CHARACTER EVIDENCE; HABIT AND CUSTOM; REPUTATION AS TO CHARACTER

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I

CHARACTER EVIDENCE

Character is defined in the Model Code as "the aggregate of a person's traits, including those relating to care and skill and their opposites."[1] Character is distinguished from reputation in that the former denotes what a person is, the latter what others think he is.[2] The distinction is observed by careful writers and careful courts.[3]

The Code deals separately with the admissibility of evidence to prove a trait of character (a) when the trait itself is a necessary fact in issue or is relevant in measuring damages and (b) when it is offered as proof of conduct on a specified occasion. Clause (a) is covered by Rule 305; clause (b) by Rule 306.

A. Rule 305

Rule 305[4] provides in substance that when a trait of a person's character is one of the facts necessary to establish a liability or defense or is a factor in measuring damages, (a) opinion evidence, (b) evidence of reputation as to the trait and (c) evidence of specific instances of conduct may all be admitted. It is stated that the rule has relatively narrow application; that it concerns chiefly the traits of chastity and competence. Examples given of its application are: cases of seduction or breach of promise where prior virtue is impor-

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[1] Rule 304.

[2] AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, COMMENT, RULE 304.

[3] 11 C. J. 289. JONES, COMMENTARIES ON EVIDENCE, (2d ed.) 1243, Dufresne v. Weise, 46 Wis. 290, 297, 1 N.W. 59 (1879).

[4] Rule 305 reads as follows: "As tending to prove a trait of a person's character when it is one of the facts necessary to establish a liability or defense or is a factor in the measurement of damages (a) a witness may state his opinion under Rules 401-409, and (b) evidence of the person's reputation as to that trait is admissible under Rule 526, and (c) evidence of specific instances of the person's conduct is admissible." Rule 401-409 deals with expert and opinion evidence generally and is the subject of another article in this series. Rule 526 is covered later in this note.

tant in determining whether plaintiff recovers and how much; and actions for breach of employment contracts or actions based on the defendant's retention of a careless or incompetent employee, where carelessness or incompetence may be a controlling issue.[5]

The framers of the Code say that the existing law is in conflict on the subject covered by Rule 305.[6]

Support for the rule can be found in Wisconsin. It has been here held that in an action for seduction, evidence of want of chastity is admissible in mitigation of damages and that general reputation as well as specific acts may be shown.[7] An employee's general reputation for competence may be shown in an action by an injured fellow employee against the master for retaining a careless and incompetent employee.[8] Our court has indicated that in a suit against parents for permitting a minor child to operate an automobile which caused injury, proof as to the customary manner in which the child drove was admissible.[9] Evidence in support of the defense of truth in libel and slander actions based on defamatory words which directly attack a trait of character, *e. g.* "plaintiff has been in the habit of stealing," would seem to come under Rule 305 although not specifically mentioned in the comment. Wisconsin permits proof of specific instances of relevant conduct in such libel and slander cases.[10]

Rule 305 seems to make good sense. The arguments advanced against the reception of character evidence that it confuses the real issues and wastes time,[11] are not relevant when character is a material fact to be determined in the case. The argument against evidence of specific instances "because of the unfair surprise to the witness, who cannot know what variety of false charges may be specified, and cannot be prepared to expose their falsity"[12] should not be controlling. Surprise at a trial may be caused by almost any kind of evidence; we have our pre-trial discovery examinations to minimize the risk. Further, the trial court is given a broad discretion under the Code to exclude evidence if it finds that its probative value is out-

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[5] AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, COMMENT b, RULE 305.
[6] AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, COMMENT a, RULE 305.
[7] Stewart v. Smith, 92 Wis. 76, 65 N.W. 736 (1896); Barton v. Bruley, 119 Wis. 326, 96 N.W. 815 (1903).
[8] Moering v. The Falk Corp., 141 Wis. 294, 124 N.W. 402 (1910).
[9] Dormeyer v. Hall, 192 Wis. 197, 212 N.W. 257 (1927).
[10] Talmadge v. Baker, 22 Wis. 625, (1868); Kimball v. Fernandez, 41 Wis. 329, (1877); Bilgrien v. Ulrich, 150 Wis. 532, 137 N.W. 759 (1912).
[11] *Cf.* JONES, COMMENTARIES ON EVIDENCE, (2d ed.) 639.
[12] Lowe v. Ring, 123 Wis. 107, 101 N.W. 381 (1904).

weighed by the risk that its admission will waste time, confuse issues, create undue prejudice or unfairly surprise a party.[13]

B. Rule 306

Rule 306,[14] subject to the exceptions hereafter noted, provides that evidence of a trait of a person's character is admissible as tending to prove his conduct on a specified occasion. Opinion evidence, evidence of reputation and evidence of prior conviction showing the trait to be bad, but no other specific instances of conduct, are made admissible. The exceptions mentioned are these: (a) evidence of a trait of character with respect to care or skill or the opposite is inadmissible as tending to prove the quality of conduct on a specified occasion; (b) in criminal cases the accused may offer evidence of a trait of character to prove his innocence without the risk of discretionary exclusion by the trial court;[15] (c) the prosecutor may not gain admission of evidence of a trait of character offered to prove guilt unless the accused has first introduced evidence of good character.

Support for much of Rule 306 can be found in Wisconsin. Thus, opinion evidence offered by plaintiff in a slander action to prove the relevant trait of virtue was admitted.[16] Reputation has been held admissible to prove solvency in a prosecution for unlawfully accept-

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[13] Rule 303 covered in another article in this series, gives the trial court discretion to exclude otherwise admissible evidence where its probative value is outweighed by other considerations.

[14] Rule 306 reads: "(1) Subject to Paragraph (3), evidence of a trait of a person's character is admissible as tending to prove his conduct on a specified occasion, except that in a criminal action evidence of a trait of the accused's character, offered to prove his guilt or innocence of the offence charged, (a) if offered by the accused, may not be excluded under Rule 303, and (b) if offered by the prosecution, may be admitted only after the accused has introduced evidence of good character; (2) As tending to prove a trait of a person's character under Paragraph (1), (a) a witness may state his opinion under Rules 401-409, and (b) evidence of the person's reputation is admissible under Rule 526, and (c) evidence that the person has been convicted of a crime the commission of which tends to prove the trait to be bad is admissible, but no other evidence of specific instances of his conduct is admissible except as stated in Rule 106 (1); (3) Evidence of a trait of a person's character with respect to care or skill or the lack of either or both is inadmissible as tending to prove the quality of his conduct on a specified occasion."

Rules 401-409 relate to expert and opinion evidence and are covered in another article in this series. Rule 106 (1) relates to evidence affecting credibility and is likewise covered in another note. Rule 526 is discussed later in this note.

[15] AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, RULE 303.

[16] Dufresne v. Weise, 46 Wis. 290, 1 N.W. 59 (1879).

ing deposits;[17] plaintiff's bad reputation may be shown in libel[18] and slander;[19] plaintiff's good reputation may be shown to establish want of probable cause in an action for malicious prosecution;[20] on the issue of self-defense in assault and battery, the defendant may show show the plaintiff's reputation as quarrelsome and pugnacious.[21] Specific instances of conduct at other times and places to prove conduct on a specified occasion is generally inadmissible;[22] an exception has been made in the case of an indecent assault upon a female, permitting the defendant to show that the plaintiff has been guilty of indiscretion with others about the time of the alleged assault on the ground that it repels the allegation of force.[23] The exception does not seem authorized by either Rules 305 or 306, although it could be brought within the range of the former if the evidence were admitted to mitigate damages.

Following the Rule 306, our court has held that evidence that a plaintiff was habitually reckless or careless[24] or that the defendant was unusually careful[25] are not admissible in personal injury cases.

The Wisconsin practice with respect to character evidence in criminal cases seems consistent with the rule, except that opinion evidence is probably not admissible under the current practice.[26] The rule goes beyond Wisconsin precedent in admitting character evidence in a civil action grounded on fraud.[27]

It is believed that the Wisconsin practitioner should find nothing alarming in Rule 306 for its adoption will not require him to learn much that is new.

II

Habit or Custom

Rule 307[28] defines habit as a course of behavior of a person regularly repeated in like circumstances. Custom is defined as the "habit"

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[17] Ellis v. State, 138 Wis. 513, 119 N.W. 1110 (1909).

[18] Pfister v. Milw. Free Press Co., 139 Wis. 627, 121 N.W. 938 (1909); Maxwell v. Kennedy, 50 Wis. 645, 7 N.W. 657 (1880).

[19] Earley v. Winn, 129 Wis. 291, 109 N.W. 633 (1906).

[20] Woodworth v. Mills, 61 Wis. 44, 20 N.W. 728 (1884).

[21] Lowe v. Ring, 123 Wis. 107, 101 N.W. 381 (1904); Keep v. Quallman, 68 Wis. 451, 32 N.W. 233, (1887).

[22] Lowe v. Ring, 123 Wis. 107, 101 N.W. 381 (1904).

[23] Watry v. Ferber, 18 Wis. 500, (1864).

[24] Brennan v. Town of Friendship, 67 Wis. 223, 29 N.W. 902 (1886); Prompson v. Leatham, 80 Wis. 608, 50 N.W. 586 (1891).

[25] Slack v. Joyce, 163 Wis. 567, 158 N.W. 310 (1916).

[26] Schulz v. State, 133 Wis. 215, 113 N.W. 428 (1907).

[27] American Law Institute, Model Code of Evidence, Illustrations 2, Rule 306: Drexler v. Zohlen, 216 Wis. 483, 257 N.W. 675 (1934).

[28] Rule 307 reads: "(1) Habit means a course of behavior of a person regularly

of a group of persons. Evidence of habit or custom is admissible as tending to prove conduct or behavior on a specified occasion conforming to the habit or custom. Opinion evidence may be introduced as well as evidence of specific instances of behavior, if enough specific instances are offered to warrant a finding of the habit or custom.

The framers state that there is a conflict in authorities as to the admissibility of evidence of habit when offered to prove behavior on a particular occasion, but that there is no serious conflict in the authorities over the admissibility of evidence of custom.[29]

Wisconsin has held custom evidence admissible in a variety of cases, *e.g.* to prove a usual course of business in a commercial field;[30] customary compensation for work done;[32] to show the scope of an agent's authority.[33] Customary methods have also been admitted to prove negligence.[34]

In the few Wisconsin cases that have been found on habit evidence, reception has been denied. Thus, it has been held that in an action for personal injuries sustained by the plaintiff while riding on horseback, evidence that he was an habitually reckless and careless rider was inadmissible.[35] In an automobile case, evidence offered by the defendant that her chauffeur was an unusually careful, painstaking driver was excluded.[36] In another personal injury case[37] evidence

repeated in like circumstances. Custom means a course of behavior of a group of persons regularly repeated in like circumstances. (2) Evidence of a habit of a person is admissible as tending to prove that his behavior on a specified occasion conformed to the habit. Evidence of a custom of a group of persons is admissible as tending to prove that their behavior on a specified occasion conformed to the custom. (3) As tending to prove habit or custom under Paragraph (2), (a) a witness may state his opinion under Rule 401, and (b) evidence of specific instances of behavior of the person or the group of persons is admissible if the proponent offers admissible evidence of a sufficient number of such instances to warrant a finding of the habit or custom."

[29] AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, COMMENT, RULE 307.

[30] Aetna Insurance Co. v. Northwestern Iron Co. 21 Wis. 458, (1867); Scaramelli & Co., Inc. v. Courteen Seed Co., 194 Wis. 520, 217 N.W. 298, (1928). But see Frank v. Metropolitan Life Ins. Co., 227 Wis. 613, 277 N.W. 643 (1938). Cf. Prudential Trust Co. v. Hayes, 247 Mass. 311, 142 N.E. 73 (1924).

as tending to show a course of dealing between parties;[31] to show

[31] Lill's Chicago Brewery Co. v. Russell, 22 Wis. 178 (1867).

[32] Kelly v. Phelps, 57 Wis. 425, 15 N.W. 385 (1883).

[33] Ames v. D. J. Murray Mfg. Co., 114 Wis. 85, 89 N.W. 836, (1902).

[34] Whitney v. Chicago & N.W. Ry. Co., 27 Wis. 327, (1870); Nadau v. White River Lumber Co., 76 Wis. 120, 43 N.W. 1135, (1890); Boyce v. Wilbur Lumber Co., 119 Wis. 642, 97 N.W. 563, (1903); Berg v. United States Leather Co., 125 Wis. 262, 104 N.W. 60, (1905); Rasmussen v. Wisconsin Traction, Light, Heat & Power Co., 133 Wis. 205, 113 N.W. 453, (1907).

[35] Brennan v. Town of Friendship, 67 Wis. 223, 29 N.W. 902, (1886).

[36] Slack v. Joyce, 163 Wis. 567, 158 N.W. 310, (1916).

[37] Prompson v. Leatham, 80 Wis. 608, 50 N.W. 586, 1891).

that the plaintiff was an habitually careless man was held inadmissible. A distinction between the last case and the first two mentioned should be observed: the first two involved the habit of doing a particular thing, *i.e.* riding or driving in a careful or careless manner; the latter involved carelessness generally. The framers of the Code distinguish between the habit of being careful generally, which is really a trait of character (covered by Rule 306) and the habit of doing a particular thing in a careful or careless manner.[38] It is pointed out that a man may have the habit of doing a particular thing carefully and be reckless in all other respects;[39] hence, evidence of the particular trait should not be deemed character evidence. The Code would probably admit evidence of a habit of being careful or reckless in riding or driving, while evidence of care generally, or of recklessness generally, would not be admitted.[40]

While the precedents are more liberal in admitting evidence of custom than habit, it may be argued that logically the two should be treated in the same manner, as is done by the Rule.

III

Reputation as to Character

Rule 526 provides:

> "Whenever a trait of a person's character at a specified time is a material matter, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with whom he then habitually associated in his work or business or otherwise is admissable as tending to prove the truth of the matter reputed."

It will be noted that the rule does not require that the evidence be directed exclusively to reputation at the specified time; evidence at any relevant time is admissible. It is pointed out that a servant's reputation for skill some months before or after an accident may be evidence of his skill at the time of the accident, and, if so, evidence of his reputation at these other times is admissible.

It is stated that the rule changes the law in the majority of juris-

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[38] American Law Institute, Model Code of Evidence, Comment, Rule 307.
[39] *Ibid.*
[40] Rule 306 (3), discussed earlier in this article.

dictions by making reputation among intimate associates admissible.[41] Wisconsin has indicated that it is the reputation "in the community" which is relevant.[42] Confining reputation to community of residence seems unduly restrictive. Doubtless many cases arise where reputation among business or work associates is a far more accurate appraisal of a trait of character.

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[41] AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, COMMENT a, RULE 526.

[42] Schulz v. State, 133 Wis. 215, 113 N.W. 428, (1907).