PRODUCT LIABILITY LITIGATION: IMPACT OF FEDERAL RULE OF EVIDENCE 404(b) UPON ADMISSIBILITY STANDARDS OF PRIOR ACCIDENT EVIDENCE

As early as 1810 American courts recognized the critical need for logically relevant, similar fact evidence.[1] Similar fact evidence is evidence of prior acts, happenings, transactions or claims that are similar to the facts at issue in the present dispute.[2] Currently, a split of authority exists regarding the admissibility of such evidence in civil and criminal cases. The exclusionary approach[3] and the inclusionary approach[4] to admissibility reflect this split.

---

1. *See* State v. Van Houten, 3 N.J.L. 248 (1810). This forgery case was the first principal American case in which proof of the prior conduct of the accused was admitted to prove that he knew the bill he was passing was a counterfeit. Evidence of the accused's prior acts created a circumstantial inference that he passed the present counterfeit bill with the requisite knowledge and intent:

> [Justice Pennington] [w]as clearly of opinion that the whole of the conduct of the defendant from the time he left Newark, the day before he passed the bill at Trenton, until he was apprehended the same evening, was a proper subject of inquiry; not however to prove the fact that he passed the bill, or that the bill itself was counterfeit, but the knowledge that he had of its being counterfeit at the time of passing it; and the evil intent with which he did it.

Id. at 250 (footnote omitted).

See generally Stone, *The Rule of Exclusion of Similar Fact Evidence: America,* 51 HARV. L. REV. 988, 993-94 (1938).

2. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 196-200 (E. Cleary 2d ed. 1972) [hereinafter cited as MCCORMICK].

3 The exclusionary approach to similar fact evidence, which strictly prohibits the introduction of any such evidence, is based upon the theory that courts should never admit such evidence unless a strictly construed exception is triggered by the proffered evidence. As one commentator stated.

> As there was in England, so in America there is a pervading belief among judges and text writers, which has scarcely been questioned since it arose about 1850, that in the beginning the law said, "Let no similar facts be admitted", and no similar facts were admitted. So great, runs the thought, was the solicitude of the common law to avoid damning the accused with prejudice, diffusion, and confusion of issues that, however, relevant and on whatever issue, similar facts and, above all, similar bad acts of the accused were never admitted.

Stone, *supra* note 1, at 989.

Exceptions developed to this general rule of exclusion, however, and the modern view, still based upon the general preference of exclusion, admits prior act evidence where it conforms to narrow exceptions. The United States Supreme Court in Spencer v. Texas, 385 U.S. 554 (1967), summarized the modern exclusionary view:

> Because such evidence is generally recognized to have potentiality for prejudice, it is usually excluded except when it is particularly probative in showing such things as intent, an element in the crime, identity, malice, a system of criminal activity, or when the

The need for logically relevant, similar fact evidence is especially great in product liability litigation.[5] In product liability litigation similar fact evidence includes relevant proof of other accidents or injuries. Plaintiffs in product liability actions offer such evidence as logically relevant to establish similarity of circumstances with prior accidents.[6] They often must rely solely on similar fact evidence to establish by circumstantial inference the existence of the product's defect in the hands of the manufacturer. Without this inference, a plaintiff is not likely to successfully carry the heavy burden of proof, resulting in a dismissal.[7]

---

defendant has raised the issue of his character, or when the defendant has testified and the State seeks to impeach his credibility.

Id. at 560-61 (citations omitted).

See *infra* notes 53-56 and accompanying text for a more detailed analysis of this theoretical approach.

4. The inclusionary approach to similar fact evidence is based upon the belief that all similar act evidence should be admitted if it is relevant to the case at bar. Slough & Knightly, *Other Vices, Other Crimes,* 41 IOWA L. REV. 325 (1956), define the inclusionary approach:

> In a minority of jurisdictions, the general theory of exclusion has been rejected in favor of a more lenient theory of admission. This minority rule will admit evidence of other crimes if it is relevant, unless its relevance is to show only a *general disposition* to commit the crime in question. Such evidence is admissible not because it comes within an exception to a rule of exclusion, but because the rule of exclusion is sufficiently narrow that it does not apply.

Id. at 326-27 (footnote omitted).

See *infra* notes 57-60 and accompanying text for a more detailed analysis of this theoretical approach.

5. To state a claim in strict liability against a manufacturer, the plaintiff has the burden of proving that the product was defective and that the defect existed while the product was in the manufacturer's possession. To successfully carry this burden, the plaintiff often needs to rely on prior accident evidence to establish a circumstantial inference of such a manufacturer's defect. *See generally* Barker, *Circumstantial Evidence in Strict Liability Cases,* 38 ALB. L. REV. 11, 12-13 (1973); Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past* Vandermark, 38 S. CAL. L. REV. 30, 47 (1965); Morris, *Proof of Safety History in Negligence Cases,* 61 HARV. L. REV. 205, 225-28 (1948).

6. Plaintiffs offer similar fact evidence to establish the existence of a dangerous condition, a causal link between the dangerous condition and the injury suffered, knowledge of the dangerous condition by the defendant, or to rebut the defendant's claim of impossibility. *See* MCCORMICK, *supra* note 2, § 200, at 473-76.

7. *See, e.g.,* Halbrook v. Koehring Co., 75 Mich. App. 592, 255 N.W.2d 698 (1977). In *Halbrook*, a crane operator sustained injuries when he attempted to lift an object heavier than the maximum capacity of the crane. The plaintiff was unable to sustain his cause of action because the trial court excluded evidence of product defects, the failure of mechanical locks, prior to the accident.

See generally Langford v. Chrysler Motors Corp., 513 F.2d 1121, 1124 (2d Cir. 1975) (elements of plaintiff's burden of proof under strict products liability doctrine) (quoting Codling v. Paylia, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 470 (1973)).

Courts generally exclude similar fact evidence because the probative value of such evidence does not outweigh the dangers that generally accompany its admission, such as jury misuse of the evidence.[8] Courts also refuse to admit such evidence for fear that issues collateral to the dispute will dominate the litigation.[9]

Many courts, to minimize the dangers such evidence creates, have imposed "similarity" requirements upon prior accident evidence in product liability litigation.[10] Theoretically, if the prior accident occurred under substantially similar circumstances as the accident at issue, with nearly identical products, the probative value of the prior accident evidence justifies its admission.[11] The various similarity tests found in products liability litigation, however, lead to inconsistent decisions regarding the admissibility of prior accident evidence.[12] The most serious consequence of this inconsistency is that courts often improperly exclude logically relevant evidence. Similarity goes to the weight of the evidence, not its admissibility.[13] Some courts, however, relying

---

8. *See, e.g.*, Jones & Laughlin Steel Corp. v. Matherne, 348 F.2d 394 (5th Cir. 1965). The Fifth Circuit explained:

> The admission of such evidence is also subject to the reasonable discretion of the trial court as to whether the defendant is taken by unfair surprise and as to whether the prejudice or confusion of issues which may probably result from such admission is disproportionate to the value of such evidence.

Id. at 400 (footnote omitted). *See also infra* note 30 and accompanying text.

9. See, *e.g.*, Blackwell v. J.J. Newberry Co., 156 S.W.2d 14 (Mo. Ct. App. 1941), in which the court analyzed the effect of an admission of lack of prior accident evidence:

> Not only would such evidence be unfair to plaintiff, but it would, by introducing numerous collateral issues, produce such confusion into the trial of the case that the value to the jury of whatever probative value it had would be far outweighed by the disadvantages which would result from its introduction.

Id. at 21. On this basis the court rejected the proffered evidence of a lack of prior accidents, which the defendant offered to show that he was reasonably unaware of the "dangerous condition" in his store which allegedly caused the plaintiff's injury.

See also Uitts v. General Motors Corp., 411 F. Supp. 1380 (E.D. Pa. 1974). In *Uitts*, the court rejected prior accident evidence because "[i]t can often result in unfair prejudice, consumption of time and distraction of the jury to collateral matters." *Id.* at 1383.

10. Similarity tests vary according to the purpose for which the evidence is offered. See *infra* note 24 and accompanying text. In Freed v. Simon, 370 Mich. 473, 122 N.W.2d 813 (1963), the Michigan Supreme Court held: "[T]he rule now seems to be established that evidence of prior accidents at the same place and arising from the same cause is admissible . . . subject to the general requirements of similarity of conditions, reasonable proximity in time, and avoidance of confusion of issues." *Id.* at 475, 122 N.W.2d at 814-15. *See also infra* notes 28-30 and accompanying text.

11. *See generally* MCCORMICK, *supra* note 2, § 200, at 473-76.

12. *See infra* notes 24 & 33-43 and accompanying text.

13. *See infra* note 93 and accompanying text.

on the exclusionary theory, automatically exclude prior accident evidence if it does not meet one of the recognized exceptions to the general rule of exclusion.[14]

Congress enacted the Federal Rules of Evidence in 1975.[15] Rule 404(b)[16] governs the admissibility of similar fact evidence in federal courts by providing that such evidence is admissible so long as it is not offered to prove the "bad" character of the accused. It has failed, however, to resolve the conflict between the exclusionary and the inclusionary approaches to such evidence.[17] Courts have interpreted rule 404(b) as codifying either view, with the anomalous result that the two inconsistent interpretations have survived the adoption of the rule.[18]

Part One of this Note presents an historical overview of admissibility of prior accident evidence in product liability litigation before the adoption of the Federal Rules of Evidence. This section also provides

---

14. Historically, exclusion of prior accident evidence rested in the discretion of the trial judge. Judges utilized this discretion, however, within the confines of the exclusionary theory of admissibility. McCormick states:

> Proof of other similar accidents and injuries, offered for various purposes in negligence and product liability cases, is another kind of evidence which may present for consideration the counterpulls of the probative value of and need for the evidence on the one hand, and on the other the danger of unfair prejudice, undue consumption of time, and distraction of the jury's attention from the issues. A few courts . . . adopted a more or less flexible rule of exclusion. Most courts, however, wisely confide in the trial judge's discretion, . . . the responsibility for determining the balance of advantage and of admitting or excluding the evidence. Even in these liberal jurisdictions, most trial judges will scrutinize cautiously offers of evidence of other accidents . . . . The prospects for success will be much affected by the purpose for which the proof is offered, which in turn determines whether, and how strictly, the requirement of proof of similarity of conditions will be applied.

MCCORMICK, *supra* note 2, § 200, at 473 (footnotes omitted).

The trial judge would thus formulate a similarity standard and apply it on an ad hoc basis. This often resulted in inconsistent interpretations and applications of the standard. *See infra* notes 28-30 and accompanying text.

15. On January 2, 1975, Congress adopted the Federal Rules of Evidence. *See* Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified as amended at 28 U.S.C. §§ 101-1103 (1976 & Supp. V 1981)).

16. Federal Rule of Evidence 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FED. R. EVID. 404(b).

17. *See infra* note 62 and accompanying text.

18. *See generally* MCCORMICK, *supra* note 2, § 200; 2 J. WIGMORE, EVIDENCE § 252 (Chadbourn rev. ed. 1979); Barker, *supra* note 5; Keeton, *Products Liability—Problems Pertaining to Proof of Negligence,* 19 SW. L.J. 26 (1973); Lascher, *supra* note 5; Morris, *supra* note 5.

an overview of similar fact evidence in the closely allied criminal context. Part Two presents a statutory analysis of Federal Rule of Evidence 404(b) and explains that a majority of courts employ such an analysis when faced with prior act evidence in the criminal context. Finally, Part Three analyzes the impact of rule 404(b) upon the admissibility of prior accident evidence in product liability litigation and demonstrates that the inclusionary approach best achieves equitable and consistent results.

I. HISTORICAL OVERVIEW OF PRIOR ACT EVIDENCE

A. Prior Accident Evidence in Product Liability Litigation

Historically, a split of authority has existed over the admissibility of proof of prior accidents in product liability cases.[19] Courts adhering to the minority approach[20] totally excluded evidence of other accidents or injuries.[21] Courts following the majority view[22] analyzed the purpose for which the proponent offered the evidence and then defined an admissibility standard relevant to that purpose.[23] Admissibility standards varied in the degree of similarity required between the prior accident

19. *See infra* notes 20-24 and accompanying text.

20. *See, e.g.*, Collins v. Inhabitants of Dorchester, 60 Mass. (6 Cush.) 396 (1850). *Collins* represented the majority view until Darling v. Westmoreland, 52 N.H. 401 (1872), which first questioned the *Collins* doctrine. *See infra* notes 21 & 22.

21. *See* 2 J. WIGMORE, *supra* note 18, § 458, at 584. Wigmore states the rule in a discussion of Collins v. Inhabitants of Dorchester, 60 Mass. (6 Cush.) 396 (1850):

> That ruling proceeded from the point of view both of relevancy and of auxiliary probative policy, though without any full consideration of either reason; and, coming at a comparatively early date, served for a long time as a stumbling block to many courts whose instinct would have led them to receive such evidence.

2 J. WIGMORE, *supra* note 18, § 458 at 584.

22. The New Hampshire Supreme Court first refuted the minority view in Darling v. Westmoreland, 52 N.H. 401 (1872). In *Darling*, the trial court excluded evidence of a prior accident upon a road, adhering to the then majority view, set out in cases like Collins v. Inhabitants of Dorchester, 60 Mass. (6 Cush.) 396 (1850). *See supra* note 20. The evidence was offered to show defects in the highway.

Reversing the trial court, the New Hampshire Supreme Court applied a logical and legal relevancy test, noting:

> The only rule relied upon to exclude . . . [evidence] in such a case as this, is the rule requiring the evidence to be confined to the issue,—that is, to the facts put in controversy by the pleadings, prohibiting the trial of collateral issues,—that is, of facts not put in issue by the pleadings, and excluding such evidence as tends solely to prove facts not involved in the issue. This rule merely requires evidence to be relevant. It merely excludes what is irrelevant.

52 N.H. at 405.

23. MCCORMICK, *supra* note 2, § 200, at 473-76.

and the accident involved in the present dispute. These similarity requirements acted as limitations to admissibility of prior accident evidence, and ultimately became "similarity tests" for admissibility.[24]

Similarity tests fall along a sliding scale of admissibility. The most lenient standard merely requires the defendant to have knowledge of the prior accident. The strictest test demands identity of conditions between the two accidents.[25] Courts currently use this similarity test approach to determine admissibility of prior accident evidence.[26] The purpose for which the proponent offers the evidence dictates the degree of similarity needed for admissibility.[27] The similarity test controls admissibility, but the degree of similarity required may vary at a court's discretion.

Logical relevance is not the sole test governing the admissibility of prior accident evidence. Rather than relying solely on judicial discretion to weigh the evidence's probative value against the danger of unfair prejudice, courts apply similarity tests for admissibility dependent upon the proponent's purposes for offering the evidence. The trial judge confines his analysis to categorizing the evidence as defined by these purposes. The judge then excludes the evidence if it is not sufficiently similar to conditions surrounding the prior accident.

For example, in *Robitaille v. Netoco Community Theaters*,[28] an action for personal injuries resulting from a fall on theater stairs allegedly caused by loose carpet, the Supreme Judicial Court of Massachusetts refused to admit evidence of a prior fall on the same stairs to establish the dangerous condition of the carpeted staircase. The court stated that evidence of prior accidents or injuries caused by a dangerous product or condition was admissible to show the danger of the condition. It required, however, substantial identity of conditions and human behavior between the two incidents involved, which the plaintiff was un-

24. *See* MCCORMICK, *supra* note 2, § 200, at 473-76. See also *infra* notes 32-45 for representative cases describing purposes and limitations upon admissibility. It is beyond the scope of this Note to extensively analyze the variety of tests used by various jurisdictions to subtly enforce these limitations upon admissibility.

25. In Uitts v. General Motors Corp., 411 F. Supp. 1380 (E.D. Pa. 1974), the court stated the test for admitting evidence of prior accidents: "If plaintiffs are attempting to prove the existence of a specific defect or malfunction it is clear that the admission into evidence of the occurrence of similar accidents would require a showing that those accidents were caused by the *same* malfunction or defect." *Id.* at 1383 (emphasis added).

26. *See infra* notes 33-34 and accompanying text.

27. *See supra* note 24; *infra* notes 33-34.

28. 305 Mass. 265, 25 N.E.2d 749 (1940).

able to establish.[29] The court noted, in addition, that admission of such evidence must not create a serious danger of confusion of the issues.[30]

The approach used in the early case of *Dyas v. Southern Pacific Co.*[31] contrasts with the *Robitaille* approach. In *Dyas*, an insecure platform gave way and a derrick fell, killing an employee of the defendant. The plaintiff sued for the employee's wrongful death. The California Supreme Court admitted evidence of a prior accident on the same platform five years earlier to show that the platform was in fact dangerous or defective at the time of the accident.[32] The court added that such evidence may also establish that the defendant had knowledge of the danger involved, or that the dangerous condition of the platform caused the plaintiff's injuries.[33] The *Dyas* court liberally interpreted the substantial identity test.[34] It did not balance the evidence's proba-

---

29. *Id.* at 268-69, 25 N.E.2d at 751.

30 The *Robataille* court states the test:

> Usually the failure to show substantial identity of the circumstances of the incident on trial with those of the incidents offered in evidence, or the danger of unfairness, confusion or unreasonable expenditure of time in trying the latter, has led to a justified exclusion of the evidence, in a wise exercise of discretion if not through the application of a positive rule of law.

Id. at 267, 25 N.E.2d at 750 (footnote omitted).

31. 140 Cal. 296, 73 P. 972 (1903).

32. *Id.* at 305, 73 P. at 974. The plaintiff also introduced evidence that the defendants had not repaired the platform in the interim. *Id.* at 304, 73 P. at 973. The court stated:

> The pertinency of the evidence was to the insecure condition of the substructure, upon which the derrick rested, and defendant's knowledge of it and inattention to it. Nor is the matter of remoteness any objection; the remoteness of the former accident, with the showing that no measures were taken in the interim to prevent a reoccurrence, is of the substance and materiality of the proof; in the natural order of decay, what was bad many years before, must, in the nature of things, be worse at the end of that time. Nor was it a collateral matter. The Dyas derrick was operated upon the same substructure, as far as method by which it was attached was concerned, and the condition of that substructure at the time of the accident was a proper subject of inquiry.

Id. at 304-05, 73 P. at 974.

33. *Id.* at 305, 73 P. 974. The trial judge instructed the jury that: "[t]he occurrence of accidents, similar to the one under scrutiny, is of greater or less value in determining how much care is reasonable to exact in a particular case." On appeal, the state supreme court upheld the requirement that the prior accident be "similar to the one under scrutiny," stating:

> [T]he plaintiff had a right to have the jury instructed, that they could take into consideration previous accidents similar to the one in question, in determining the probable cause of a subsequent one. It is that similarity which permits them to be shown in evidence and considered by the jury. In its general effect this is what the court told the jury. It was stating a general principle of law, and, we think, stated it correctly.

Id. at 306, 73 P. at 975.

34. If the evidence does not satisfy this test, however, a court would rule such evidence inadmissible. *See* Langford v. Chrysler Motors Corp., 513 F.2d 1121 (2d Cir. 1975); Walker v. Trico Mfg. Co., 487 F.2d 595 (7th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974); Hecht Co. v. Jacobsen,

tive value against its attendant dangers. Instead, it admitted the evidence exclusively in terms of similarity of conditions and lack of intervening acts which might alter these conditions.[35]

Thus, courts adhering to the exclusionary approach in determining admissibility of prior accident evidence developed standards of "similarity" requirements which were triggered by the proponent's purpose for offering the evidence.

Other courts follow an inclusionary approach to admissibility of prior accident evidence. Under the inclusionary approach, even when substantial identity cannot be established, evidence of prior accidents or injuries can be admitted if relevant to show the defendant's knowledge of the danger.[36]

In *Hecht Co. v. Jacobsen*,[37] an action for injuries sustained by a minor when her hand was caught in an opening in an escalator in the defendant's store, the court stated that evidence of a prior accident has always been admitted to demonstrate the defendant's knowledge of a defective or dangerous condition.[38] Thus, in jurisdictions following the inclusionary approach, relevancy[39] dictates the admissibility of prior

180 F.2d 13 (D.C. Cir. 1950); Uitts v. General Motors Corp., 411 F. Supp. 1380 (E.D. Pa. 1974); Birmingham Union Ry. v. Alexander, 93 Ala. 133, 9 So. 525 (1891); Narring v. Sears, Roebuck & Co., 59 Mich. App. 717, 229 N.W.2d 901 (1975). *See generally* McCORMICK, *supra* note 2, § 200, at 475.

35. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 P. 972 (1903). In admitting the evidence the court stated:

> If five years previously, the substructure was in such a condition as to fail to retain the derrick in its hold upon it, proof of that fact, coupled with proof of no repairs, was matter properly to go before the jury, in determining whether the substructure was not in a similar, if not worse condition, when Dyas was killed, and whether the accident was not directly attributable to that fact. We think there was no error committed in allowing the evidence.

Id. at 305, 73 P. at 974.

36. *See infra* note 40 and accompanying text.

37. 180 F.2d 13 (D.C. Cir. 1950).

38. *Id.* at 17. *Accord* District of Columbia v. Armes, 107 U.S. 519 (1882); Capital Traction Co. v. Copland, 47 App. D.C. 152 (1917); Dyas v. Southern Pac. Co., 140 Cal. 296, 73 P. 972 (1903). In the *Armes* case the Supreme Court stated:

> The frequency of accidents at a particular place would seem to be good evidence of its dangerous character. . . . Here the character of the place was one of the subjects of inquiry . . . and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject.

107 U.S. at 525.

In *Armes* the Court used the two-prong relevancy test of materiality ("subject inquiry") and probativeness ("good evidence of its dangerous character") in ruling on the admissibility of the prior accident evidence.

39. *See* District of Columbia v. Armes, 107 U.S. 519, 524-25 (1882). *See also supra* note 38.

accident evidence.[40]

When the issue shifts from evidence of prior accidents to evidence of absence of prior accidents, the distinction between the two analytical approaches becomes even more apparent. The majority of courts, adherents of the inclusionary approach, deem evidence of a lack of prior accidents inadmissible.[41] These courts reason that such evidence has little probative value and raises too many collateral issues.

In *Blackwell v. J.J. Newberry Co.*,[42] the plaintiff sustained injuries after falling over a small stepladder in an aisle in defendant's department store. The defendant tried to prove lack of negligence and lack of an unsafe condition by offering evidence of an absence of prior accidents. The court rejected the evidence, however, fearing that it would cloud the issues and result in jury confusion.[43] It found that the danger of confusion of the issues outweighed the relevance and probative value of the evidence.[44] Thus, under the inclusionary analysis, courts have refused to admit even logically relevant evidence because of policy considerations.

Courts following the exclusionary approach initially apply the exclusionary similarity tests to evidence of lack of prior accidents. If the

---

40. In Cahill v. New York, N.H. & H.R.R., 351 U.S. 183 (1956), the Supreme Court granted a motion to recall the judgment, but failed to rule directly on the issue of the proper test courts should use in determining the admissibility of evidence of prior accidents. In a dissenting opinion, however, Mr. Justice Black stated: "What better proof could there be than the fact that the railroad knew there had been repeated accidents at the same location of the kind that brought about Cahill's injury? No fair system of evidence would exclude such testimony when issues are raised like those involved here." *Id.* at 189-90 (Black, J., dissenting).

41. *See* Rayner v. Stauffer Chem. Corp., 120 Ariz. 328, 585 P.2d 1240 (1978); Sanitary Grocery Co. v. Steinbrecher, 183 Va. 495, 32 S.E.2d 685 (1945). *But see* Koloda v. General Motors Parts Div., No. 82-3314 (6th Cir. Sept. 8, 1983) (current standards for admissibility of lack of prior accidents).

See generally Morris, *supra* note 5; Comment, *Proof of Safety History in Railroad Crossing Accident Cases,* 28 TEX. L. REV. 76 (1956).

42. 156 S.W.2d 14 (Mo. Ct. App. 1941).

43. *Id.* at 19-20. The court cited Professor Wigmore's "Auxiliary Probative Policy" theory, which provides that even logically relevant evidence can be ruled inadmissible because of an auxiliary principle or policy, such as confusion of issues, unfair surprise, or undue prejudice. He stated further that "the unrestricted admission of such instances might result in so multiplying the subordinate issues in a cause that confusion of mind would ensue and the main controversy would be lost sight of in the great mass of minor issues." *Id. See* 1 J. WIGMORE, EVIDENCE § 29a (3d ed. 1940) (discussion of the auxiliary probative policy theory). *See also* Vinyard v. Vinyard Funeral Home, Inc., 435 S.W.2d 392 (Mo. Ct. App. 1968).

But see MCCORMICK, *supra* note 2, § 200, at 477 (refuting the application of the auxiliary probative policy theory as applied to lack of prior accident evidence).

44. 156 S.W.2d at 19-21.

evidence of lack of prior accidents fails the similarity tests, courts reject the evidence.[45] Therefore, while both approaches to admissibility of evidence of lack of prior accidents will on occasion produce consistent results,[46] the approaches remain analytically distinct.

In summary, before the adoption of Federal Rule of Evidence 404(b), the majority of courts followed the exclusionary approach and admitted prior accident evidence in product liability cases only if the evidence met the similarity test. Courts applied a strict similarity standard, requiring nearly identical conditions, if the proponent offered the evidence to establish the existence of a dangerous condition. A broader similarity standard was applied, however, if the proponent offered the evidence to establish the defendant's knowledge of the dangerous condition.[47]

The minority view, prior to the adoption of the federal rules, permitted the admission of prior accident evidence if such evidence was relevant to the issue in dispute. Courts discarded the similarity tests in favor of a relevancy analysis, but retained control over the scope of admissibility of prior act evidence and collateral issues within the relevancy framework.

B. Prior Act Evidence in the Criminal Context

Prior to the enactment of the Federal Rules of Evidence a similar split of authority existed regarding prior act evidence in the criminal context.[48] The danger of using prior act evidence to develop an improper inference between prior and present conduct[49] increases consid-

45. *See, e.g.,* Walker v. Trico Mfg. Co., 487 F.2d 595, 599 (7th Cir. 1973), *cert. denied,* 415 U.S. 978 (1974). The *Walker* court stated:

> Generally speaking, evidence of this sort is properly admitted only if the party defendant shows, as foundation, that the absence of prior accidents took place with respect to machines substantially identical to the one at issue and used in settings and circumstances sufficiently similar to those surrounding the machine at the time of the accident to allow the jury to connect past experience with the accident sued upon.

Id.

46. *See supra* notes 34 & 41.

47. *See supra* notes 38-41 and accompanying text.

48. *See infra* notes 49-60 and accompanying text.

49. For example, in United States v. Clemons, 503 F.2d 486 (8th Cir. 1974), the court expressed this concern: "The defendant is to be convicted, if at all, on the evidence showing him to be guilty of the particular offense charged. To admit evidence of other crimes possibly committed by the defendant prejudices him before the jury." *Id.* at 489. *See generally* Comment, *Evidence—Proof of Particular Facts—Evidence That Defendant May Have Committed Similar Crimes Is Admissible to Prove Corpus Delicti of Murder,* 87 HARV. L. REV. 1074 (1974).

erably in the criminal context because of constitutional concerns that the defendant receive a fair trial.[50] Because the element of proof of criminal intent frequently rests upon prior act evidence, however, the need for such evidence is often as great as in the civil context.[51]

Prior to adoption of the Federal Rules of Evidence, the majority of courts excluded prior act evidence in the criminal context,[52] subject, however, to a limited number of exceptions.[53] The United States Supreme Court noted circumstances in the criminal context in which a court could admit prior act evidence.[54] In these circumstances, limiting instructions and the trial judge's discretionary power to rule such evidence inadmissible, if he believed the danger of the evidence outweighed its probative value, protected the defendant's interests in a fair trial.[55] The trial judge could not rule such evidence admissible, however, unless it first fell within one of the recognized exceptions to the general rule of exclusion.[56]

---

50. *See* Michelson v. United States, 335 U.S. 469, 475-76 (1948).

51. See Spencer v. Texas, 385 U.S. 554 (1966), in which the appellants claimed that the use of prior convictions "was so egregiously unfair upon the issue of guilt or innocence as to offend the provisions of the Fourteenth Amendment." *Id.* at 559. The Supreme Court rejected the appellants' contentions and stated:

> [T]he jury learns of prior crimes committed by the defendant, but the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction of the evidence. The defendant's interests are protected by limiting instructions, and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence.

Id. at 561 (citations omitted).

52. See Michelson v. United States, 335 U.S. 469 (1948), in which the Supreme Court set forth the common law rationale for this view. The Court stated that prior act evidence, while usually relevant, was excluded because such evidence created too great a risk of prejudice for the jury The Court feared that the defendant would be accused because he was a "bad man," rather than because of his commission of the crime. 355 U.S. at 475-76. *See also* Slough & Knightly, *supra* note 4, at 326; *supra* note 50. *See generally* MCCORMICK, *supra* note 2, § 190; Stone, *supra* note 1, at 1025.

53. In Spencer v. Texas, 385 U.S. 554 (1966), the Supreme Court acknowledged that a court could admit such evidence, even though it carried a potential for prejudice, if it fell within a recognized exception. *See infra* note 54.

54. In *Spencer* the Supreme Court stated:

> Because such evidence is generally recognized to have potentiality for prejudice, it is usually excluded except when it is particularly probative in showing such things as intent, . . . an element in the crime, . . . identity, . . . malice, . . . motive, . . . a system of criminal activity, . . . or when the defendant has raised the issue of his character, . . . or when the defendant has testified and the State seeks to impeach his credibility.

Id. at 560-61 (citations omitted).

55. Spencer v. Texas, 385 U.S. 554, 561 (1966).

56. *See id.* at 554; Michelson v. United States, 335 U.S. 459 (1948); United States v. Calvert,

A strong minority of courts, proponents of the inclusionary view, coexisted with the exclusionary approach, even in the criminal context.[57] Under this approach, prior act evidence had to be substantially relevant for a purpose other than to show the defendant's criminal character.[58] The trial judge then balanced the probative value of the evidence against its prejudicial character,[59] and ruled on the admissibility of the evidence.[60]

Thus, prior to the adoption of the Federal Rules of Evidence, courts, even in the criminal context, were divided over the proper admissibility standard for prior act evidence. Courts either automatically excluded such evidence unless it fit into an excepted category, or admitted the evidence if relevant and more probative than prejudicial.

---

523 F.2d 895 (8th Cir. 1975), *cert. denied,* 424 U.S. 911 (1976); United States v. Knohl, 379 F.2d 427 (2d Cir. 1967); United States v. Ross, 321 F.2d 61 (2d Cir.), *cert. denied,* 375 U.S. 894 (1963); Swann v. United States, 195 F.2d 689 (4th Cir. 1952); Paris v. United States, 260 F. 529 (8th Cir. 1919); Fish v. United States, 215 F. 544 (1st Cir. 1914). In *Knohl*, the Court enunciated the exclusionary test but then balanced the logical and legal relevancy of the proffered evidence. The court thus mixed elements of both the exclusionary and the inclusionary approaches. 379 F.2d at 438-39. *See generally* Stone, *supra* note 1, at 1006; Symposium, *Rule 404(b) Other Crimes Evidence: The Need for a Two-Step Analysis,* 71 NW. U.L. REV. 635 (1976).

57. *See* United States v. Deaton, 381 F.2d 114 (2d Cir. 1967). In *Deaton*, the court stated: "A minority of courts has adopted the inclusionary form of the rule, that is, that evidence of other crimes is admissible except when offered solely to prove criminal character. This form is favored by the commentators and has been recognized and used by this court." *Id.* at 117 (citation omitted). Thus the Second Circuit, with the *Deaton* decision, expressly advocated the inclusionary approach. The court did not distinguish United States v. Knohl, 379 F.2d 427 (2d Cir. 1967), nor United States v. Ross, 321 F.2d 61 (2d Cir.), *cert. denied,* 375 U.S. 894 (1963), but cited *Knohl* as a case supporting the inclusionary approach. *See supra* note 56.

58. *Id. See generally* Slough & Knightly, *supra* note 4, at 326-27.

59. United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967).

60. *See* United States v. Kaufman, 453 F.2d 306 (2d Cir. 1971); United States v. Knohl, 379 F.2d 427 (2d Cir.), *cert. denied,* 319 U.S. 973 (1967); Swann v. United States, 195 F.2d 689 (4th Cir. 1952); People v. Woods, 35 Cal. 2d 504, 218 P.2d 981 (1950); State v. Scott, 111 Utah 9, 175 P.2d 1016 (1947). *See also* United States v. Byrd, 352 F.2d 570, 574 (2d Cir. 1965) (trial judge should be afforded a wide range of discretion).

Prior to adoption of the Federal Rules of Evidence, the Model Code of Evidence adopted the inclusionary approach.

> [E]vidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime or civil wrong on another occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally.

MODEL CODE OF EVIDENCE Rule 311 (1942). *See generally* Stone, *supra* note 1, at 1020 (analysis of the theoretical differences and the policy distinctions between the inclusionary and exclusionary approaches).

II. STATUTORY ANALYSIS OF FEDERAL RULE OF EVIDENCE 404(B)

Congress intended the Federal Rules of Evidence to provide a clear and uniform standard of admissibility for evidence used in the federal courts.[61] Rule 404(b), however, has failed to resolve the conflict between the exclusionary and the inclusionary approaches to prior act evidence.[62]

A growing number of courts have held that rule 404(b) adopts the inclusionary approach to the admissibility of prior act evidence.[63] The legislative history of the rule reveals that Congress did not intend it to be a rule of exclusion.[64] The text of the rule also suggests an inclusion-

61. *See* S. REP. NO. 1277, 93d Cong., 2d Sess. 8 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7054 [hereinafter cited as SENATE REPORT]. *See also* H.R. REP. NO. 650, 93d Cong., 1st Sess. (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075 [hereinafter cited as HOUSE REPORT].

62. *See* Symposium, *supra* note 56. "Two distinct approaches to the list of exceptions have developed—the inclusionary and exclusionary approaches—and recent interpretations of Rule 404(b) reflect them both." *Id.* at 636.

For cases using an inclusionary approach after adoption of the Rules, see, e.g., United States v. Frederickson, 601 F.2d 1358 (5th Cir. 1979); United States v. James, 555 F.2d 992 (D.C. Cir. 1977); United States v. Riggins, 539 F.2d 682 (9th Cir. 1976), *cert. denied,* 429 U.S. 1045 (1977); United States v. Senak, 527 F.2d 129 (7th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976); United States v. Ellis, 493 F. Supp. 1092 (M.D. Tenn. 1979); State v. Leecy, 294 N.W.2d 280 (Minn. 1980); Hopkinson v. State, 632 P.2d 79 (Wyo. 1981).

For cases using an exclusionary approach after adoption of the Rules, see, e.g., Garcia v. Aetna Casualty & Sur. Co., 657 F.2d 652 (5th Cir. 1981); United States v. Bowman, 602 F.2d 160 (8th Cir. 1979); United States v. Westbo, 576 F.2d 285 (10th Cir. 1978).

63. *See supra* note 62.

64. See HOUSE REPORT, *supra* note 61, which provides:

> The second sentence of Rule 404(b) as submitted to this Congress began with the words 'This subdivision does not exclude the evidence when offered.' The Committee amended the language to read 'It may, however, be admissible,' the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final court version.

Id. at 7081. See also SENATE REPORT, *supra* note 61, which states: "[I]t is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion or waste of time." *Id.* at 7071.

Congress placed only two limitations upon admissibility of relevant evidence. First, prior act evidence is inadmissible to show a defendant's propensity to commit such acts or to be a "bad person." Second, rule 403 is to be applied to prior act evidence to determine whether the dangers created by the evidence outweigh its probative value. *See* United States v. Fairchild, 526 F.2d 185 (7th Cir. 1975), *cert. denied,* 425 U.S. 942 (1976). In *Fairchild*, the Seventh Circuit applied the following admissibility test to evidence of other crimes:

> Evidence of other criminal transactions is, of course, not admissible to show that the defendant has a 'propensity' to commit the charged offense. . . . Such evidence may, however, be admissible if, entirely apart from the matter of "propensity," it has a tendency to make the existence of an element of the crime charged more probable than it would be without such evidence. See Rules 401 and 404(b) of the Fed. Rules of Evi-

ary approach:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[65]

The key to a statutory analysis of the rule centers on the question of whether the words "such as" make the list of acceptable purposes exhaustive or illustrative. The use of the words "such as" clearly connotes a suggestive or illustrative list of purposes.[66] Moreover, the use of the discretionary word "may" suggests a grant of permission to admit the evidence.[67] Taken together,[68] "may" and "such as" indicate that

---

dence; . . . Even though relevant, the evidence could have been excluded had the trial court found that its prejudicial effect outweighed its probative value. Fed. Rule of Evidence 403.

Id. at 188-89 (citation omitted). *See also* Hammann v. Hartford Accident & Indem. Co., 620 F.2d 588 (6th Cir. 1980); United States v. Long, 574 F.2d 761 (3d Cir.), *cert. denied,* 439 U.S. 985 (1978); State v. Leecy, 294 N.W.2d 280 (Minn. 1980).

For an analysis of this approach, see generally Slough, *Relevancy Unraveled,* (pt. 1) 5 U. KAN. L. REV. 1 (1956); Slough & Knightly, *supra* note 4; Symposium, *supra* note 56; Comment, *supra* note 49; Comment, *Federal Rules of Evidence—Rule 404(b) Limits the Admission of Other Crimes Evidence, Under an Inclusionary Approach, to Cases Where it is Relevant to an Issue in Dispute,* 55 NOTRE DAME LAW. 574 (1980) [hereinafter cited as Comment, *Federal Rules of Evidence*]; Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters,* 70 YALE L.J. 763 (1961).

65. FED. R. EVID. 404(b). *See infra* notes 69-76.

66. Advocates of the exclusionary approach view the rule's list of acceptable purposes as exhaustive, while advocates of the inclusionary approach view the list as merely illustrative. *See supra* note 62 and accompanying text.

67. *See* SENATE REPORT, *supra* note 61. The report states:

> [The committee] anticipates that the use of the *discretionary* word 'may' with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion or waste of time.

Id. at 7071.

68. J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4908 (3d ed. 1943), discusses a maxim of statutory construction, *noscitur a sociis*:

> In case the legislative intent is not clear, the meaning of doubtful words may be determined by reference to their association with other associated words and phrases. . . . At best the maxim merely represents a conclusion that considering the language of the entire act, its subject matter, and the available evidences of legislative intent, the interpretation of the court is consistent with the legislative purposes.

Id. (footnotes omitted).

Thus, by combining the use of the discretionary words "may" and "such as" with the legislative intent of facilitating the admissibility of relevant, non-prejudicial evidence, it is clear that the second sentence of rule 404(b) embraces an inclusionary approach to admissibility, the list of purposes being illustrative, not exhaustive.

although courts may not admit the evidence for the "bad character" purpose described in the rule's first sentence, courts may admit it for any other purpose, such as those listed in the second sentence.

The discretion granted by Congress in the second sentence of rule 404(b), however, is not unlimited. Rule 404(b) must be considered *in pari materia* with the other rules of evidence dealing with relevancy. Rule 401 defines "relevant evidence."[69] Rule 402 puts forth the general rule that all relevant evidence is admissible except as otherwise provided by the Constitution, Congress, the Federal Rules of Evidence or other rules prescribed by the Supreme Court.[70] Rule 403 outlines the considerations that may render logically relevant evidence inadmissible.[71] Considering these three rules *in pari materia*[72] with rule 404(b),

---

69. Federal Rule of Evidence 401 states:

> 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

FED. R. EVID. 401.

70. Federal Rule of Evidence 402 states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FED. R. EVID. 402.

71. Federal Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R EVID. 403. *See also* United States v. Beechum, 582 F.2d 898 (5th Cir. 1978). In *Beechum* the court stated:

> [T]he judge must consider the danger of undue prejudice . . . when he determines whether to admit the extrinsic offense evidence. The judge should be mindful that the test under rule 403 is whether the probative value of the evidence is *substantially* outweighed by its unfair prejudice. . . . "[T]he discretionary policy against undue prejudice would seem to require exclusion only in those instances where the trial judge believes that there is a genuine risk that emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence."

Id. at 915 n.20 (quoting Trautman, *Logical or Legal Relevancy—A Conflict in Theory,* 5 VAND. L. REV. 385, 410 (1952)).

72 J. SUTHERLAND, *supra* note 68, defines *in pari materia*:

> The intent of the legislature when a statute is found to be ambiguous may be gathered from statutes relating to the same subject matter—statutes *in pari materia*. On the presumption that whenever the legislature enacts a provision it has in mind the previous statutes relating to the same subject matter, it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together.

several guidelines emerge to aid in the proper application of rule 404(b).

First, the only limitations upon prior act evidence under the Federal Rules of Evidence are those defined by rules 402, 403 and 404(b).[73] Second, the first sentence of rule 404(b) establishes a limitation on admissibility of similar fact evidence. That sentence identifies the one absolute limitation against admission of logically relevant prior act evidence. The second sentence of rule 404(b), by using the word "however," clearly demarcates the end of the exclusion defined in the first sentence of the rule. This second sentence returns the focus of the rule to the inclusionary approach to admissibility evident in rules 401 and 402. Finally, the judge must apply the balancing test in rule 403 before making an ultimate decision on the admissibility of the evidence.[74] This test requires the court to weigh the probative value of the evidence against the danger created by admission of the evidence.[75]

Id. at § 5201.

Sutherland adds to this definition:

> [A]pplication of the rule that statutes *in pari materia* should be construed together is most justified in the case of statutes relating to the same subject matter that were passed at the same session of the legislature, especially if they were passed or approved or take effect on the same day . . . In these situations the probability that acts relating to the same subject matter were activated by the same policy is very high, for . . . they were enacted by the same men and . . . were declared to be within the knowledge of the Legislature at the same time.

Id. § 5202 (footnotes omitted).

Thus, Federal Rules of Evidence 401-404(b), which relate to the same subject matter, relevancy of proffered evidence, were passed by the same session of the legislature, and were approved to take effect on the same day, should be construed *in pari materia* in order to determine the overall legislative scheme for admissibility of such evidence.

73. *See supra* notes 70-71 and accompanying text. *See also* United States v. Bailleaux, 685 F.2d 1105, 1111 n.2 (9th Cir. 1982).

74. *See supra* note 71.

75. To summarize, rule 402 states that all relevant evidence is admissible unless specifically excluded. Rule 401 defines relevancy, and rule 403 provides limitations upon the general rule of admissibility to avoid unfair prejudicial impact. Rule 404(b) fits into this scheme by first describing a rule of exclusion. Then, however, it refers to the general tenor of rule 402 of inclusion of relevant evidence by listing illustrative examples of acceptable purposes for the admission of prior act evidence. This sentence contrasts with the single unacceptable purpose narrowly defined in the first sentence of rule 404(b). As Sutherland explains:

> [G]eneral and special acts may be *in pari materia*. If so, they should be construed together. Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail. . . . unless it appears that the legislature intended to make the general act controlling.

J. SUTHERLAND, *supra* note 68, § 5204 (footnotes omitted).

Thus, the rule of general admissibility of relevant evidence (rule 402) is the general view, but

Most courts in jurisdictions which follow the Federal Rules of Evidence adhere to this inclusionary approach in criminal litigation.[76] This interpretation of Rule 404(b) is not only the clear trend[77] but is also the sounder construction of the statute. The rule on its face makes no distinction between the civil and criminal context.[78] Furthermore, the drafters of the rule have suggested that courts should follow the inclusionary approach.[79] Therefore, courts should extend the inclusionary approach to product liability litigation.[80]

---

the specific prohibition of the first sentence of rule 404(b) would prevail if the evidence proffered created a conflict between rules 402 and 404(b). The language of the specific element of exclusion, however, is very narrow and only relates to the "specific" forbidden act of proving character and conforming behavior. Therefore, courts should not admit evidence offered solely for this limited purpose in light of the general view of admissibility of all relevant evidence expressed in rule 402.

76. See *supra* note 62 for cases which adhere to the inclusionary theory of admissibility.

In United States v. Senak, 527 F.2d 129 (7th Cir. 1975), the court of appeals applied the inclusionary approach in holding that evidence of prior acts, to be admissible, does not have to constitute evidence of criminal acts. "We do not agree that similar acts introduced to establish motive, intent, the absence of mistake or accident, or a common scheme or plan must necessarily be acts constituting a crime." *Id.* at 143.

Even though courts had not previously levied such a limitation upon prior acts evidence, the defendant in *Senak* tried to bar admissibility of his prior non-criminal activity using a theory of prejudice based upon prior criminal behavior. The court rejected this convoluted argument:

> Probably most of the cases dealing with the precise issue (admissibility) have involved other acts which were of a criminal nature because of the court's concern that a defendant may be unduly damaged in the eyes of the trier of fact by being considered a common criminal . . . . [T]he defendant would be being [*sic*] tried on the purity of his character rather than on his guilt or innocence of the crime charged.

Id. Thus the court denied Senak the policy protection, which would dictate barring evidence based on "criminal character" grounds, and admitted the offered evidence. Yet the court still applied the rule 403 test for prejudicial danger, for "criminal character" is not the exclusionary bar; any "bad character" inference is enough if such an inference outweighs the probative value of the proffered evidence.

In United States v. Frederickson, 601 F.2d 1358 (8th Cir. 1979), the court further refined the test for admissibility of prior act evidence by adding the following criteria: (1) a material issue must be involved relevant to the evidence being offered; (2) defendant's guilt of the other crime must be clear and convincing; (3) the other crime must be similar and reasonably close in time to the case at bar; and (4) the evidence must pass the rule 403 balancing test. *Id.* at 1365. *See also* United States v. Little, 562 F.2d 578, 581 (8th Cir. 1977). *See generally* Dolan, *Rule 403: The Prejudice Rule in Evidence,* 49 S. CAL. L. REV. 220, 224 (1976).

77. *See supra* note 62.

78. *See infra* note 84.

79. *See* FED. R. EVID. 404(b) advisory committee note.

80. *See generally* Hill, *A Judge's View of the Trial of a Products Liability Case in Federal Court—The Impact of the Federal Rules of Evidence*, [hereinafter cited as Hill, *A Judge's View*] in S. METHODIST U. PRODUCTS LIABILITY INSTITUTE, THE TRIAL OF THE PRODUCTS LIABILITY CASE, 2-1 (V. Walkowiak ed. 1982) [hereinafter cited as PRODUCTS LIABILITY INSTITUTE].

Opponents of the inclusionary approach argue that it may lead to undue prejudice to the defendant or to prosecutorial overzealousness. *See, e.g.,* United States v. Coades, 549 F.2d 1303 (9th

III. IMPACT OF RULE 404(B) UPON PRIOR ACCIDENT EVIDENCE

Following the enactment of the Federal Rules of Evidence, courts failed to develop the inclusionary approach to similar fact evidence in product liability litigation as they had in the criminal context.[81] Arbitrary exclusion of logically relevant evidence stifles thorough product liability litigation. Courts currently exclude critically needed, relevant evidence by improperly following the exclusionary approach to admissibility of evidence of prior accidents.[82]

Although most commentators focus on the criminal applications of the rule,[83] rule 404(b) is equally applicable to prior act evidence in civil litigation.[84] Because Congress intended to incorporate the inclusionary approach to admissibility of prior act evidence into rule 404(b),[85] the rule must substantially alter the traditional standards of admissibility of such evidence in product liability suits. These standards turn upon

---

Cir. 1977). Yet, proper application of the rule 404(b) test for admissibility allows the trial judge to control the element of prejudice by employing the rule 403 balancing test before admitting evidence of prior acts. *See* United States v. Frederickson, 601 F.2d 1358 (8th Cir. 1979); MCCORMICK, *supra* note 2, § 190, at 453. While rule 404(b) does relax the standards for admitting the defendant's other crimes into evidence, the trial judge still retains the administrative control in the courtroom necessary to prevent admission of unfairly prejudicial evidence, or evidence improperly offered by overzealous prosecutors.

81. *See, e.g.,* Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 75 (D. Mass. 1976) (adhering to similarity standard regarding admissibility of evidence of prior accidents in product liability litigation); Rucker v. Norfolk & W. Ry., 64 Ill. App. 3d 770, 785, 381 N.E.2d 715, 727 (1978) (same); Holbrook v. Koehring, 75 Mich. App. 592, 593, 255 N.W.2d 698, 699 (1977) (same); Magic Chef, Inc. v. Sibley, 546 S.W.2d 851, 855 (Tex. Civ. App. 1977) (same); Caldwell v. Yamaha Motor Co. Ltd., 648 P.2d 519, 526 (Wyo. 1982) (same).

82. *See infra* notes 86-88.

83. *See* Slough & Knightly, *supra* note 4; Stone, *supra* note 1; Symposium, *supra* note 56; Comment, *supra* note 49.

84. The full title of rule 404 is "Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes." The title, on its face, seems to imply that the rule is limited to the criminal context, or at least to admissibility of "other crimes" evidence. However, rule 404(b) is entitled "Other Crimes, Wrongs, or Acts." Because effect must be given to every word, clause and sentence of a statute, J. SUTHERLAND, *supra* note 68, § 4705, to conclude that rule 404(b) is limited to other crimes or strictly the criminal context is to overlook this express expansion of classes of evidence which rule 404(b) is to control. *See* United States v. Senak, 527 F.2d 129 (7th Cir. 1975) (similar acts evidence need not be acts constituting a crime). In Dahlen v. Landis, 314 N.W.2d 63 (N.D. 1981), the North Dakota Supreme Court construing North Dakota's version of Federal Rule of Evidence 404(b), stated that "the requirement that the court assess the probative worth of the evidence is equally applicable in civil [as well as criminal] cases." *Id.* at 70. *See also* Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334 *modified,* 620 F.2d 464 (5th Cir. 1980), *cert. denied,* 449 U.S. 1112 (1981); Campus Sweater & Sportswear Co. v. Kahn Constr. Co., 515 F. Supp. 64 (D.S.C. 1979); American Nat'l. Watermattress Corp. v. Manville, 642 P.2d 1330 (Alaska 1982).

85. *See supra* note 61 and accompanying text.

the purpose for which the evidence is offered. Courts have identified five purposes for which prior accident evidence is offered. These purposes include: to prove that a particular physical condition, product defect, or situation exists; to prove that the plaintiff's injury was caused by this condition, defect or situation; to prove that the situation or environment in which the accident occurred was dangerous; to prove that the defendant knew or should have known of the danger; and, to rebut the defendant's assertion that the injury sued for could not have been caused by the defendant's conduct.[86] These purposes will be separately considered. The impact of the inclusionary approach to admissibility of prior accident evidence upon these purposes compels the conclusion that such evidence should be admitted if the two-prong test of logical and legal relevance, as defined by rules 404(b) and 403, is satisfied.

A. Prior Accident Evidence to Prove Defective Product

When plaintiffs offer evidence of a prior accident to prove the existence of a particular condition, situation or defect, they face a number of traditional limitations upon admission of such evidence. Traditional admissibility standards variously include requirements that the prior accident occurred with either an "identical product,"[87] a "substantially similar product,"[88] or a "similar product."[89] These limitations exist because prior accident evidence has a strong impact upon the jury, which creates a danger that the jury may use the evidence improperly.[90] A related concern is that the need for such evidence may not overcome its "sensational" aspect if admitted.[91]

Under the inclusionary approach, if the trial judge finds the evidence relevant, he simply applies the rule 403 test.[92] The rule 403 balancing

86. *See* MCCORMICK, *supra* note 2, § 200, at 473-76.

87. *See, e.g.*, Mitchell v. Fruehauf Corp., 568 F.2d 1139, 1147 (5th Cir. 1978); Uitts v. General Motors Corp., 411 F. Supp. 1380, 1383 (E.D. Pa. 1974); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 75 (D. Mass. 1976); Narring v. Sears, Roebuck & Co., 59 Mich. App. 717, 725, 229 N.W.2d 901, 904 (1975); Magic Chef, Inc. v. Sibley, 546 S.W.2d 851, 855 (Tex. Civ. App. 1977).

88. *See, e.g.*, Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334, 339 *modified*, 620 F.2d 464 (5th Cir. 1980), *cert. denied*, 449 U.S 1112 (1981); Campus Sweater & Sportswear Co. v. Kahn Constr. Co., 515 F. Supp. 64, 89 (D.S.C. 1979); Caldwell v. Yamaha Motor Co. Ltd., 648 P.2d 519, 521 (Wyo. 1982).

89. *See, e.g.*, Holbrook v. Koehring Co., 75 Mich. App. 592, 255 N.W.2d 698 (1977); Seavy v. Chrysler Corp., 93 Wash. 2d 319, 609 P.2d 1382 (1980).

90. *See supra* note 9.

91. *See generally* MCCORMICK, *supra* note 2, § 200, at 474 n.42.

92. *See supra* notes 72 & 74 and accompanying text.

test allows the trial judge to weigh the need for the evidence against its potential for unfair prejudice, without the added burden of applying an artificial standard of admissibility. Under this approach, if prior accident evidence is relevant to the existence of a particular physical condition, situation or defect, the trial judge would apply the balancing tests[93] of rules 404(b) and 403. The judge would not automatically exclude such relevant evidence on the basis of a lack of substantial similarity.[94] Rule 404(b) does not levy a similarity requirement against the proffered evidence, and rule 402 prevents courts from engrafting such a requirement under the guise of rule 404(b).[95]

B. Prior Accident Evidence to Prove Causation

If a plaintiff offers evidence of a prior accident to show that the alleged defective or dangerous condition caused the plaintiff's injury, the traditional limitation upon admissibility requires substantially similar or similar[96] conditions to exist between the prior accident and the accident in question.

In contrast, the Federal Rules apply a two-pronged test for admissibility, the balancing and relevancy test of rules 403 and 404(b). Although the judge may consider similarity between the two accidents as one of the factors in determining admissibility, he does not need to

93. No other test or standard for relevancy or prejudice is required to determine admissibility of proffered evidence under the Federal Rules. *See* Hill, *A Judge's View, supra* note 80, at 2-5, in PRODUCTS LIABILITY INSTITUTE, *supra* note 80.

94. *See* Campus Sweater & Sportswear Co. v. Kahn Constr. Co., 515 F. Supp. 64 (D.S.C. 1979). In *Campus Sweater*, the court distinguishes the "similarity" standard, an admissibility standard, from the more viable approach which uses the similarity requirement as a weight issue going to the ultimate jury question of sufficiency of the evidence. The court stated: "[R]ealizing that hundreds of potentially different factors are present in every situation, courts have also held that perfect similarity is not required, but that dissimilarities brought out on cross-examination go to the weight of the evidence, not its admissibility." *Id.* at 90.

This approach to the similarity standard is consistent with the Federal Rules. Courts that use similarity as a test for admissibility of prior accident evidence are introducing an additional standard to be met other than the required tests of rules 402, 403 and 404(b). Rule 402 expressly forbids courts from creating additional admissibility tests. *See supra* notes 70-74 and accompanying text.

95. *See supra* notes 70-76.

96. *See* Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334 *modified,* 620 F.2d 464 (5th Cir. 1980), *cert. denied,* 449 U.S. 1112 (1981); Rucker v. Norfolk & W. Ry., 64 Ill. App. 3d 770, 381 N.E.2d 715 (1978); Holbrook v. Koehring Co., 75 Mich. App. 592, 255 N.W.2d 698 (1977); Caldwell v. Yamaha Motor Co. Ltd., 648 P.2d 519 (Wyo. 1982). *See generally* MCCORMICK, *supra* note 2, § 200, at 474 nn.43 & 45.

apply a rigid test of similarity.[97] Nor need the judge, by some undefined standard, rule as a matter of law that on its face the evidence of the prior accident is not similar enough to be admissible[98] and thus risk reversal for a possible abuse of discretion.[99] The balancing test established by the Federal Rules of Evidence permits the judge to consider the factors of need and prejudice; similarity is merely an ingredient in the relevancy test.

C. Prior Accident Evidence to Prove Dangerous Conditions

When a plaintiff offers prior accident evidence to show the danger of the situation at the time of the accident, numerous courts have held that they must strictly apply the requirement of similarity of conditions.[100] This type of evidence, however, may most convincingly demonstrate that a hazardous situation caused the plaintiff's accident.[101] If the trial judge follows the inclusionary approach, the similarity issue would constitute merely one factor in the test for admissibility. If the court finds the evidence of the prior accident relevant, only considerations of prejudice, confusion or waste of time as set out in rule 403 should warrant its exclusion.[102]

---

97. *See generally* Aronson, *The Federal Rules of Evidence: A Model for Improved Evidentiary Decisionmaking in Washington,* 54 WASH. L. REV. 31 (1978); Froncek, *Proof of Prior Act Evidence,* 49 U. CIN. L. REV. 613 (1980); Green, *Relevancy and Its Limits,* 1969 LAW & SOC. ORD. 533 (1969); Schmerty, *Impact of Federal Rules of Evidence on the Trial of a Products Case,* 13 TRIAL LAW. Q. 8 (1980).

98. See Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334 *modified,* 620 F.2d 464 (5th Cir. 1980), *cert. denied,* 449 U.S. 1112 (1981), in which the appellate court reversed the trial court's ruling that the offered prior accident evidence was inadmissible. The court stated:

> [W]e hold that the evidence . . . was relevant and . . . sufficiently similar to be admitted. The trial court generally has broad discretion in the admission of evidence, but that discretion does not sanction exclusion of competent evidence without a sound, practical reason. The probative value . . . also was not outweighed by the possibility of unfair prejudice to the appellees.

Id. at 340. *See also* Uitts v. General Motors Corp., 411 F. Supp. 1380 (E.D. Pa. 1974); Holbrook v. Koehring Co., 75 Mich. App. 592, 255 N.W.2d 698 (1977); Narring v. Sears, Roebuck & Co., 59 Mich. App. 717, 229 N.W.2d 901 (Mich. 1975).

99. *See* Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334, 340 *modified,* 620 F.2d 464 (5th Cir. 1980), *cert. denied,* 449 U.S. 1112 (1981).

100. *See, e.g.,* Walker v. Trico Mfg. Co., Inc., 487 F.2d 595 (7th Cir. 1973); Uitts v. General Motors Corp., 411 F. Supp. 1380 (E.D. Pa. 1974); Holbrook v. Koehring Co., 75 Mich. App. 592, 255 N.W.2d 698 (1977); Narring v. Sears, Roebuck & Co., 59 Mich. App. 717, 229 N.W.2d 901 (1975); Fowler v. S-H-S Motor Sales Corp., 560 S.W.2d 350 (Mo. 1977); Caldwell v. Yamaha Motor Co. Ltd., 648 P.2d 519 (Wyo. 1982).

101. *See generally* MCCORMICK, *supra* note 2, § 200, at 474.

102. *See supra* notes 65 & 72 and accompanying text.

D. Prior Accident Evidence to Prove Knowledge

If a plaintiff offered evidence of a prior accident to show that the defendant knew of the danger leading to the plaintiff's accident, had constructive notice of the danger, or should have known of the danger, courts traditionally relaxed the similarity requirement and relied on the relevancy of the proffered evidence. If knowledge is the issue, relevancy remains the test.[103] Therefore, the inclusionary and exclusionary approaches are in harmony regarding evidence offered to show knowledge.[104]

E. Prior Accident Evidence to Rebut Impossibility

Should the defendant claim that the plaintiff's theory of causation is impossible, courts adhering to the traditional view allow the plaintiff to present evidence of other similar happenings to rebut the claim of impossibility.[105] The inclusionary approach would admit evidence of a product defect if such evidence passed the rule 404(b) and rule 403 tests for admissibility.[106] If the prior product and accident, and the plaintiff's product and accident, are not identical, the defendant should be allowed to establish the degree of dissimilarity. The jury should consider this dissimilarity and weigh the plaintiff's evidence accordingly. Courts which automatically bar relevant evidence on the basis of dissimilarity usurp the jury function.[107]

---

103. *See supra* note 65 and accompanying text. *See also* Campus Sweater & Sportswear Co. v. Kahn Constr. Co., 515 F. Supp. 64, 89 (D.S.C. 1979); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976); Rayner v. Stauffer Chem. Corp., 120 Ariz. 328, 585 P.2d 1240 (1978); Fowler v. S-H-S Motor Sales Corp., 560 S.W.2d 350 (Mo. 1977).

104. *See supra* note 24 and accompanying text.

105. *See, e.g.,* Walker v. Trico Mfg. Co., 487 F.2d 595 (7th Cir. 1973); Rucker v. Norfolk & W. Ry. Co., 64 Ill. App. 3d 770, 381 N.E.2d 715 (1978); Steinberg v. Ford Motor Co., 72 Mich. App. 520, 250 N.W.2d 115 (1976); Soper v. Enid Hotel Co., 383 P.2d 7 (Okla. 1963); Auzene v. Gulf Pub. Serv. Co., 118 So. 513 (La. App. 1939); Texas & N.O. Ry. v. Glass, 107 S.W.2d 924 (Tex. Civ. App. 1937); *see also supra* note 27 and accompanying text.

106. *See supra* note 76.

107. Balancing the dangers of the plaintiff's evidence against its probative value is the trial judge's proper function. Mechanically excluding evidence because it fails a similarity test is an improper function for the trial judge if he is not the sole fact finder. *See supra* note 93. Weighing the evidence is a jury function. If the goal of a trial is to seek the "truth" for a fair and just resolution of the dispute, courts should utilize the inclusionary approach to admissibility of safety history evidence in product liability cases. The exclusionary approach keeps relevant evidence from the fact finder, which interferes with the trial court's ability to render a fully informed decision on the merits of the case. *See generally* Kuhns, *The Propensity to Misunderstand the Character*

IV. CONCLUSION

The majority of courts interpreting rule 404(b) correctly adopt the inclusionary theory of admissibility. This interpretation radically alters the common law standards of admissibility of prior accident evidence in product liability litigation. The common law similarity standards must be supplanted by the two-prong test of logical and legal relevance inherent in the rule 404(b) and rule 403 tests for admissibility.[108]

The inclusionary test renders similarity merely a factor to be weighed in the balancing test rather than an absolute requirement under the traditional approach.[109] The inclusionary approach still allows the trial judge to retain discretion and to control the litigation to prevent prejudice.[110] Because the primary goal of judicial administration is to render consistent judgments based upon relevant evidence which is not unfairly prejudicial, all courts should follow the inclusionary approach to admissibility under rule 404(b).

Gail A. Randall

---

of Specific Acts Evidence, 66 IOWA L. REV. 777 (1981); Stone, *supra* note 1. *See also supra* note 93 and accompanying text.

108. *See supra* notes 74 & 76.

109. *See supra* notes 92 & 93.

110. *See supra* note 93.