup>246</sup> *Gillette* involved a two-truck collision resulting in the death of the plaintiff's decedent—one of the truck drivers.<sup>247</sup> At trial, the only eyewitness was the driver of the defendant's truck.<sup>248</sup> The witnesses for the plaintiff included the deceased's spouse, a number of relatives, a photographer, a police officer, and another person who later arrived at the collision site.<sup>249</sup>

The trial court permitted the following testimony: "by the wife . . . that her husband was a careful driver . . ." and by "the brother-in-law [who] . . . testif[ied] that the deceased was a careful, painstaking driver and was a very good driver and always wanted to drive ever since he was a child."<sup>250</sup> The trial court also "permitt[ed] . . . introduction in evidence of the certificate awarded from a previous employer that the deceased was given such award for having been theretofore a careful driver."<sup>251</sup> This testimonial and documentary evidence was unquestionably character evidence pertaining to the character trait of carefulness.<sup>252</sup>

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241. See David P. Leonard, *The Perilous Task of Rethinking the Character Evidence Ban*, 49 HASTINGS L.J. 835, 836 & n.7 (1998) (discussing whether being a "drunkard" is considered to be valid character evidence—if so, a moral requirement to character may be needed, describing "temperance" and "moderation" as perhaps worthy of being labeled character evidence).

242. See, e.g., Hart & Tisdell, *supra* note 238, at 511-13 (explaining that a plaintiff in a Connecticut case argued that the definition "heedlessness" in the state's Guest Statute was equivalent to "carelessness" or "negligence;" ultimately, the Supreme Court of Connecticut, as well as other courts, reasoned that "heedlessness" requires a showing higher than mere negligence).

243. *Cassidy*, 12 R.I. at 447 (decided in 1879).

244. Best & Donohue, *supra* note 193, at 949.

245. See Schroeder, *supra* note 106, at 409-10 ("Careful habits evidence presents special problems. . . . With the elimination of the contributory negligence bar on recovery in personal injury cases, plaintiffs no longer need to plead and prove freedom from contributory negligence in order to recover. Under these circumstances, it is difficult to see any reason, except adherence to precedent, that courts should continue to allow evidence of careful habits while barring other kinds of character evidence.").

246. 253 P.2d 139 (Okla. 1952) (per curiam).

247. *Id.* at 140.

248. *Id.*

249. *Id.* at 140-41.

250. *Id.* at 141.

251. *Gillette*, 253 P.2d at 141.

252. See *id.* at 143 (holding that "evidence of the deceased's careful habits . . ." and "testimony of the general habits of carefulness . . ." were inadmissible in this case due to eyewitness testimony).

In its opinion, the Supreme Court of Oklahoma referred to authority prohibiting careful habits evidence “if there was an eyewitness to a fatal accident.”<sup>253</sup> Of course, this suggests that the Supreme Court of Oklahoma would have recognized the propriety of careful habits evidence in the absence of eyewitnesses. However, the court also noted authority for the proposition that “[t]estimony of general habits of carefulness is too remote to raise the presumption that they have been exercised in any given case.”<sup>254</sup> This statement reflects the understanding of a general prohibition on the admissibility of character evidence.<sup>255</sup>

The Supreme Court of Oklahoma concluded that there was an eyewitness to the accident, albeit an employee of the defendant, and this fact rendered the careful habits testimony—as well as the testimony regarding the plaintiff’s award for careful driving—inadmissible.<sup>256</sup> This suggests that the court would have found careful habits evidence admissible in the absence of a collision eyewitness. Oklahoma is now a modified comparative negligence jurisdiction.<sup>257</sup> Hopefully, this dooms any further recognition of careful habits in Oklahoma.<sup>258</sup>

### *I. West Virginia*

In 1914, the Supreme Court of Appeals of West Virginia, in *McLaughlin v. Baltimore & O. R.R. Co.*,<sup>259</sup> considered an appeal from a plaintiff’s verdict arising from a negligence claim involving a barn fire.<sup>260</sup> Plaintiff sued the defendant railroad when sparks from its locomotive allegedly ignited the barn.<sup>261</sup> The court noted “that there was no reasonable way of accounting for the fire, other than it had caught from a spark from defendant’s engine.”<sup>262</sup>

The testimony at trial implicated character evidence: “the engineer testified that he was careful at the time in question . . . .”<sup>263</sup> The court noted

253. *Id.* at 141.

254. *Id.* (quoting *Junction City v. Blades*, 41 P. 677, 678, 680 (Kan. Ct. App. 1895)).

255. See FED. R. EVID. 404(a)(1) (containing the modern prohibition against character evidence: “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”); see also James B. Thayer, *The Present and Future of the Law of Evidence*, 12 HARV. L. REV. 71, 85 (1898) (“The rule excluding character evidence, when exactly stated, merely forbids the use of a person’s general reputation, or of his actual character, as the basis of an inference to his own conduct. This rule is modern.”).

256. *Gillette*, 253 P.2d at 143.

257. Best & Donohue, *supra* note 193, at 949.

258. See Schroeder, *supra* note 106, at 409-10.

259. 83 S.E. 999 (W. Va. 1914).

260. *Id.* at 1000.

261. *Id.*

262. *Id.*

263. *Id.* at 1000-01.

that the fireman "did not testify, and the engineer d[id] not say, that the fireman was careful."<sup>264</sup> The court then stated that, "A man of reasonably careful habits is liable to be negligent sometimes, and from aught that appears in the evidence the fireman may have been negligent on this particular occasion."<sup>265</sup> It is unclear if this is identical to the careful habits concept with which this paper is concerned.

*J. Arkansas*

In 1884, the Supreme Court of Arkansas referred to careful habits when defining the tort duty of ordinary care.<sup>266</sup> The court, in *Memphis & Little Rock R.R. v. Sanders*,<sup>267</sup> considered the "injury to a horse, done by a running train."<sup>268</sup> The case also involved a claim of the plaintiffs' contributory fault, about which the court noted "that there [was] not a particle of proof of it in the whole transcript."<sup>269</sup>

In discussing the duty of care, the court stated:

[a]fter the discovery of a danger, brought about by the negligence of another, one must in all cases use a reasonable diligence to avoid the consequences, and, where human life is involved, to be reasonable it must be everything that humanity would prompt, and which might be reasonably thought of in the emergency. In ordinary cases like this, involving property, it must be ordinary care. Such as a prudent man, of average *careful habits*, would be prompted to use, to avert an injury to property of his own.<sup>270</sup>

One can only wonder if this definition suggests that perhaps many years ago the Arkansas courts would have recognized careful habits evidence. *Sanders* is another very old opinion.<sup>271</sup> Arkansas' adoption of modified comparative negligence would cause any possible vitality of careful habits evidence to be questioned.<sup>272</sup>

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264. *McLaughlin*, 83 S.E. at 1001.

265. *Id.*

266. *Memphis & Little Rock R.R.*, 43 Ark. at 229.

267. *Id.* at 225.

268. *Id.* at 226.

269. *Id.* at 228.

270. *Id.* at 229 (emphasis added).

271. *Memphis & Little Rock R.R.*, 43 Ark. at 225 (decided in 1884).

272. Best & Donohue, *supra* note 193, at 950.

### K. Kentucky

In the 1880's and 1890's, the Court of Appeals of Kentucky utilized the term "careful habits" in defining the duty of care.<sup>273</sup> All three of the subsequent cases involved injuries suffered by railroad employees during the course of their employment.<sup>274</sup> In *Louisville & Nashville R.R. Co. v. McCoy*,<sup>275</sup> the court defined ordinary care as:

that degree of care which a majority of men of prudent and careful habits would exercise under the same or like circumstances to avoid injury to their own persons from the same risks which others undergo in their service or in obedience to their orders, or by reason of the conduct of their hazardous business.<sup>276</sup>

In *Louisville & Nashville R.R. Co. v. Sheets*,<sup>277</sup> the court referred to the definition of gross negligence in the jury instructions as "the failure to exercise such skill as one of careful habits would observe, to avoid danger, under similar circumstances."<sup>278</sup> In *Cincinnati, New Orleans, & Texas Pac. Ry. v. Palmer*,<sup>279</sup> the court noted that the jury was erroneously instructed in a gross negligence case with an ordinary negligence instruction, as follows: "Gross negligence, as applicable to this case, is equivalent to slight care only, or the absence of that degree of care which most men of prudent and careful habits or temperament would have exercised under the same or like circumstances to avoid injuring others."<sup>280</sup> Again, these cases do not speak to whether trial courts in Kentucky would actually receive careful habits character testimony in evidence.<sup>281</sup>

### L. Iowa

In 1895, the Supreme Court of Iowa considered a claim brought on behalf of a deceased railroad worker—a night yard master—who was killed when struck by a railroad engine.<sup>282</sup> The opinion in *Adams v. Chicago*,

273. *McCoy*, 81 Ky. at 409; *Louisville & Nashville R.R. Co. v. Sheets*, 13 S.W. 248 (Ky. 1890); *Cincinnati, New Orleans & Texas Pac. Ry. Co.*, 33 S.W. at 201.

274. *McCoy*, 81 Ky. at 409; *Sheets*, 13 S.W. at 248; *Cincinnati, New Orleans & Texas Pac. Ry. Co.*, 33 S.W. at 199.

275. 81 Ky. at 403, 408-09.

276. *Id.* at 409.

277. 13 S.W. at 248.

278. *Id.*

279. 33 S.W. at 201.

280. *Id.*

281. See *McCoy*, 81 Ky. at 409; *Sheets*, 13 S.W. at 248; *Cincinnati, New Orleans & Texas Pac. Ry. Co.*, 33 S.W. at 201.

282. *Adams v. Chicago, Milwaukee & St. Paul Ry. Co.*, 61 N.W. 1059, 1059-60 (Iowa 1895).

*Milwaukee & St. Paul Ry. Co.*<sup>283</sup> provided an opportunity for the court to comment on careful habits evidence.<sup>284</sup> The *Adams* opinion detailed the events of the accident and referred to "three or four witnesses [who] testified to the facts immediately attending the casualty."<sup>285</sup> At trial, the court allowed witnesses to testify "as to Adams being a careful and prudent man, and watchful for danger, about his work."<sup>286</sup> The Supreme Court of Iowa noted its awareness of "cases which hold that evidence of this character is proper when there are no witnesses to facts attending the accident," but concluded it "need not consider that question, as it is not in this case" due to the availability of testimony at trial.<sup>287</sup> Considering the age of this opinion, and the fact that Iowa is a modified comparative negligence jurisdiction, it is hopeful that careful habits evidence does not resurface.<sup>288</sup>

#### *M. California*

In 1865, the Supreme Court of California addressed careful habit evidence in an appeal of a personal injury action involving a plaintiff injured by a "wild and apparently alarmed" steer.<sup>289</sup> In an effort to prove the non-culpability of the co-defendant in charge of the herd, "the defendants proposed to prove by a witness on the stand that Jones was a safe and prudent man in the business of driving and conducting cattle through the city . . . ."<sup>290</sup> The trial court rejected this evidence "on the plaintiff's objection that it was incompetent and irrelevant."<sup>291</sup>

Although evidence of prudent and safe conduct is character trait evidence, the Supreme Court of California held that this evidence "might properly have had some weight," noting that in a case such as this, it was "incumbent on the defendant to show that those in charge of and conducting the business were persons of good and careful habits and competent skill . . . ."<sup>292</sup> Again, this opinion is outdated and likely inconsistent with California's status as a pure comparative negligence jurisdiction.<sup>293</sup>

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283. *Id.* at 1059.

284. *See id.* at 1061.

285. *Id.* at 1060-61.

286. *Id.* at 1060.

287. *Adams*, 61 N.W. at 1061.

288. *See id.* at 1059; Best & Donohue, *supra* note 193, at 949.

289. *Ficken v. Jones*, 28 Cal. 618, 622-23, 628 (1865).

290. *Id.* at 623-24.

291. *Id.* at 624.

292. *Id.* at 626, 628.

293. *See* Best & Donohue, *supra* note 193, at 949; *see generally Ficken*, 28 Cal. at 618.



*N. North Dakota*

Almost fifty years ago, the Supreme Court of North Dakota aptly recognized the distinction between character and habit evidence in *Glatt v. Feist*.<sup>294</sup> This opinion merits mention here. *Glatt* involved a pedestrian who was struck by an automobile when she was returning from church.<sup>295</sup> The plaintiff's and the defendant's testimony, as the only witnesses to the accident conflicted.<sup>296</sup> The defendant desired to introduce into evidence proof of plaintiff's habit of route selection to and from church.<sup>297</sup> The trial court refused this evidence.<sup>298</sup>

The Supreme Court of North Dakota embarked on a discussion of habit evidence, defining habit as "a course of behaviour of a person regularly repeated in like circumstances . . . one's regular response to a repeated specific situation" and "the person's regular practice of meeting a particular kind of situation with a specific type of conduct."<sup>299</sup> It distinguished the inadmissibility of careful habit evidence, referring to the position taken by text writers that "evidence of reputation for care or lack of care, or evidence of a proneness for an experience free from accident is not admissible on the issue of negligence . . . ."<sup>300</sup> The Supreme Court of North Dakota then correctly concluded that the evidence rejected by the trial court—how the plaintiff habitually crossed a specific street when returning from church—was admissible "and that it was error to keep it from the jury . . . ."<sup>301</sup>

*O. Federal Courts of Appeals*

At this juncture, a brief comment is appropriate, which is not about those federal courts of appeals which have recognized state law of careful habits, but is a reference to careful habits by the United States Court of Appeals for the Second Circuit. In *Sawyer v. United States*,<sup>302</sup> the court of appeals reviewed a Federal Tort Claims Act case involving a mid-air aircraft collision.<sup>303</sup> The trial court "denied recovery . . . on the ground that plaintiff failed to prove negligence on the part of the government, and that plaintiff's decedent was guilty of contributory negligence."<sup>304</sup> The court of

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294. 156 N.W.2d 819, 825 (N.D. 1968).

295. *Id.* at 821-22.

296. *Id.* at 823.

297. *Id.* at 824.

298. *Id.*

299. *Glatt*, 156 N.W.2d at 825.

300. *Id.* at 826.

301. *Id.* at 828.

302. 436 F.2d 640, 641 (2d Cir. 1971).

303. *Id.*

304. *Id.*

appeals found no proof of defendant's negligence.<sup>305</sup> As to one of plaintiff's contentions, the court of appeals stated that "Plaintiff contends that the trial judge erred in refusing to allow plaintiff to introduce into evidence proof of Captain Sawyer's careful habits as a pilot. Our holding that defendant's negligence was not established precludes reversal even were we to agree with plaintiff on this point."<sup>306</sup>

It seems difficult to imagine that the court of appeals could recognize the careful habit as an evidentiary concept. *Sawyer* was decided in 1971.<sup>307</sup> Not long thereafter, in 1975, the Federal Rules of Evidence were adopted, containing Rules 404 and 406, which exclude character evidence and embrace evidence of habit.<sup>308</sup>

#### V. WHY CAREFUL HABITS EVIDENCE?

What is the explanation for the recognition of careful habits evidence? Certainly, the notion of inadmissible character evidence was known many years ago. An excellent example is *Parsons v. Syracuse, Binghamton, & N.Y. R.R. Co.*,<sup>309</sup> involving a railroad crossing accident.<sup>310</sup> Here, a man and his wife were killed when he "attempted to cross defendant's tracks in the night time with his wife in a covered buggy drawn by one horse [when] he was struck by a light engine . . . ."<sup>311</sup> At trial, the court permitted a witness to testify "that the plaintiff's intestate was a careful, prudent man . . . ."<sup>312</sup>

Commenting on this evidence, the court of appeals noted, "There is simply the testimony in general terms that he was a man of prudent character, well acquainted with the crossing, and that a few moments before the accident he was conducting himself and managing his horse in a careful, prudent manner."<sup>313</sup> The court of appeals then concluded that "we have had occasion to consider the probative value of evidence more direct than that here presented of a man's habits of care and caution as tending to establish his conduct on a given occasion, and have held such evidence to be insufficient for such purpose."<sup>314</sup> The offending testimony was purely character evidence.<sup>315</sup>

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305. *Id.*

306. *Id.* at 645.

307. *Sawyer*, 436 F.2d at 640.

308. See FED. R. EVID. 404; see also FED R. EVID. 406.

309. 98 N.E. at 331.

310. *Id.* at 331-32.

311. *Id.* at 331.

312. *Id.*

313. *Id.* at 332.

314. *Parsons*, 98 N.E. at 332.

315. See *id.* at 331-32.

Adding to the curiosity of careful habits evidence is the development of the law of contributory negligence.<sup>316</sup> It has been urged that uncontrollable juries, sympathetic to careless persons suffering railroad related injuries, were the motivation for the law of contributory negligence.<sup>317</sup> Essentially, contributory negligence provided a vehicle for courts to eliminate non-meritorious claims.<sup>318</sup> *Spencer v. Utica & Schenectady R.R. Co.*<sup>319</sup> has been reported as “the first railroad crossing case involving contributory negligence . . . .”<sup>320</sup> However, contributory negligence is criticized for its “harshness.”<sup>321</sup>

The law of contributory negligence may have required a plaintiff in a given jurisdiction to plead and prove freedom from contributory negligence as one “of the essential elements of a cause of action for negligence.”<sup>322</sup> Lawsuits involve proof or the absence of proof, and have been well characterized as follows:

Lawsuits are social post-mortems; they do not deal with the diagnosis of living situations, but with judgments as to dead and past events. All that is available by way of data for the task is the report that individuals can give of the present state of their recollection of past observation and whatever record may be contained in existing documents and, occasionally, other things. Recollections, documents and things relating to past events constitute the “evidence” on which courts and lawyers act and are the stuff out of which the “facts” are constructed. At best, lawsuits are decided on such evidence; at worst, they are decided on a refusal to consider this evidence and on a hunch, rule or prejudice as to which party should be favored in the absence of evidence.<sup>323</sup>

Understanding that lawsuits require proof, that early negligence actions arising from railroad accidents required proof of freedom from contributory negligence, and that the principle of contributory negligence likely arose from sympathetic juries typically returning negligence verdicts against

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316. See Malone, *supra* note 93, at 151-55.

317. *Id.* at 151-52.

318. See *id.* at 155.

319. 5 Barb. 337 (N.Y. Sup. Ct. 1849).

320. Malone, *supra* note 93, at 165-66, 165 n.35.

321. Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI-KENT L. REV. 189, 200 (1950).

322. See Fleming James, Jr., *Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur)*, 37 VA. L. REV. 179, 179 (1951) [hereinafter James, *Proof of the Breach*] (discussing proof of the negligence claim; the need for evidence of the parties' conduct).

323. Lee Loevinger, *Facts, Evidence and Legal Proof*, 9 CASE W. RES. L. REV. 154, 155-56 (1958).

railroads, why then would courts allow the use of careful habit evidence to ease a plaintiff's burden to prove freedom from contributory fault, even if no eyewitnesses were present at the accident? If contributory negligence was a judicial tool allowing courts to effectively combat sympathetic juries, careful habits evidence introduced at trial on behalf of injured or deceased persons would effectively eliminate the power of the principle of contributory negligence. Why? It is because the use of typically inadmissible character evidence—the trait of carefulness—fills the gap created by an absence of proof.<sup>324</sup> Courts have never been shy about recognizing and responding to the absence of proof at trial.<sup>325</sup> Motions for directed verdict or motions for judgment as a matter of law under the Federal Rules of Civil Procedure exist for this purpose.<sup>326</sup>

To be fair, it should be mentioned that courts have created tort law claims that would otherwise not have survived dispositive motions. Claims for alternative liability,<sup>327</sup> market share liability,<sup>328</sup> and lost chance of survival (or of a better outcome)<sup>329</sup> come to mind. The recognition of these theories of liability resurrected claims that would have failed in an effort to prove causation.<sup>330</sup> However, it did not involve the creation of a fictitious evidentiary concept, such as the careful habit.<sup>331</sup>

If focusing on wrongful death actions, an explanation for the admissibility of careful habits evidence may be apparent. As one law professor noted, "It is well understood that the contributory negligence of the deceased will constitute a bar to recovery in actions for wrongful death."<sup>332</sup> It is the beneficiaries of the wrongful death claim, "the heirs of the decedent who have suffered pecuniary loss, who are the persons injured by the act of the tortfeasor."<sup>333</sup> The beneficiaries did not create this harm, yet they are obligated to prove the deceased's freedom from contributory fault in the absence of eyewitness testimony.<sup>334</sup> It has been urged that a, "'no eyewitness rule' is a rule of evidence that is a corollary of the rule of

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324. See, e.g., *Hawkins*, 587 S.W.2d at 364 n.1.

325. See, e.g., *id.* at 363-64.

326. See, e.g., *id.* at 359.

327. See *Summers v. Tice*, 199 P.2d 1 (Cal. 1948); see also *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980); *Holton v. Mem'l Hosp.*, 679 N.E.2d 1202 (Ill. 1997).

328. *Sindell*, 607 P.2d at 937-38.

329. *Holton*, 679 N.E.2d at 1206, 1213.

330. See *Summers*, 199 P.2d at 5; *Sindell*, 607 P.2d at 937-38; *Holton*, 679 N.E.2d at 1206, 1213.

331. See *Summers*, 199 P.2d at 5; *Sindell*, 607 P.2d at 937-38; see also *Holton*, 679 N.E.2d at 1206, 1213.

332. Robert H. Wettach, *Wrongful Death and Contributory Negligence*, 16 N.C. L. REV. 211, 211 (1938).

333. Paul Nourse, *Is Contributory Negligence of Deceased a Defense to a Wrongful Death Action?*, 42 CALIF. L. REV. 310, 312 (1954).

334. *Id.*

law concerning contributory negligence.”<sup>335</sup> This “rule enables the representatives of a deceased person to get to the jury even though they are unable to show by direct evidence that the decedent was free from contributory negligence.”<sup>336</sup> This accomplishment occurs by virtue of an evidentiary inference or presumption “based on the thought that the instinct of self-preservation implanted in every human breast will have caused the deceased person to take reasonable precautions for his own safety and thus be free of any contributory negligence.”<sup>337</sup> If this is so, “careful habits” evidence is merely icing on the cake, adding one legal fiction to another.

Beyond the old cases, largely involving unwitnessed railroad injuries, any current recognition of careful habit evidence is misplaced and simply defies the basic distinction between character and habit evidence. The Illinois jurisprudence in this regard is, in my estimation, unfortunate.

## VI. CONCLUSION

In 1938, the Harvard Law Review, in commenting on an Illinois appellate opinion, explained the admission of careful habits evidence in a case that looked at the intersection of two rules of evidence: (1) the inadmissibility of habit evidence where there was a living eyewitness; and (2) the inadmissibility of evidence under the Dead Man’s Act.<sup>338</sup> The commentary referred to the court’s opinion as “sound,” as it cures the problem facing the administratrix of the deceased’s estate—to call the defendant as a witness or call no other witness as to the deceased’s conduct.<sup>339</sup>

In my opinion, this position is not compelling. It confuses character evidence (carefulness) with habit evidence, and a court’s effort to join the concepts together—into careful habits—does not cure the problem.<sup>340</sup> Careful habits evidence was not the needed remedy. Circumstantial proof of freedom from negligence, or of negligence, is recognized as a viable mode of proof.<sup>341</sup> The absence of legitimate proof should simply yield a failed claim, not a form of erroneous and misplaced evidence.<sup>342</sup>

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335. Bruce M. Snell, Jr., *Eyeing the Iowa No Eyewitness Rule*, 43 IOWA L. REV. 57, 57 (1957).

336. *Id.*; see WIGMORE, *supra* note 33, at 53, 453 (“The process of thought, by which we reason from evidence toward proof, is termed Inference. . . . A presumption is a general rule of law, applied by the judge, in certain classes of probanda, to help out a proponent’s deficiency of evidence and to relieve him from adducing more.”).

337. Snell, *supra* note 335, at 57.

338. Recent Cases, *Evidence—In General—Admissibility of Evidence as to Habits of Deceased Where Solo Living Eyewitness is Defendant*, 51 HARV. L. REV. 736, 743-44 (1938).

339. *Id.*

340. *See id.*

341. See James, *Proof of the Breach*, *supra* note 322, at 185.

342. *See id.*

Classic character evidence, such as evidence of carefulness or prudence, should never be confused with habit evidence and should not be admissible in a negligence claim.<sup>343</sup> Almost sixty years ago, the basis for the inadmissibility of character evidence was explained as follows:

Thus it is not the lack of logical 'relevance' that causes courts to exclude such kinds of evidence. Rather it is a policy judgment that the introduction of such evidence will consume undue time in relation to the importance of the issues, the other work of the court and the other demands for expedition, that the evidence may cause unfair surprise to the adverse party, or that the evidence will be given more importance than it deserves by the jury, thus causing prejudice to the other party.<sup>344</sup>

Equally well expressed, "[t]he theory of the character evidence rule is that . . . the jury is supposed to base its judgment on evidence of what the relevant actors in the case *did*, not what sort of people they *are*."<sup>345</sup>

It is the hope of this paper to demonstrate that the time for careful habits as an evidentiary concept has never come. To the extent that any jurisdiction continues to recognize the existence of careful habit suggests an unnecessary and unfortunate misunderstanding of the law of evidence.<sup>346</sup>

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343. Compare FED. R. EVID. 404, with FED. R. EVID. 406.

344. Loevinger, *supra* note 323, at 164-65.

345. Gross, *supra* note 32, at 846.

346. *Id.*