The Pushy Ox: Character Evidence in Pennsylvania Civil Actions

Thomas J Reed
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If an ox gore a man or woman, that they die then the ox shall be surely stoned . . . but the owner of the ox shall be quit. But if the ox were wont to push with his horn in time past and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or woman the ox shall be stoned, and his owner shall also be put to death.


INTRODUCTION

Like the owner of the biblical pushy ox, who could have been executed because of the ox’s bad disposition, civil litigants can be held at fault by proof that they or someone under their control had a general disposition to behave in a set manner. Proof of general disposition, commonly known as character evidence, often becomes the basis for the jury’s inference that the actor behaved in accordance with an established disposition at the time and place of the incident in the case at bar. Character is usually proved by testimony relating to an individual’s reputation, a form of opinion evidence, or by proof of enough specific similar acts to allow the trier of fact to draw an inference that the actor behaved in a set way under the same conditions. Once an actor’s character is proved, the trier of fact may infer from the demonstrated character that the actor behaved in a similar manner under the conditions of the case.

Character evidence is regularly admitted in civil cases overtly, in a manner that identifies character evidence as such, and covertly, as evidence of habit, routine practice, or similar acts. The generally accepted rule asserts that character evidence is admissible in civil cases when character is “at issue.”

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1. IA J. WIGMORE, EVIDENCE §§ 54.1, 64 (P. Tillers rev. 1983) (relevance of character in civil action explained).

2. Id. at §§ 54.1, 55.1, 58.2, 65.1 (modes of proving character explained). For an excellent discussion of the use of similar specific acts evidence, see E. IMWINKELREID, UNCHARGED MISCONDUCT EVIDENCE § 7.01-07 (1984) (provisions of Federal Rules of Evidence concerning similar acts evidence described).

3. The more typical way of expressing this rule is in Dean Wigmore’s style:

It is to-day generally said that (subject to specific exceptions, some of them doubtful) the character of a party in a civil cause is inadmissible, i.e., that it cannot be used, as it is for or against a defendant in a criminal case, to indicate the likelihood that the act at issue was done or was not done. This is laid down as a general rule, to which a specific exception, if any, must be clearly made out.

I J. WIGMORE, EVIDENCE § 64 (2d ed. 1923) (emphasis in original).

Wigmore then records specific exceptions: (1) the character of the plaintiff in defamation actions, id. §§ 70-74, 76; (2) the victim’s character in actions for seduction, criminal conversion, and
Although commentators have not compiled a list of the situations in which courts have held character to be "at issue", the following list is illustrative:

(1) slander and libel actions, in which the plaintiff's reputation for having committed acts like those stated in the defamatory statement diminishes the plaintiff's damages, or alternatively allows the defendant to maintain that his statement was justified by fair and accurate reporting; 4

breach of promise to marry, id. §§ 75, 77; (3) the character of residents of gambling houses and speakeasies in prosecutions for maintaining such establishments, id. § 78; (4) the character of an employee for intemperance or carelessness in negligence cases, id. § 80; (5) the character of the defendant in malpractice actions, id. § 66; (6) the character of the defendant or plaintiff charged with negligence, id. § 65 (which Wigmore doubted was a true exception); (7) the character of third persons alleged to have exerted undue influence over the testator in will contests, id. § 68; and (8) when a person is named as co-respondent in divorce granted for adultery, id. § 68.


(2) alienation of affection and seduction actions, in which the victim's reputation affects the plaintiff's right to recover damages for injury to the victim's reputation;

(3) will contests and actions to cancel deeds, contracts, or trust instruments on grounds of lack of capacity, undue influence, or duress, in which the victim's mental state and the defendant's character for coercive conduct are relevant to prove lack of capacity, undue influence or duress;

(4) divorce, termination of parental rights, adoption, and custody actions, in which the fitness of the custodian is at issue;

(5) divorce on grounds of cruel and inhuman treatment or similar grounds, in which the defendant's disposition toward cruel and abusive behavior is at issue;

(6) false imprisonment and malicious prosecution actions, in which the defendant may show probable cause based on the plaintiff's prior behavior;

5. See, e.g., Robinson v. Burton, 5 Del. 335, 339-40 (5 Harr. 1851) (seduction); White v. Murtland, 71 Ill. 250, 264 (1874) (seduction); Bell v. Rinker, 29 Ind. 268, 269 (1868) (seduction); Browning v. Browning, 226 Mo. App. 322, 336, 41 S.W.2d 860, 867 (1931) (alienation of affection); Hoffman v. Kemerer, 44 Pa. 452, 453 (1863) (seduction); Reed v. Williams, 37 Tenn. 580, 582-83 (5 Sneed 1858) (seduction).


9. See, e.g., Ferguson v. Simmons, 226 Mo. App. 178, 182-83, 43 S.W.2d 875, 876 (1931) (plaintiff's carrying firearms in past admissible to show probable cause to search); Doyle v. Douglas, 390 P.2d 871, 874-75 (Okla. 1974) (prior theft admissible to show probable cause); Russell v. Shuster, 8 Watts & Serg. 308 (Pa. 1844) (contents of trunk containing burglar tools introduced to show probable cause for arrest); Bean v. Best, 93 N.W.2d 403, 407-09 (S.D. 1958) (bad character of plaintiff admissible to show probable cause to search).
(7) assault and battery cases, in which the defendant may claim self-defense or provocation as a way of raising the issue of the victim’s propensity toward violent acts;\(^{10}\)

(8) actions to remove public officials from office on grounds of malfeasance in office, in which the official’s bad moral character is a ground for removal from office;\(^{11}\) and

(9) administrative proceedings to deny or cancel a license to conduct a business or to practice a profession on grounds of the licensee’s bad moral character.\(^{12}\)

The rule allowing proof of character in a civil action when character is at issue is a rule of relevance. The character of an actor becomes relevant to the case because that trait or behavioral characteristic must be proved in order to establish a cause of action or a defense.

Instances in which parties may overtly prove character are outnumbered, however, by the judicially permitted covert use of character evidence. Proof of habit or routine practice is one common covert form of character evidence. When an actor manifests a particular repetitive behavior pattern that is relevant to some issue in the case, courts normally will allow parties to prove that repetitive behavior pattern by witnesses testifying on an individual’s reputation,\(^{13}\) or by proof of enough specific similar acts to establish a pattern.\(^{14}\) The jury is then able to speculate whether the actor behaved in accordance with prior behavior.

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patterns during the incident at issue in the case. Courts tend to distinguish between character and habit by describing character as a general condition, and habit as a specific series of repetitive acts. Although character evidence is generally inadmissible, evidence of habit is admissible. This distinction creates confusion because it appears to be a simple distinction between a general state of mind, and a particular component of that general state.

The second form of covert character evidence involves proof of intent, knowledge, motive, plan or design, opportunity, or identity as the

15. States are divided on the issue of proof of character by specific acts when character is at issue. Those states that have adopted the modified Uniform Rules of Evidence have adopted Rule 405(b), which authorizes proof of the character of a person by specific instances of conduct when character "is an essential element of a charge, claim or defense . . . ." See ARIZ. R. EVID. 405(b); ARK. STAT. ANN. § 28-1001, Rule 405(b) (1979); COLO. R. EVID. 405(b); DEL. R. EVID. 405(b); FLA. STAT. ANN. § 90, 405(b) (West 1977); HAWAI'I R. EVID. 405(b); IOWA R. EVID. 405(b); ME. R. EVID. 405(b); MICH. R. EVID. 405(b); 50 MINN. STAT. ANN. EVID. R. 405(b) (1977); MONT. R. EVID. 405(b); NESB. REV. STAT. § 27-405(b) (1975); N.M. R. EVID. 405(b); N.C. R. EVID. 405(b), N.C. GEN. STAT. 8B-I R. 6-405(b) (1984); N.D. R. EVID. 405(b); OHIO R. EVID. 405(b); 12 OKLA. STAT. ANN. § 2405(b) (1978); S.D. COMP. LAWS ANN. 19-12-405(b) (1979); TEX. R. EVID. 405(b); VT. R. EVID. 405(b); WASH. R. EVID. 405(b); WIS. STAT. ANN. § 904.05 (1974); WYO. R. EVID. 405(b). Some states have reached the same conclusion through case law. See, e.g., McGowin v. Howard, 251 Ala. 204, 208, 36 So. 2d 323, 325 (1948) (general reputation of driver for recklessness admitted in action based on negligent entrusting of automobile).

Other states do not permit proof of character by specific acts. See Verdi v. Donahue, 91 Conn. 448, 453, 99 A. 1041, 1044 (1917) (specific instances of prior aggression inadmissible in malicious prosecution case to prove who was aggressor in assault); Morgan v. Mull, 202 Ga. App. 36, 37, 112 S.E.2d 661, 663 (1960) (proof of violent character permitted by proof of reputation, not specific acts); Edwards v. Griner, 42 Ga. App. 282, 282, 155 S.E. 789, 790 (1930) (evidence of decedent's prior acts of aggression in suit to recover from his homicide); Luthmers v. Hazel, 212 Ill. App. 199, 205 (1918) (plaintiff's bad reputation in malicious prosecution suit cannot be proved by specific instances of conduct); In re Estate of Rivers, 175 Kan. 809, 814, 267 P.2d 506, 509 (1954) (specific instances of reckless aircraft flying not admissible to prove reputation); Hager v. Hager, 17 Tenn. App. 143, 151, 66 S.W.2d 250, 255 (1934) (specific acts to prove character inadmissible). Courts in the remaining states, including Pennsylvania, either have not set forth a precedential ruling on this issue within the past 60 years, or have not resolved conflicts on this issue.

16. This distinction is found in the Federal Rules of Evidence. See FED. R. EVID. 406 advisory committee note, which cites Dean McCormick's discussion of the distinction between character and habit. The Federal Rules of Evidence adopt McCormick's view that habit is a more specific quality than character because habit is a regular practice, while character is a general disposition to act in a certain way. See also MCCORMICK ON EVIDENCE, supra note 14, § 195, at 574-75 (character more general than habit).


tortfeasor, contract breaker, or other civil wrongdoer. 22 By characterizing covert use of character evidence as proof of an intermediate issue by similar acts, courts avoid confronting the issue of introducing character evidence in civil litigation when it also is offered to prove something other than an actor’s character. None of the major commentators have treated evidence of habit or routine practice, similar acts, and character as branches of the same general doctrine. 23 This article is an attempt to clarify the use of character evidence in civil cases.

This article analyzes the use of character evidence in civil cases in Pennsylvania. It deals with covert and overt use of character evidence, the rationale given by courts in support of admission of such evidence, and the judicial explanations offered for excluding both kinds of evidence. It sets forth a rationale for increasing the use of character evidence in civil cases. Finally, this article proposes that courts distinguish between civil and criminal cases in setting forth a

knowledge); Calbom v. Knudson, 65 Wash. 2d 157, 168, 396 P.2d 148, 154 (1964) (prior acts of interference with other attorneys admissible in action for interference with contractual relations).

19. FED. R. EVID. 404(b). For case law in states not under the Federal Rules of Evidence or the revised Uniform Rules of Evidence, see, e.g., Flynn v. Songer, 399 S.W.2d 491, 495 (Ky. 1966) (other acts admissible to show motive in malicious prosecution action); Raphsis v. St. Paul Fire & Marine Ins. Co., 198 N.W.2d 505, 510 (S.D. 1972) (evidence of suspicious fire in plaintiff’s restaurant admissible to show intent, motive, scheme or plan to defraud fire insurance company in claim for fire at another of plaintiff’s restaurants); Smith v. Gilbert, 49 Utah 510, 514, 164 P. 1026, 1027 (1917) (similar false representations admissible in stock fraud case to prove intent or motive).

20. FED. R. EVID. 404(b). For cases from jurisdictions not yet adopting this rule, see, e.g., Altman v. Ozdoba, 237 N.Y. 218, 222-23, 142 N.E. 591, 593 (1923) (prior instance of forged endorsement on note and other false representations admissible to show plan); Karsun v. Kelly, 258 Or. 155, 167-68, 482 P.2d 533, 539 (1971) (other false representations admitted to prove plan); Lackey v. Metropolitan Life Ins. Co., 20 Tenn. App. 390, 402-03, 206 S.W.2d 806, 812 (1947) (proof of other defamatory statements made by defendant’s agents admissible to show plan or design to conspire to slander).

21. FED. R. EVID. 404(b). For case law outside the jurisdictions adopting this rule, see, e.g., Feinberg v. Poorvu, 249 Mass. 88, 94, 143 N.E. 824, 826 (1924) (payment of subcontractors by builder admissible to show builder had control of premises).


23. At least three commentators have attempted to discern the meaning of character evidence in civil actions. IA J. WIGMORE, supra note 1, §§ 64-68.1, revised in 1983, is the latest attempt by a major commentator to struggle with this application of character evidence in civil actions. Tillers, who edited the work, fails to deal with similar act evidence as a form of character evidence in civil cases. Instead, he retains the traditional analysis based on Wigmore’s original presentation. Imwinkelreid devoted an entire chapter to civil actions in Uncharged Misconduct Evidence. IMWINKELREID, supra note 2, § 7.01-07. His comments are helpful in understanding the origin of the proscription against the use of character evidence. Cleary’s latest revision of MCCORMICK ON EVIDENCE updates McCormick’s chapters on character and habit, and similar happenings and transactions, without denaturing McCormick’s original presentation. MCCORMICK ON EVIDENCE, supra note 14, § 186-200. See also FED. R. EVID. 404(a), 404(b), 405(b) & 406 (character at issue).
rationale for admitting character evidence. This distinction will increase the use of character evidence in civil litigation.

I. General Exclusionary Rule and Exceptions

A. Exclusion of Character Evidence in Civil Cases

As a general rule, evidence relating to the character of any actor is not admissible in Pennsylvania unless character is "at issue." Character is "at issue" when the character of the actor is particularly important to the claim asserted. Character has been held to be "at issue" in Pennsylvania in libel actions, slander actions, actions on accounts, will contests alleging undue influence, divorce actions alleging indignities or cruel and barbarous treatment as grounds for divorce or seduction, alienation of affection, and other causes of action. These actions have one common attribute. In each case, the allegation required to make out a cause of action for the plaintiff, or an affirmative defense or plea for the defendant, requires proof of the disposition of the defendant or some third party.

In libel and slander actions, the general reputation of the plaintiff has been injured by the defamatory statement, and proof of the plaintiff's good character or contrary proof of bad character goes to the issue of damages. False arrest hinges on the absence of probable cause for making the arrest or detention, and proof of the plaintiff's acts or conduct showing probable cause defeats the action. When divorce must be established by proof of a partner's acts of adul-

33. See, e.g., Eustice v. Plymouth Coal Co., 120 Pa. 299, 13 A. 975 (1888) (statutory action for wages; Russell v. Shuster, 8 Watts & Serg. 308 (1844) (proof of probable cause in false arrest action).
34. See Hopkins v. Tate, 255 Pa. 56, 61, 99 A. 211-12 (plaintiff's bad reputation for honesty admissible); See IA J. Wigmore, supra note 1, §§ 69.1, 70.2 (relevance of character to damages in defamation cases).
35. See Russell v. Shuster, 8 Watts & Serg. 308, 309 (1884). See also IA J. Wigmore, supra note 1, § 69 (relevance of character to false arrest). But see Bell v. City of Philadelphia, ___ Pa.
tery, cruelty, or maltreatment, the character of the marital partner is a necessary element of proof. A will that was made through the undue influence of some beneficiary or legatee may be set aside if the plaintiff demonstrates a legatee's acts of undue influence, duress, or fraud, thus making the character of the legatee a major issue in the case. Finally, the character for truth and veracity of every witness called by each party is always "at issue." Parties may offer reputational evidence of any witness's general character for truthfulness and veracity. A witness's character for truthfulness also may be proved or disproved by specific instances of dishonest conduct, such as proof of a conviction for a crime.

The civil character evidence rule was originally framed by English judges during the eighteenth century, based on a perception of relevance derived from the form of writ issued to initiate a civil action. The standard English evidence treatises, such as those by Buller, Peake, and Gilbert, considered relevance to be determined by the form of the pleadings in the case. Buller treated the issue of admissibility of character evidence as an issue of relevance. If the pleadings required an allegation of some character trait of the defendant, the plaintiff, under Buller's view, could prove that character trait by reputation or by proof of specific acts showing the existence of the trait. Peake's version of

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37. See Dietrick v. Dietrick, 5 Serg. & Rawle 207, 208-09 (1819) (character of disinherited son's wife admissible to rebut rational purpose for disinheritance).


40. One might suppose that this statement is self evident because relevance has traditionally been controlled by the pleadings in the case. See MCCORMICK ON EVIDENCE, supra note 14, § 185. Nevertheless, the subject of relevance troubled early English text writers. Gilbert structured his treatment of relevance on the issues raised by the pleadings, and devoted a lengthy chapter to discussing the kind of evidence relevant to various pleadings, such as non est factum and nihil debit. See G. GILBERT, THE LAW OF EVIDENCE 112-199 (S. Cotter ed. London 1754). Buller referred his readers to Gilbert's treatment of relevance. See F. BULLER, AN INTRODUCTION TO THE LAW RELATING TO TRIALS AT NISI PRIUS 298 (7th ed. London 1817).

41. F. BULLER, supra note 40.

42. T. PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE (London 1801).

43. G. GILBERT, supra note 40.

44. See F. BULLER, supra note 40, at 297-98. Relevance was usually stated as a rule that the evidence in a case must be confined to the issues raised in the case.

45. Id. at 296. Buller based his rule on Clark v. Perriam, 26 Eng. Rep. 603 (1742), reprinted in 88 Eng. Rep. 493, (1908). The case involved enforcement of a bond given by defendant's decedent to plaintiff as security for her liaison with the defendant's decedent. Id. When the plaintiff tried to
the character evidence rule was essentially the same as Buller's view. Both agreed that reputation evidence and specific acts evidence were admissible to prove character only when character was “at issue.”

The English civil character evidence rule first surfaced in the early Pennsylvania cases of *Nash v. Gilkison* and *Anderson v. Long*. In both cases, character evidence was excluded because the court found that the character of the plaintiff or defendant was not at issue in the pleadings. The New York Supreme Court addressed the issue of character evidence in 1827 in *Fowler v. Aetna Fire Insurance Company*. The court held it was improper to admit evidence of the plaintiff's prior overinsurance of personal property in an action under a fire insurance policy for a different loss because the plaintiff's character for honesty was not at issue. New York courts followed this approach in *Gough v. St. John*, decided in 1837, in which the defendant offered evidence of his good character to rebut the plaintiff's allegations of misrepresentation. The court restated the general English rule excluding character evidence unless raised by the pleading, but held that the proffered character evidence was erroneously admitted because character was not “at issue.” Consequently, the general outlines of the civil character evidence rule had been well established by 1854 when the Pennsylvania Supreme Court decided *Porter v. Seiler*.

*Porter v. Seiler* set forth a detailed discussion of the use of character evidence in civil cases. During a civil trial for damages from an assault and battery, the defendant attempted to introduce evidence of his general reputation for good character, peacefulness and orderly behavior. The trial court rejected
the offer on the ground that his character was not at issue.57 The jury found for the plaintiff and the defendant appealed.58 The supreme court stated that evidence of the defendant's good character for honesty would have been relevant and admissible in a criminal indictment based on the same facts.59 Moreover, the court explained that the rule against admission of reputational character evidence in civil cases was so well settled that it should not be disregarded.60

The court reviewed English and American cases on the use of reputational evidence of character in civil cases, but it devoted no attention to defining "character." Furthermore, even though an indictment for assault and battery for the same incident had been issued, the court did not consider the admissibility of specific instances of conduct to establish the character of a party.61

Nine years after Porter, the Pennsylvania Supreme Court dealt with the admission of specific instances of conduct to prove character in Hoffman v. Kemerer.62 Some prior decisions had excluded specific instances of conduct to prove character when character was not at issue.63 In Hoffman, the trial court refused to permit the victim in a seduction case, the plaintiff's daughter, to be cross examined on prior instances of sexual misconduct with other men.64 The defendant appealed a verdict and judgment for the plaintiff.65 The supreme court held that although the victim's reputation for chastity might be relevant to the measure of damages in the action, her bad reputation for chastity could not be proved by specific instances of misconduct on her part.66 Since 1863, Hoffman has been cited for the general proposition that character cannot be proved

58. Id. at 426.
59. Id. at 430.
60. Id. at 429.
61. Id. at 428-29. The court reviewed the leading English authorities on the admissibility of specific instances of conduct. See, e.g., Attorney General v. Bowman, 126 Eng. Rep. 1423, 2 Bos. & Pul. 532 (1791) (character of defendant admissible in information for forfeiture of goods). The court also relied on several early American cases. See, e.g., Humphreys v. Humphreys, 7 Conn. 116 (1828); Rogers v. Lamb, 3 Blackf. 155 (Ind. 1832); Givens v. Bradley, 6 Ky. 192 (3 Bibb 1813); Gough v. St. John, 16 Wend. 646 (N.Y. Sup. Ct. 1837); Fowler v. Aetna Fire Ins. Co., 6 Cowen 673 (N.Y. Sup. Ct. 1827); Ruan v. Perry, 3 Cai. R. 120 (N.Y. Sup. Ct. 1805). All of these cases except Ruan v. Perry held that general evidence of character by reputation was inadmissible when the plaintiff's complaint alleged fraud. Earlier Pennsylvania cases, such as Nash v. Gilkeson, 5 Serg. & Rawle 352 (1818), and Anderson v. Long, 10 Serg. & Rawle 55 (1823), also found allegations of fraud insufficient to allow a defendant to rebut the charge by showing good character for truth, honesty or veracity.
62. 44 Pa. 452 (1863) (proof of reputation for unchastity by cross-examination of seduction victim inadmissible).
64. 44 Pa. at 453.
65. Id. at 452.
66. Id. at 453. The court cited no authority for its holding.
by showing specific instances of misconduct. The last such citation, in 1977, supported the proposition that a witness's character for truthfulness cannot be impeached by proof of specific instances of bad conduct.

The Pennsylvania Supreme Court formulated its rule on admission of character evidence in civil actions as a categorical exclusion of character evidence, whether proved by reputational witnesses or by specific instances of prior conduct. It then created an exception for reputational proof of character evidence when character is at issue in the case. When the court dealt with evidence of habit or routine practice, however, it had described its rule on proof of habit without reference to its prior consideration of character evidence. The court did not reflect on its ruling on admission of character evidence or of habit or routine practice when it subsequently encountered proof of intent, knowledge or plan by specific similar acts evidence.

B. Exceptions to the Exclusionary Rule

Traditionally, courts have excluded reputational evidence of character in civil cases. Similarly, courts have excluded proof of character by specific instances of prior conduct from which the trier of fact could infer a general disposition or character. Nevertheless, Pennsylvania courts have created a list of exceptions to the general rule excluding both reputational proof of character and specific acts proof of character. The exceptions tend to swallow the rule.

1. Proof of Character When Character Is Relevant to the Cause of Action

Reputational proof of an actor's character, or proof of an actor's specific instances of conduct, is admissible when relevant to the cause of action. Four classes of cases make an actor's character, or the reputation of the actor regarding character, part of the cause of action itself: (1) cases involving the fitness of someone to be a custodian of person or property; (2) cases involving divorce for habitual cruelty; (3) cases in which reputation is part of the plaintiff's measure of recovery; and (4) cases seeking cancellation of a deed, trust instrument, contract, or will on grounds of lack of capacity, undue influence and duress.
In the first class of cases, the issue is whether a person is fit to be the custodian of another person or property. Whenever fitness for custody is an issue, courts permit proof of the character of the person claiming to be entitled to act as custodian. For example, in *Eustice v. Plymouth Coal Company* the mother of a minor sued to collect her son’s back wages from his employer. The statute that allowed the mother to sue on behalf of her child required the plaintiff to prove that she provided her son a good example and properly maintained him. The plaintiff was cross-examined on her sexual conduct to show that she did not provide a proper home for the minor. The supreme court upheld a verdict for the defendant on the ground that fitness as custodian for the minor was at issue. Similarly, in divorce, adoption, and termination of parental rights cases, courts have made the general disposition or character of an actor part of the action itself. Consequently, parties have been able to establish the relevance of reputation, or specific instances of conduct tending to prove that disposition.

In matrimonial, adoption, or parental rights cases, in which the type of evidence reputational character evidence is admissible. If the Pennsylvania Supreme Court affirms the decision in *Bell v. City of Philadelphia*, 120 Pa. 299, 13 A. 975 (1888), in which the superior court held that evidence of a victim's aggressive behavior was properly admitted in an action for assault and battery, then a fifth category will have been created: personal injury actions where the character of the victim for violent behavior is relevant to show which party had been the aggressor.

Section 201 of the Divorce Code sets forth the current grounds for divorce in Pennsylvania. They include: (1) willfully and maliciously deserting a spouse; (2) adultery; (3) cruel and barbarous treatment; (4) knowingly entering a bigamous marriage; (5) being sentenced to imprisonment of two or more years; (6) offering indignities to the injured spouse; (7) insanity or mental disorder, accompanied by a three-year confinement to a mental institution with no reasonable hope for discharge; (8) irretrievable breakdown of the marriage; and (9) living separate and apart for at least three years.

The Divorce Code requires the family court to review the character of the custodial and noncustodial spouse to determine fitness to act as separate or joint custodians of their offspring. In recent years, litigation has focused on the custodial spouse’s living arrangement with another partner in an informal extramarital relationship. For example, in *Grimes v. Grimes*, 281 Pa. Super 484, 422 A.2d 572 (1980), the spouse seeking custody called 14 character witnesses to show that despite his living arrangement with a girlfriend, he was fit to care for his children. In *In re Anderson*, 317 Pa. Super 490, 496, 464 A.2d 428, 431 (1983) (unfitness demonstrated by parent’s low IQ, instances of child abuse, instability, and neglect); J.H. v. E.D.W., 306 Pa. Super. 280, 282, 452 A.2d 725, 726 (1982) (mother's emotional problems admitted to show instability and unfitness).
allowed to prove fitness or unfitness was disputed, no court has weighed the probative value of such evidence against its prejudice to the person whose character was attacked. The cases reflect a consensus that such evidence is admissible without regard to its probative value.\textsuperscript{81}

In the second class of cases, the issue is whether the court should terminate a marriage because of the conduct of the parties. The traditional divorce grounds of cruel and barbarous treatment and indignities raise issues of this kind.\textsuperscript{82} The propensity of a spouse to flaunt adulterous behavior before the other spouse has been held a sufficient ground for divorce on indignities.\textsuperscript{83} Repeated specific acts of cruelty or infidelity may be proved on the issue of divorce for cruel and barbarous treatment.\textsuperscript{84} The general exclusionary rule forbidding proof of character by specific acts has never been applied to family law matters.

In the third class of cases—usually involving slander and libel actions—the plaintiff seeks to recover for damage to reputation.\textsuperscript{85} If the plaintiff's reputation is already bad, then the plaintiff's damages will necessarily be less.\textsuperscript{86} Logically, rebuttal proof of good reputation should be admissible, although no Pennsylvania case authority supports this conclusion. Similarly, in criminal conversation actions, in which a spouse sues for injuries the spouse suffered as a result of the seduction of the marital partner, the victim's reputation for unchastity could be proved to diminish the plaintiff's recovery.\textsuperscript{87} The object of proof in these cases is the reputation of plaintiff or of the victim, which can be inferred from proof by reputational witnesses\textsuperscript{88} and from proof of specific instances of

\textsuperscript{81} Reported decisions have not balanced the probative value of such evidence with its prejudice to the party opposing admission. In *In re Custody of Pearce*, 310 Pa. Super. 254, 456 A.2d 597 (1983), the noncustodial spouse attacked his former wife's fitness on the ground that her "born again" religious beliefs would harm the children if she obtained custody. *Id.* at 259, 456 A.2d at 600. Although the court eventually found the mother fit, and stated that religious beliefs might be irrelevant, it did not rule that such evidence was inadmissible because its prejudicial effect outweighed its probative value. *Id.* at 259-60, 456 A.2d at 600.


\textsuperscript{83} See *id.* at 174, 269 A.2d at 373-74 (evidence that husband heard wife boasting that she was having sexual relations with other men admissible to show grounds for divorce).


\textsuperscript{85} See, e.g., Drown v. Allen, 91 Pa. 393, 394 (1879) (general reputation as thief admissible where libel concerned sheep theft); Moyer v. Moyer, 49 Pa. 210, 211 (1865) (plaintiff's reputation for honesty admissible in libel action when perjury is alleged in the defamatory statement).

\textsuperscript{86} See, e.g., Drown v. Allen, 91 Pa. 393, 395 (1879) (slander); Henry v. Norwood, 4 Watts 347, 350-51 (1835) (other publication of defamatory matter offered to show acts of malice and bad character of plaintiffs admissible in libel action).


prior conduct that diminishes reputation.

The fourth class of cases involves cases in which an individual's mental state is at issue. In an action to set aside a contract for lack of capacity, the central issue is the mental state of the person at the time of making the contract. When an action to cancel a deed or trust instrument is based on lack of capacity, undue influence, or duress, the mental state of the person executing the instrument at the time of execution must be proved. Likewise, in will contests alleging that a will was made with lack of testamentary capacity, undue influence, or under duress, the mental state of the testator at the time of execution of the will must be determined by the trier of fact. These issues are formally framed by the pleadings in all instances.

The will contest is the paradigm for all actions to cancel instruments based on the mental state of executor. Most of the law applicable to will contests also applies to actions to cancel deeds, contracts, and trust instruments. Pennsylvania courts follow the general principle that the proponent of a will has the burden of proving the testator's capacity. Once due execution of the will is proved through attesting witnesses or otherwise, the burden of proof shifts to the contestant to disprove capacity. The testator is presumed to have testamentary capacity at this stage of the proceedings. Proof of due execution of a will also gives rise to a presumption that the testator's will was made free of undue influence and shifts the burden to the contestant to demonstrate undue influence.

89. Milliken, 188 Pa. at 413, 41 A. at 541 (victim's character for chastity relevant in seduction action).
90. See, e.g., Mulholland v. Sterling Motor Truck Co., 309 Pa. 590, 592, 164 A. 597, 598 (1933) (other transactions of defendant before or after making contract admissible to show mental state at time of contracting).
91. See, e.g., T. Atkinson, Law of Wills § 51 (2d ed. 1953) (testamentary capacity). See also id. § 55 (undue influence).
92. In re Estate of Kuzma, 487 Pa. 91, 95, 408 A.2d 1369, 1371 (1979) (mental condition of testator at time of execution critically important); In re Estate of Hastings, 479 Pa. 122, 127, 387 A.2d 865, 867 (1978) (mental capacity determined at time of execution); In re Estate of Higbee, 365 Pa. 381, 384, 75 A.2d 599, 601 (1950) (evidence of lack of capacity for reasonable time before and after execution of will admissible).
93. See, e.g., In re Estate of Kuzma, 487 Pa. 91, 95, 408 A.2d 1369, 1371 (1979) (burden on proponent to show proper execution of will); In re Estate of Hastings, 479 Pa. 122, 127, 387 A.2d 865, 867 (1978) (proponent must show proper execution of will); In re Estate of Higbee, 365 Pa. 386, 382, 75 A.2d 599, 601 (1950) (burden of proving execution of will on proponent).
94. See, e.g., In re Estate of Hastings, 479 Pa. 122, 127, 387 A.2d 865, 867-68 (1978) (burden shifts to contestant); In re Estate of Cohen, 445 Pa. 549, 551, 284 A.2d 754, 756 (1971) (after showing due execution burden shifts to contestant); In re Estate of Brantlinger, 418 Pa. 236, 242, 210 A.2d 246, 253 (1965) (contestant has burden of proof).
95. See, e.g., In re Estate of Brantlinger, 418 Pa. 236, 242, 210 A.2d 246, 249 (1965) (presumption of testator's capacity arises on proof of due execution).
97. See, e.g., id. at 59, 334 A.2d at 630 (1975) (burden on contestant to prove all elements of undue influence); In re Estate of Abrams, 419 Pa. 92, 98, 213 A.2d 638, 642 (1965) (contestant has burden of proving undue influence); Kerr v. O'Donovan, 389 Pa. 614, 623, 134 A.2d 213, 217 (1957) (contestant has burden of proving undue influence).
The contestant is allowed to prove lack of capacity by disproving any of the three elements of testamentary capacity under Pennsylvania law: (1) knowledge of the natural objects of one’s bounty; (2) knowledge of the content of one’s estate; and (3) a rational plan of disposition. In order to meet this burden, a contestant is required to demonstrate the lack of one of these three elements by clear, strong, and compelling evidence.

Proof of undue influence requires the contestant to demonstrate that: (1) the testator and the influencer enjoyed a confidential relationship; (2) the influencer or some other target person received the bulk of the testator’s estate; and (3) the testator had a weakened intellect, such as someone who was particularly susceptible to undue influence. Once the contestant establishes these three conditions, the testator’s will is presumed invalid due to undue influence.

The character of the testator is at issue in a will contest because mental stability is an object of proof. Proof of instability may be based on expert opinion or on recitation of specific instances of aberrational conduct by laypersons occurring within a reasonable time before or after the execution of the testator’s will. Proof of susceptibility to undue influence through mental deterioration also may be made by showing specific instances of conduct of the testator within a reasonable time before or after execution of the will.

All four classes of cases share one common element: statutory or decisional


100. In re Estate of Clark, 461 Pa. 52, 60, 334 A.2d 628, 630, 633 (1975) (confidential relationship, weakened intellect, and substantial benefit to proponent are minimum requirements to show susceptibility); In re Estate of Button, 459 Pa. 234, 240, 328 A.2d 480, 483-84 (1974) (where recipient of bulk of estate had confidential relationship with testator of weakened intellect, burden on recipient to establish that bequest was free, voluntary, and clearly understood by testator).

101. In re Estate of Button, 459 Pa. 234, 240, 328 A.2d 480, 482-84 (1974) (once contestant proves that party receiving bulk of estate was in confidential relationship with testator, burden of proof shifts to proponent to disprove undue influence).


103. Id. at 503-04.

104. See, e.g., In re Estate of Kuzma, 487 Pa. 91, 95, 408 A.2d 1369, 1371 (1979) (evidence of capacity of testator for reasonable time before and after execution of will is admissible); In re Estate of Hastings, 479 Pa. 122, 127, 387 A.2d 865, 867 (1978) (evidence of incapacity for reasonable time before and after making will admissible on issue of testator’s incapacity on day of will execution); Williams v. McCarroll, 374 Pa. 281, 293, 97 A.2d 14, 19-20 (1953) (evidence of capacity before and after making will admissible on issue of incapacity on day of will execution); In re Estate of Higbee, 365 Pa. 381, 384, 75 A.2d 599, 601 (1950) (evidence of lack of testamentary capacity before and after execution of will is admissible).

law specifies that character must be proved as an element of a claim or defense. These cases also address character evidence in a straightforward manner, unlike those dealing with habit or routine practice, which tend to address the issue indirectly.

2. Proof of Habit or Routine Practice

Pennsylvania case law allows proof of an actor's habit or routine practice to support an inference that the actor behaved the same way in a situation relevant to the case at bar.\(^{106}\) Proof of an actor's habit may violate the similar acts rule, which generally forbids proof of similar acts of negligence at other times to show negligence in a particular case.\(^{107}\)

The weight of Pennsylvania authority prohibits proof of an actor's habit by specific instances of the actor's prior conduct. Pennsylvania's approach is based on five cases. In *Levant v. Wasserman*,\(^{108}\) the supreme court refused to permit a defendant in a "slip and fall" case to cross examine the plaintiff on a similar incident.\(^{109}\) Similarly, in *Roney v. Clearfield County Grange Mutual Co.*,\(^{110}\) the court considered the issue in the context of an action to recover on a fire insurance policy in which the defendant alleged that the plaintiff had fraudulently failed to report an outstanding mortgage on the premises. The court held that the trial court had erred in permitting a plaintiff to cross examine the defendant's agent on whether he had previously inserted a "no encumbrances" clause on another person's application for fire insurance without consulting the pro-

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\(^{106}\) In re Estate of Ciaffoni, 498 Pa. 267, 269-70, 446 A.2d 225, 225-26 (other wills drafted by scrivener admissible to challenge validity of will), cert. denied, 459 U.S. 1036 (1982); Baldridge v. Matthews, 378 Pa. 566, 569-70, 106 A.2d 809, 811 (1954) (evidence of habit or custom admissible only if sufficiently regular to show that it would be applied in most situations); Pennsylvania R.R. v. Books, 57 Pa. 339, 343 (1868) (evidence of train conductor's drinking habits admissible to show negligence).

Dean Wigmore attempted to distinguish between an actor's habit and an actor's character by stating that character is a more general notion than habit, which is more specific and related to known stimuli. Essentially, Wigmore reasoned that a part of a person's disposition to act, segregated from the overall bundle of dispositional tendencies, may be proved if it is called a "habit," but not if it is labeled "character." I J. WIGMORE, *supra* note 3, § 92.


\(^{109}\) *Id.* at 392, 284 A.2d at 795-96 (evidence of similar act inadmissible to prove act charged when evidence of similar act is irrelevant).

\(^{110}\) 332 Pa. 447, 2 A.2d 365 (1939).
spective insured. In a third case, *Morris v. Guffey & Queen,* the court excluded a book of lease forms purchased by defendant and given to the county recorder to be used to record oil and gas leases as proof of the terms of an oral lease made by plaintiff and defendant. This decision is contradicted, though apparently not overruled, by the holding in *Laney v. Columbia Natural Gas Co.*

Only *Baker v. Irish* supports the general rule prohibiting proof of a habit by proof of specific instances. In *Baker,* the plaintiff broke his back in a fall when he dismounted from a moving elevator in the building where he worked as a messenger. He sued the owner in trespass for personal injuries. The owner sought to prove contributory negligence by cross-examining Baker on his alleged practice of jumping from moving elevators. On appeal, the supreme court concluded that the plaintiff could not be cross-examined on prior similar acts, reasoning that the plaintiff's prior acts of negligence warranted no inference of negligence at the time of the injury. The court failed to cite any other Pennsylvania case in support of its holding.

Nevertheless, when a corporation or other entity adopts standard operating procedures, Pennsylvania courts have admitted evidence of similar acts to prove a business or trade practice. Pennsylvania courts also permit opinion evidence to prove collective business habits. Moreover, Pennsylvania courts always have been willing to allow evidence of a business or trade custom to prove

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111. *Id.* at 449, 2 A.2d at 366-67.
112. 188 Pa. 534, 41 A. 731 (1898).
113. *Id.* at 540-41, 41 A. at 732-33.
114. 305 Pa. 527, 536, 158 A. 266, 269 (1931). Lantry involved a dispute over the meaning of oil and gas leases. *Id.* at 529, 158 A. at 267. The court permitted the plaintiff to admit evidence of similar provisions in other leases. *Id.* at 536, 158 A. at 269. Nevertheless, the court cautioned that the evidence was admitted for the limited purpose of rebutting defendant's evidence of custom or usage. *Id.*
115. 172 Pa. 528, 33 A. 558 (1896).
116. *Id.* at 530-31, 33 A. at 558.
117. *Id.* at 531, 33 A. at 558.
118. *Id.* at 531-33, 33 A. at 558-59. Men do not normally risk their life without motive, the court explained, and "the fact that a man has done so once, or oftener, does not warrant the deduction that he did so on the particular occasion in controversy." *Id.*
119. *Id.* at 531-32, 33 A. at 558-59.
the standard of care to be applied in tort actions. In such cases, however, the
party attempting to prove the trade custom must show that it was "certain, rea­
sonable, distinct, uncontradicted, continued, and so notorious as to be probably
known to all parties to be controlled by it." Consequently, a party introduc­
ing evidence of an industry custom or practice simply must show that the cus­
tom has been established for a fairly long period and was known, actually or
constructively, to the alleged tortfeasor. Opinion evidence is the equivalent of
reputational evidence; thus it follows that Pennsylvania's treatment of the proof
of business customs or routine practices contradicts its principles of proof re­
garding individual habits.

Pennsylvania courts should consider permitting parties to prove an individ­
ual's habit in the same way as they prove a collective habit or routine corporate
practice. If so, individual habits should be demonstrated by proof of a sufficient
number of repetitions of the same acts to demonstrate a consistent routine prac­
tice. In both instances, the object of proof is the same: proof of an established
individual or collective disposition to act in a certain manner given certain ante­
cedent factual conditions.

Based on this reasoning, when the general disposition of any actor to be­
have in any way is a material issue in civil litigation, a party may prove that
disposition by reputational or opinion evidence, or by sufficient specific instances
of conduct to show the existence of a routine practice or habit. Once generalized
disposition is proved, the trier of fact may infer that the actor behaved in a
similar manner at the relevant time and place in the case at bar. Nevertheless,
when the probative value of the preferred evidence of general disposition is
weak, and the corresponding prejudice to the opponent is high, such proof
should not permitted.

III. EVIDENCE THAT PROVES INTENT, KNOWLEDGE, MOTIVE, PLAN
OR DESIGN, OPPORTUNITY, OR IDENTITY, FROM WHICH THE
TRIER OF FACT CAN DEDUCE THE ACTOR'S PROPENSITY
FOR WRONGDOING

A. The Similar Acts Rule

The similar acts rule excludes proof of wrongdoing by proof of similar
acts, but permits such evidence to prove an actor's intent, knowledge,

122. See, e.g., Jemison v. Pfeifer, 397 Pa. 81, 89, 152 A.2d 697, 701 (1959) (industrywide cus­
tom admitted); Carlo v. Bessemer & Lake Erie R.R., 293 Pa. 343, 347-48, 143 A. 5, 6-7 (trade
custom used as standard of care), cert. denied, 278 U.S. 622 (1928); Brown v. American Steel Foun­
dries, 272 Pa. 231, 236, 116 A. 546, 549 (1922) (trade custom admissible to show standard of care).

custom stated). See also RESTATEMENT (SECOND) OF TORTS § 295(a) (1965) (custom usually not
completely controlling on standard of due care).

124. Pennsylvania cases have not analyzed the issue of probative value versus prejudice. For a
discussion of probative value versus prejudice, see MCCORMICK ON EVIDENCE, supra note 14, § 185.

125. This is the general rule in most jurisdictions. See, e.g., Genins v. Geiger, 144 Ga. App.
244, 248, 240 S.E.2d 745, 749 (1977) (no error to exclude cross-examination of plaintiff on other
failures to pay counsel in action to cancel security agreement for lawyer's fee); Vuletich v. Bolgla, 85
motive,128 nature and extent of an activity or enterprise,129 control or the opportunity to control a device,130 or identity.131 Although the similar acts rule is not always treated as an application of the civil character evidence rule, courts should logically view the similar acts rule as part of the larger character evidence rule. First, the prohibited object of proof in similar acts evidence is the inference that actors are guilty of wrongdoing because they committed the same acts as alleged in a complaint at some other time. Second, the relevance of similar acts evidence to some collateral issue such as intent, knowledge or motive allows a party to admit similar acts evidence under the doctrine of multiple


126. See Leebov v. United States Fidelity & Guar. Co., 401 Pa. 477, 484-85, 165 A.2d 82, 86 (1960) (evidence that defendant insurance company had previously paid similar claims under identical policies admissible to show intent to be bound to risk); Jamestown Iron & Metal Co. v. Knofsky, 302 Pa. 483, 487, 154 A. 15, 16-17 (1930) (evidence of prior instances of obtaining credit under false pretenses admissible to show knowledge or intent in action for obtaining credit based on false financial statement); Homewood People's Bank v. Marshall, 223 Pa. 289, 292-93, 72 A. 627, 629-30 (1909) (other similar deeds of grantor while insolvent admissible to show grantor's intent to make fraudulent conveyance); Baumeister v. Baugh & Sons, 142 Pa. Super. 346, 353, 16 A.2d 424, 427-28 (1940) (similar acts of employee carelessness would have been admissible to show defendant caused fatal tetanus infection).


131. See, e.g., Helfrich v. Stem, 17 Pa. 143, 151 (1851) (evidence of other creditors' suits and nonpayment of debts admissible to show insolvency of plaintiff before levy, and to show probable cause for fraudulent conveyance); Love v. Tioga Trust Co., 68 Pa. Super. 447, 451 (1917) (evidence showing plaintiff had made repeated overdrafts in the past admissible in trespass action for injury to credit).
admissibility. This is permitted even though the trier of fact will be able to draw the impermissible inference that because an actor did the same thing before, the actor did it again in the case at bar.

For example, in Henderson Hull & Co. v. Philadelphia & Reading Railroad,132 an action to recover for the loss of a building that caught fire after a train passed, the court allowed proof that the railroad’s employees had operated trains with faulty spark arresters in the past.133 The plaintiff offered evidence to show that the railroad had control over the trains that allegedly caused the fire.134 Yet, by admitting this evidence, the court permitted the trier of fact to infer that the railroad’s train crews were habitually careless about fire safety, and therefore were careless at the time of the fire. Thus, the prohibited inference of habitual carelessness in Henderson and similar cases occurs whenever courts admit evidence of other acts to show something collateral to the ultimate issue of negligence. Each of the subdivisions of the similar acts rule must be analyzed in this light.

1. Intent

Similar acts evidence often is admitted to prove intent when intent is an issue in a case.135 Intent of an actor often is a real issue in civil litigation. For example, the intent of the parties to contract is always an issue in suits on an oral or written contract.136 Some tort claims also require proof of an actor’s intent, such as a claim founded on a fraudulent transfer under the Uniform Fraudulent Conveyance Act.137 In trespass actions for deceit, intent to defraud must be proved in order to recover.138 In all these situations, the similar acts rule permits proof of intent by proof of prior similar acts, and justifies the admission of evidence that allows the trier of fact to infer from the past wrong that someone committed a civil wrong on the occasion in controversy.

Similar acts evidence shows intent because the performance of similar acts requires the same state of mind as the matter at issue in the case. The similarity also tends to heighten the impact of the evidence as a source of the prohibited

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133. Id. at 463, 22 A. at 852-53.
134. Id. at 463-64, 22 A. at 852-53.
135. See supra notes 106-124 and accompanying text for a discussion of habit and custom.
inference that actors behaved the same way because they have performed the same act on more than one occasion.

For example, in *Keiter v. Miller*,\(^{139}\) an action against a father for necessities furnished to a minor, the defendant was cross-examined about similar contracts he had made with other people to maintain his children. He had repudiated these agreements, claiming the children were put out "for companionship" to other people, and not for compensation.\(^{140}\) The supreme court reversed a verdict for the plaintiff on the ground that the testimony of similar contracts was too remote and speculative to be rational proof of intent to make a contract with the plaintiff in the case at bar.\(^{141}\) Thus, the court concluded, this evidence had low probative value on intent to make a contract and relatively great prejudice to the defendant.

Similarly, in *Jamestown Iron & Metal Co. v. Knafsky*,\(^{142}\) the court refused to admit defendant's later false financial statements to prove deceit. Nevertheless, the court, in dicta, observed that such statements could be admitted if the fact of the falsity of the earlier statement could be established from another source.\(^{143}\) Under those circumstances, the court opined, the later false statements would be relevant to show both knowledge and intent to deceive.\(^{144}\) Thus, although the court held the earlier statement should not be admitted, it nonetheless suggested that the admission of later, similar acts of a defendant in a deceit action may sometimes be used to show intent.

### 2. Knowledge

Similar acts evidence is also admissible to show knowledge as an intermediate way of proving intent, if intent is an issue in the case.\(^{145}\) If the trier of fact reviews evidence of similar acts, it may find that the actor had the intent required by law because the actor knew and appreciated the consequences of his actions. More often, however, similar acts evidence is admissible to establish the collateral issue of culpable knowledge when knowledge of a dangerous or defective condition is a material element of the claim.\(^{146}\) In this situation, the trier of fact may draw an inference from similar acts evidence that the culpable party had knowledge of a dangerous or defective condition because of the frequency of accidents or injuries associated with the condition.

In a number of civil actions for negligent personal injury, the defendant's duty to warn others of a dangerous condition, or to repair a defective portion of the premises, is conditioned on the defendant's knowledge of the hazard.\(^{147}\)

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140. *Id.* at 595, 170 A. at 365.
141. *Id.* at 595-96, 170 A. at 365.
143. *Id.* at 486-87, 154 A. at 16-17.
144. *Id.*
145. *See McCormick on Evidence, supra* note 14, § 190 (bad character in criminal cases, other crimes); § 198 (other contracts and business transaction in civil cases).
146. *Id.* at § 200 (other accidents and injuries to prove fault).
147. *See Restatement (Second) of Torts §§ 343, 344 comment f, 345 (similar acts to prove knowledge of dangerous condition on land).*
When the defendant's knowledge of a defect is presented in this fashion, Pennsylvania courts generally admit incidents of other injuries at the site to show knowledge of the hazard. 148 Similar acts also may be admitted to show plaintiff's knowledge of a particular dangerous condition as proof of contributory negligence. 149

The occurrence of prior incidents or injuries at the same location are collateral issues in most lawsuits. As a result, Pennsylvania courts have struggled with the admission of similar acts evidence to show knowledge of dangerous conditions. Courts have refused to admit similar acts evidence when the probative value of similar incidents on the issue of knowledge is exceeded by prejudice to the other side, confusion of the issues, and undue time consumed in proof. 150

This balancing of probative value against possible prejudice to the judicial process is illustrated by contrasting the results in two similar cases. In Fisher v. Pomeroy's Inc., 151 the plaintiff sued for an injury that occurred when she slipped and fell on defendant's stairway. 152 The Pennsylvania Supreme Court upheld the admission of testimony of persons who had been injured on the same stairs during a two-year period before and after the plaintiff's injury. 153 Thus, the court held that similar evidence of falls showed the existence of a condition capable of proximately causing harm, and that the defendant had been aware of the defect. 154 By contrast, the court in Stormer v. Alberts Construction Co. 155 rejected the introduction of similar accidents to prove the defendant's knowledge of a hazard. 156 In Stormer, a passenger in a car sued a road building company for personal injuries resulting from a collision occurring in front of a sewer excavation obstructing a highway. 157 The court held that similar accidents that had occurred along the same stretch of highway within a few days of the collision


149. See, e.g., Heis v. City of Lancaster, 203 Pa. 260, 262, 52 A. 201, 201 (1902) (existence in city of other gutters of similar make admissible to show plaintiff's knowledge of hazard).


152. Id. at 389-90, 185 A. at 296.
153. Id. at 390-91, 185 A. at 297.
154. Id.
156. Id. at 466, 165 A.2d at 89.
157. Id. at 463-65, 165 A.2d at 88.
were inadmissible to prove the construction company's knowledge of the hazard. The court reasoned that the company's knowledge of the hazard had already been established from other evidence. Evidence of other collisions could be admitted, the court acknowledged, only if the plaintiff could lay a foundation showing that the other accidents occurred under similar circumstances at substantially the same spot as the plaintiff's collision. Thus, the similar acts evidence in Stormer was excluded because its probative value on the issue of knowledge was very low. Moreover, the Stormer court determined that the evidence was cumulative and highly prejudicial to the defendant. In Fisher, however, the defendant's knowledge of the hazard had not been independently established. Thus, the defendant's knowledge of the hazard was a real issue in the case, and the court determined that evidence of other falls at the accident site was not cumulative.

3. Motive

In civil litigation, parties usually are not required to prove why an actor did or did not do some act. Motivation is not a direct object of proof in litigation involving actions in negligence, breach of contract, or land title disputes. Motivation is, however, an issue in defamation cases in which the malicious motivation of the publisher of a defamatory statement is relevant to damages. Proof of malice is essential to recovery in the case of defamation of a public figure. Malice also may be an issue in will contests and similar actions to cancel instruments on the ground of undue influence. Moreover, motive may be a means of proving intent where intent is an issue in the case.

The clearest example of the admission of similar acts evidence to prove malice may be found in libel and malicious prosecution cases. Pennsylvania courts have allowed the plaintiff to admit evidence of other defamatory publica-

158. Id. at 466, 165 A.2d at 89.
159. Id.
160. Few Pennsylvania courts have admitted other instances of malicious behavior. But see Farneth v. Commercial Credit Co., 313 Pa. 433, 440-41, 169 A.89, 92 (1933) (threats of criminal prosecution made to plaintiff's father by defendants admissible to show defendants' malicious motives in collecting debt). Cases from other jurisdictions, however, favor admission of similar acts evidence to show malice. See, e.g., Satz v. Koplow, __ Ind. App. __, 397 N.E.2d 1082, 1085 (1979) (prior pushing and shoving match and threats of arrest between defendant and plaintiff admissible to show malice in malicious prosecution suit); Beasly v. Nunn, 243 So. 2d 125, 127 (La. Ct. App. 1971) (evidence that numerous similarly situated persons had filed civil actions against defendant admissible to show plaintiff's lack of malice); Lackey v. Metropolitan Life Ins. Co., 30 Tenn. App. 390, 414, 206 S.W.2d 806, 816-17 (1947) (other statements not in complaint admissible to prove malice in slander action by attorney against insurance company). See also New York Times, Inc. v. Sullivan, 376 U.S. 254, 283-84 (1964) (public figure must prove malice to recover for defamation).
161. See, e.g., Miller v. Miller, 187 Pa. 572, 590, 41 A. 277, 283 (1898) (evidence of hostile relationship between testator and daughter's husband admitted to show motive of testator in disinheriting daughter).
162. In at least one instance, the Pennsylvania Supreme Court has indicated that proof of an actor's motive may have been relevant to prove guilty knowledge. See Vcit v. Class & Nachod Brewing Co., 216 Pa. 29, 32, 64 A. 871, 872 (1906) (motive for tying down safety valve of boiler).
tions by the defendant to show malice. The republication of a defamatory statement after commencement of a libel action is admissible to show the defendant's malice toward the plaintiff. Similarly, in malicious prosecution actions, other instances in which the defendant harassed the plaintiff have been admitted routinely to show that the defendant commenced a civil or criminal action against the plaintiff out of malice. Thus, evidence of similar malicious acts is admissible to show an actor's malice toward another person when malice is part of the plaintiff's cause of action or the defendant's affirmative defense.

4. Nature and Extent of an Enterprise

When the existence and extent of an enterprise or conspiracy is an issue in a civil case, acts in furtherance of the enterprise or conspiracy, but unrelated to the operative facts of the cause of action, may be proved to show the extent of the operation. *James F. White & Co. v. Rosenthal* illustrates the use of similar acts evidence to prove a civil enterprise. *White* was an action to recover for trade goods and credit obtained with a false financial statement. The plaintiff wished to introduce evidence showing that after the disputed transaction, the defendant bought more goods on credit from other wholesalers under false pretenses. The Pennsylvania Supreme Court admitted the evidence because it found that the defendant's actions were part of a single enterprise designed to obtain trade goods and credit by fraudulent means.

The court also has admitted proof of forged signatures on stock certificates to show a defendant's plan to transfer stock certificates by fraud in an action for conversion of the plaintiff's stock certificates. Nevertheless, the court did not allow the defendant in a replevin action to show that the plaintiff and others had

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165. Farneth v. Commercial Credit Co., 313 Pa. 433, 169 A. 89 (1933) (evidence that defendant instituted criminal charge to coerce payment admissible to show malice in abuse of process and malicious prosecution).
167. 173 Pa. 175, 33 A. 1027 (1896).
168. *Id.* at 179, 33 A. at 1028.
169. *Id.* at 180, 33 A. at 1028.
170. *Id.*
conspired to harass his motion picture business by swearing out several false replevin writs. The court explained that the defendant could not produce any independent corroborative evidence of the existence of a conspiracy. If the party who wants to show the nature and extent of an enterprise cannot prove its existence by independent evidence, the court held, then similar acts of the person or persons involved in the enterprise are inadmissible. The court’s analysis is similar to the adage in criminal law that the prosecution may not “bootstrap” its proof of a conspiracy from the declarations of the conspirators.

5. Identity of an Actor

Similar acts evidence rarely is used to establish the identity of an actor in civil cases. If an actor committed a similar act nearly identical to that alleged in the case at bar, then the similar acts might be admitted to show the identity of a tortfeasor through modus operandi evidence. An analogous issue was recently raised in the federal civil rights case of Hirst v. Gertzen. In Hirst, inmates of a county jail alleged that certain sheriff’s deputies were responsible for the beating of a jail inmate who was found dead in his cell. The court admitted evidence of other brutal acts by these guards to show the identity of the deputies. No Pennsylvania courts have upheld the admission of similar acts evidence in civil cases to show the identity of an actor, but at least one court has suggested the possibility that such evidence might be admissible. In Henderson, Hull & Co. v. Philadelphia & Reading Railroad, the supreme court admitted other instances of fires caused by defendant’s train crews in the vicinity of the fire loss to show that the railroad controlled the source of the fire. Furthermore, the court indicated that evidence of the other fires also could have been the basis of an inference that the defendant’s employees were the tortfeasors.

6. Opportunity or Control of Device

Similar acts evidence is admissible to prove that an actor had an opportunity to commit an act or had control over a device that caused injury to others. This method proves indirectly the identity of a tortfeasor by showing that the defendant committed similar acts before or after the act in the case at bar. Henderson, Hull & Co. v. Philadelphia & Reading Railroad illustrates the admission of similar acts of defendant’s train crews to show the defendant had control of the devices that caused the fire that destroyed plaintiff’s mill. In Pennsylvania Railroad v. Stranahan, the plaintiff alleged that the railroad’s train crews

174. 676 F.2d 1252 (9th Cir. 1981).
175. Id. at 1261-62.
177. Id. at 479-80, 22 A. at 853-54.
178. Id.
180. 79 Pa. 405 (1875).
caused a roadside fire by careless use of spark arresters. The court approved the admission of other roadside fires set in the vicinity of the loss by the defendant’s trains to show that the defendant had control over a dangerous instrument, a locomotive that emitted sparks. The court explained that this evidence proved the defendant was the tortfeasor by showing the defendant’s opportunity to commit the tortious act.

B. Pennsylvania’s Similar Acts Rule in Civil Cases

Other similar acts of an actor generally are not admissible to show that the actor was at fault. Nonetheless, Pennsylvania courts allow the admission of other similar acts of an actor to show intent to contract, to fraudulently transfer property or to show that an actor made a statement intending to deceive others. Similar acts evidence also is admissible to show that an actor had knowledge of a dangerous condition. If malice is at issue, other similar acts of malice toward the injured party are admissible. If the issue is the nature and extent of a conspiracy, then other similar acts of the conspirators are admissible once the conspiracy is established by independent evidence. When identity of a tortfeasor is at issue, other similar acts known to have been committed by that tortfeasor are admissible to prove identity. Similarly, opportunity or control over a dangerous instrument may be shown by evidence of other similar acts.

Similar acts evidence always is relevant to the issue that it may be used to prove. Such evidence is admitted or excluded based on a judicial balancing of probative value against prejudice, confusion of the issues, and trial of collateral matters. This balancing process includes an implicit assumption that proof of other similar acts may result in the defendant being found liable for damages or the plaintiff being found contributorily at fault based on wrongs other than those on which the trial is based.

Although the United States Constitution forbids the trial of criminal de-

181. Id. at 406.
182. Id.
183. See supra note 125 and accompanying text for discussion of the exclusionary rule.
184. See supra notes 136, 139-41 and accompanying text for a discussion of proof of intent to make a contract.
185. See supra notes 137-38 and accompanying text for a discussion of proof of intent to make a fraudulent transfer.
186. See supra notes 138, 142-44 and accompanying text for a discussion of proof of intent to deceive.
187. See supra notes 145-59 and accompanying text for a discussion of proof of knowledge.
188. See supra notes 160-65 and accompanying text for a discussion of proof of malice.
189. See supra notes 166-173 and accompanying text for a discussion of proof of conspiracy.
190. See supra id. for a discussion of plan or design.
191. See supra notes 174-78 and accompanying text for a discussion of proof of identity.
192. See supra notes 179-82 and accompanying text for a discussion of proof of opportunity.
fendants by their reputation for wrongdoing, no such limit constrains civil cases. In criminal cases, the court is required to weigh the probative value of similar criminal acts evidence against the accused's presumption of innocence, his right to be confronted by his accusers, and his right to notice of the charges against him. The sixth amendment confrontation and notice clauses do not apply to civil litigants. The right to a fair hearing is not jeopardized by the use of similar acts evidence in civil cases. The source of prejudice to the opposing party is in the introduction of collateral matters that may not have been certified in the pretrial order not satisfactorily developed by pretrial discovery. Adequate discovery will curb any surprise to the opponent.

In civil litigation, the prevailing rule is that the moving party must carry the burden of proof by a preponderance of evidence. Similar acts evidence is admissible in civil cases to prove by inference a collateral issue such as intent, knowledge, motive, malice, plan or design, identity, or opportunity. The rationale for this practice is that if the actor had the required intent, knowledge, motive, plan or opportunity at another time, then the actor had that quality at the time relevant to the case. Prejudice caused by introducing similar acts evidence usually is low and the probative value relatively high. Thus, similar acts evidence should be admissible, except when probative value is exceeded by prejudice to the opponent, or by waste of time and confusion of the issues.

IV. IMPEACHMENT OF WITNESSES BY REPUTATIONAL EVIDENCE AND BY PRIOR BAD ACTS

A. Impeachment by Reputational Evidence

Only three Pennsylvania civil cases have discussed impeachment of a witness's veracity by adverse reputational character witnesses. Nevertheless, the

194. See U.S. CONST. amend. VI (defendant has right to be notified of the charge, and to confront witnesses against him). See also E. IMWINKELREID, supra note 2, §§ 7.01, 10.14-27 (similar acts to show collateral issues).

195. See E. IMWINKELREID, supra note 2, § 7.01 (similar acts in civil case).

196. The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI (emphasis added).

197. See 1 J. WIGMORE, EVIDENCE § 199 (3d ed. 1940) (when admitting evidence of prior conduct, less risk of undue prejudice in civil trials than in criminal trials).


199. See supra notes 106-34 and accompanying text for a discussion of the similar acts rule.

200. Smith v. Hine, 179 Pa. 203, 206, 36 A. 222, 222 (1897) (character of witness for truthfulness admissible when proved by reputation); Wike v. Lightner, 11 Serg. & Rawle, 198, 199-200 (1824) (character for truthfulness and believability under oath admissible); Kimmel v. Kimmel, 3 Serg. & Rawle 336, 337-38 (1816) (witness may testify about general character for veracity of another witness based on knowledge derived from reputation in neighborhood).
technique of impeaching a witness’s veracity by resorting to reputational character witnesses still is a valuable tool in civil cases. Unlike criminal cases, impeaching a witness in a civil case by evidence of reputation raises no fifth or sixth amendment issues of fair trial. The form for impeaching a witness’s credibility by testimony on a witness’s reputation is the same for civil and criminal cases. The impeaching party calls an adverse character witness, who is questioned concerning any knowledge of the general reputation of the other witness for truth and veracity in the community in which he resides. The examiner then may ask whether the reputational witness would believe the other person under oath, based on that reputation.201

B. Impeachment by Specific Acts

Any witness may be cross-examined regarding prior convictions for crimes or on other bad acts affecting the witness’s honesty. A long standing general Pennsylvania rule permits the admission of any felony or misdemeanor constituting crimen falsi to impeach the veracity of any witness in civil or criminal cases.202 Under Pennsylvania law, crimen falsi is a crime involving a fraud and false statement or a crime that casts doubt on the truthfulness of the accused.204 Misdemeanor crimen falsi crimes include:205 (1) false representation to obtain money on a voting petition;206 (2) obtaining money under false pretenses;207 (3) draft evasion;208 (4) evading the gaming tax;209 (5) illegal possession of liquor;210 and (5) hit and run driving.211

A witness may be impeached on a prior conviction for a felony or misdemeanor crimen falsi,212 but such impeachment is limited. The Pennsylvania Supreme Court has rejected the use of a twelve-year-old felony conviction for pandering to impeach the credibility of a witness in a civil case.213 Pennsylvania courts also refuse to allow a party to be impeached on cross-examination by proof that the same actions that gave rise to civil liability also resulted in a

201. Wike v. Lightner, 11 Sergo & Rawle 198, 199-200 (1824) (witness may testify on another witness’s truthfulness if belief founded on knowledge of witness’s general character).
205. See Krauser, supra note 39, at 298-99.
211. Id.
criminal conviction. The court has determined that use of a criminal conviction for the same acts simply to impeach the witness would be highly prejudicial and would not be probative of the witness's truth and veracity.214

Pennsylvania courts have been more reluctant to allow cross-examination on prior acts not amounting to a conviction to impeach the witness's credibility, even when those acts involved instances of fraud and false dealings. In general, courts have restricted impeachment by prior acts of fraud and false dealing to insurance fraud cases, such as those involving prior false statements or claims made by the defendant to the same insurance company on a prior loss.215 In Berliner v. Schoenberg,216 the supreme court disapproved of the impeachment of a party in a fraudulent transfer case by proof that the party had filed a false claim in a probate estate.217 Under Pennsylvania law, the court held, a witness could not be impeached by specific instances of misconduct unrelated to the issues at trial.218 Although this statement must be qualified by McSparran v. The Southern Mutual Insurance Co., in which the court admitted prior false claims as a way of impeaching the defendant,219 it shows the narrow and limited view courts take on admitting specific instances of dishonesty to impeach a witness's credibility. Such cross-examination is not permitted, although it may be relevant to showing the witness's credibility. The only possible rationales that exist for excluding such evidence are that its probative value is exceeded by prejudice to the side proposing the witness, and that proof of collateral matters is difficult.

V. Conclusion: A New Rule

A. Character as a Source of Proof

If the trier of fact knew the motivation behind the acts of the parties and other persons involved in litigation, the trier of fact might be able to allocate responsibility for civil liability more effectively. The phenomenon of motivation,
however, is difficult to deal with in trials. Exact, scientifically acceptable proof of an actor’s motivation in the courtroom is impossible. Nevertheless, the courtroom is an excellent place to apply what is known about human character in order to ascertain the clinical reasons for an actor’s motivation. Dean Wigmore understood this, which helps to explain why he spent so much time working out a theory of character evidence.\textsuperscript{220} In \textit{Science of Judicial Proof}, he advocated a theory of character evidence based on the conscious mental states of individuals. He maintained that the general disposition of any actor could be proved clinically in court by showing a sufficient number of individual similar acts. The trier of fact could then infer that a general disposition or trait existed that produced the repetitive acts.\textsuperscript{221} This theory fit the existing case law in the United States.\textsuperscript{222} Once the actor’s general disposition to act was known, the trier of fact could deduce that at the time of the incident at issue in the case, the actor behaved in accordance with that disposition.\textsuperscript{223}

Dean Wigmore noted, however, that proof of character by specific instances of conduct was seldom allowed by the courts. He explained this anomaly by observing that most courts believe that specific instances of conduct are too prejudicial to be employed to prove character when character was at issue.\textsuperscript{224} Wigmore nevertheless advocated proof of character by specific instances of conduct because he believed that proof of repetitive behavior patterns was the best means of demonstrating the existence of a character trait.\textsuperscript{225} Dean McCormick accepted Wigmore’s analysis of character evidence, but he was more concerned with the impact of proof of bad character in criminal cases than with the use of character evidence in civil cases.\textsuperscript{226}

In recent years, some courts have adopted Wigmore’s analysis and accepted proof of habitual acts in civil cases by specific instances of prior conduct on the ground that such evidence is highly probative and not particularly prejudicial to the opponent. The New York Court of Appeals followed this approach in \textit{Hal-
loran v. Virginia Chemicals, Inc.,\textsuperscript{227} in which the court allowed proof that the plaintiff had repeatedly put an immersion heating coil in a water bucket to heat freon gas.\textsuperscript{228} The court admitted evidence of several prior instances of this careless act to permit the trier of fact to infer that plaintiff used the immersion coil in a dangerous manner.\textsuperscript{229} This inference is logically defensible. The jury can assess the relative probability of plaintiff's use of immersion coils to overheat water by knowing how many times the plaintiff has done so in the past. Then the jury can reason that it was more probable than not that the plaintiff used an immersion coil to overheat water in the case at bar.

This article cannot explore the psychology of character structure. A detailed examination of the theory of motivation for human action and the relationship between individual psychic structure and the roles people play in social settings is beyond the scope of this discussion.\textsuperscript{230} Nevertheless, human actors behave in predictable patterns when confronted with similar social situations.\textsuperscript{231} This patterned behavior can be discovered clinically or experimentally. If the actor's behavior pattern in a given social setting is known generally, then a social scientist can predict that the actor will behave accordingly whenever the actor is confronted with the same social conditions. This insight supports the use of character evidence in civil cases. The law of evidence permits proof of general disposition or patterned behavior. Juries use proven behavior patterns as a source for inferring that the actor behaved in accordance with behavior patterns during the time period at issue. When juries infer a generalized behavior pattern from specific instances of conduct they make a judgment of probability based on data that may be less than representative of the total behavioral or character structure of the individual whose behavior is at issue. Nevertheless, the jury's analytical process is rational support for a clinical insight into the actor's behavior in the case at bar.

The foregoing discussion suggests that character evidence should be admissible when it is logically probative on some issue in a case, and when it is

\textsuperscript{228} Id. at 392-93, 393 N.Y.S.2d at 345-46, 361 N.E.2d at 995-96.
\textsuperscript{229} Id. at 392-93, 393 N.Y.S.2d at 346, 361 N.E.2d at 996.
\textsuperscript{230} For a discussion of character and its interaction with social structure, see H. \textsc{Gerth} \& C.W. \textsc{Mills}, \textsc{Character} \& \textsc{Social} \textsc{Structure} (Harbinger ed. 1964). This writer accepts and follows Gerth and Mills' hypotheses on interactive behavior patterns and character structure. In general, Gerth and Mills define character as a three-level phenomenon, consisting of behavior patterns at the biological, psychic, and social level. The important point for legal theorists is the concept of character structure as manifested in social roles played by individuals. A person who exhibits a certain role-playing tendency in a given social situation will be likely to repeat that tendency when the same situation exists again. Thus, Gerth and Mills articulate a comprehensive theory of biological psychic and social character that permits prediction of social behavior from known prior behavior in a similar situation.

\textsuperscript{231} Evidence scholars have been predicting human behavior since the time of Jeremy Bentham. Although Bentham's evidence theories had little direct role in developing American case law on civil and criminal character evidence, his theories were viewed favorably in England and, later in the writings of American law professors on evidence issues. See III J. \textsc{Bentham}, \textsc{Rationale} \textsc{on} \textsc{Judicial} \textsc{Evidence} 183-85, 195-96 (London 1827) (discussion of character evidence that deals with predictability).
presented in a manner that allows the trier of fact to draw a valid inference that someone has a disposition to act in a predictable way. The jury may then draw the additional inference that in the situation involved in the case at bar, the actor acted in accordance with that character structure. Character evidence of reputation from nonexpert witnesses, however, is without acceptable logical foundation because witnesses testifying about an individual's reputation cannot disclose the basis for their covert opinion, except on cross-examination. Thus, the jury can never evaluate the specific instances that form the basis for the witness's assessment of an individual's reputation. Proof of specific similar prior and subsequent instances of the same kind of activity is the best source for showing a general condition of character structure that an actor would act in the same way if similar conditions existed at the time and place of the act in dispute.

The purpose of litigation is to resolve disputes. The judicial process requires that scientific certainty of judgment give way to the settlement of disputes. Similar acts evidence need not be as frequent or precise as a statistician would like for the induction of the probability of future repetition. Moreover, expert witnesses may assist the trier of fact in making an informed judgment of probability regarding the existence of a particular trait of habit based on a series of similar acts.

B. A Proposed New Rule on Character Evidence

The current Federal and Uniform Rules of Evidence relevant to character offer no new solutions to the use of character evidence in either criminal or civil cases. 232 These rules adopt, and continue to follow, Wigmore's theory on the use of character evidence. Both sets of rules treat civil and criminal cases identically for the purpose of introduction of character evidence. 233

Pennsylvania courts should adopt a new rule that rejects nonexpert opinion evidence as a means of proving character and reputation. Second, the rule should distinguish between criminal and civil cases in determining whether courts should admit evidence of specific similar acts. In civil litigation, courts should admit evidence of specific acts of any actor whenever relevant to show the disposition of any actor to behave under a given set of external circumstances. Courts can control the use of specific acts evidence by admitting such evidence only when its probative value is greater than its prejudice to the opponent. In reaching its conclusion on the probative value and potential prejudice of similar acts evidence, courts should consider factors such as: (1) the number of instances of the same repetitive act to be proved; 234 (2) the object of proof; 235

232. The character evidence rules include: FED. R. EVID. 404 (when character is at issue); FED. R. EVID. 405 (method of proof of character); FED. R. EVID. 406 (habit, routine practice); FED. R. EVID. 608 (impeachment by reputation and specific instances of conduct); and FED. R. EVID. 609 (impeachment by previous conviction of crime).


234. The greater the number of repetitive acts, the more reliable the jury's judgment on frequency.

235. If specific acts are introduced to prove a consistent pattern of behavior by showing that an actor has so acted in the past, the act at issue must be either an ultimate issue of fact in the case or a
(3) the availability of expert opinion to interpret such data;\(^{236}\) (4) the prejudice to the opponent caused by a value judgment that the opponent should be held liable because of prior miscues;\(^{237}\) and (5) the amount of time needed to prove the other acts, in light of crowded dockets, the time available to try the case, and the importance of the evidence to the resolution of the case.\(^{238}\) Finally, a court should admit expert opinion evidence on the existence or nonexistence of repetitive patterns of behavior in a particular actor if it finds the underlying specific acts admissible, and if evaluation of the prior acts would be useful to the trier of fact in reaching a decision.

Courts could easily adopt the rule, without legislative intervention, as a guide for the use of character evidence in civil cases. The task of shaping a rule for the use of character evidence in criminal cases requires that courts deal with sixth amendment issues, and with the ancient notion that a criminal defendant is not guilty of an offense if the defendant establishes evidence of good moral character. The rationale for the use of character evidence in criminal cases is inapplicable to civil litigation. Thus, the use of character evidence in civil and criminal cases should follow different paths.\(^{239}\)

collateral issue. Proof of collateral issues such as intent, motive, knowledge, plan or scheme, and opportunity, present fewer systemic problems than proof of an ultimate issue such as breach of contract or tort liability.

236. For example, the multiplication of specific instances of aberrant conduct in will contests, without the “filter” of expert interpretation, may be used to confuse the jury and to engage in the proof of numerous collateral issues without justification.

237. This leads the trier of fact to make a Calvinistic value judgment that the defendant is liable because of a prior error of judgment or intentional wrong, rather than because of a preponderance of the evidence presented in the case.

238. This would exclude much impeachment on prior acts of dishonesty.

239. *But cf.* Bell v. City of Philadelphia, ___ Pa. Super. __, 491 A.2d 1386, 1391 (1985), in which the court admitted character evidence in a civil action for assault and battery even though Pennsylvania courts normally do not admit character evidence in civil actions unless character is at issue. The court noted that such evidence would have been admitted in a criminal action. “Moreover,” the court reasoned, “it is difficult to comprehend why, where the issue is the same, the rule should be different in civil cases than it is in criminal cases.” *Id.* Thus, the court admitted evidence of the defendant’s reputation in the community for “argumentativeness, bad temper, and violence” in order to show the defendant’s propensity for aggressiveness. *Id.*

Nevertheless, the author maintains that courts should distinguish between civil and criminal cases in order to avoid burdening civil litigants with the constitutional safeguards that limit the use of character evidence in the trial of a criminal defendant.

For a discussion of the problems encountered in using evidence of other acts in criminal cases, see generally E. Imwinkelreid, *supra* note 2, §§ 1.01-6.05.