Similar Facts Evidence: Balancing Probative Value Against The Probable Dangers Of Admission

I. INTRODUCTION

Construction workers handling a steel reinforcing bar were injured when the bar came into contact with a utility wire strung about ten feet from the building where they were working. The workers sued the utility company for negligence in installing the uninsulated wire so near to the building. At trial the workers offered evidence of a similar accident one year earlier at another building, and of a later accident involving one of their co-workers. The workers' theory was that the evidence would show the company's negligence in not insulating or removing the wires once it knew of the danger.[1]

The evidence offered by the workers is commonly called similar facts evidence. Generally, similar facts evidence is of an event offered to prove a fact related to a second, similar event. This definition embraces a diverse class of circumstantial evidence. A uniform approach to such evidence is possible because common questions of admissibility arise, based on a shared evidentiary purpose.

The traditional approach to similar facts evidence, however, emphasized the diversity of such evidence. Courts developed a matrix of special rules to apply to different kinds of similar facts evidence.[2] Under this approach courts first identified which of a number of existing categories the evidence fit. Then courts applied a test for admissibility developed for that category. This resulted in an arcane, murky body of law which brought predictibility at the expense of a consistent, logical treatment of similar facts evidence.[3]

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[1] This fact pattern is taken from McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.2d 145 (1932). The court's treatment of the proffered evidence is discussed *infra*. *See* note 3, *infra*, and text accompanying notes 85 and 89, *infra*.

[2] *See, e.g.*, the analysis of similar facts evidence in B. WITKIN, CALIFORNIA EVIDENCE §§ 350-63 (2d ed. 1966, Supp. 2d ed. 1974) [hereinafter cited as WITKIN] and Slough, *Relevancy Unraveled* (pts. 1-4), 5 KAN. L. REV. 1, 404, 675 (1956), and 6 KAN. L. REV. 38 (1957).

[3] In McCormick v. Great Western Power Co., 214 Cal. 658, 665, 668, 8 P.2d 145, 148, 149 (1932), for example, the court admitted the prior accident evidence but excluded the subsequent accident evidence without clearly explaining why

The California Evidence Code[4] adopts an opposite approach to this evidence. Generally, the Code leaves the admissibility of similar facts evidence to a case by case application of general principles. It explicitly refers to a category of similar facts evidence in only three instances: other acts evidence,[5] other sales evidence used in condemnation proceedings[6] and habit or custom evidence.[7] In some cases California courts have expressly acknowledged the Code's repudiation of the traditional approach to similar facts evidence. These courts have rejected the former rules limiting admissibility of certain kinds of similar facts evidence.[8] Other courts, however, continue to refer to the category of similar facts evidence to resolve particular evidentiary problems.[9] Thus, it appears that the tension between the traditional approach to similar facts evidence and the approach adopted by the Code is not completely reconciled.

This article examines the California courts' treatment of similar facts evidence in civil cases.[10] Initially the article analyzes the basic determinants of admissibility set out in the Code: materiality, logical relevance and discretionary exclusion. This analysis concludes that admission of similar facts evidence is principally a matter of judicial discretion in balancing the probative value of the evidence against the probable dangers of admission. The remainder of the article, therefore, focuses on probative value and the dangers of admission in the context of similar facts evidence.

II. THE EVIDENCE CODE: UNIVERSAL PRINCIPLES OF ADMISSIBILITY

The Code was enacted to simplify existing law, and to replace arcane common law rules with a coherent set of universally applicable principles.[11] Its foundation is Thayer's classic postulate that all rele-

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the two kinds of evidence were treated differently. Later courts mechanically followed the *McCormick* result, thus developing the rule that prior accidents are admissible, but subsequent accidents inadmissible. *See* text accompanying note 87, *infra*.

[4] CAL. EVID. CODE (West 1968) [hereinafter referred to as the Code].

[5] CAL. EVID. CODE § 1101 (West 1968). *See* text accompanying note 42, *infra*.

[6] CAL. EVID. CODE §§ 810 *et seq.* (West 1968). *See* note 133, *infra*.

[7] CAL. EVID. CODE § 1105 (West 1968). *See* text accompanying note 118, *infra*.

[8] *See, e.g.*, Beauchamp v. Los Gatos Golf Course, 273 Cal. App. 2d 20, 37, 77 Cal. Rptr. 914, 926 (1st Dist. 1969), discussed *infra*. *See* text accompanying note 99, *infra*.

[9] *See, e.g.*, Ault v. International Harvester Co., 13 Cal. 3d 113, 121, 117 Cal. Rptr. 812, 817, 528 P.2d 1148, 1153 (1974), discussed in Comment *Evidence of Subsequent Repairs*, this volume. (28 U.S.C. FED. R. EVID. 101 *et seq.* [hereinafter cited as FED. R. EVID.]).

[10] The recently enacted federal rules parallel the Code in sections pertinent to similar facts evidence. The provisions of the Code and federal rules are compared in footnotes.

[11] 7 CAL. LAW. REV. COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES 29, 34 (1965) [hereinafter cited as 7 LAW REV. COMM'N].

vant evidence should be admitted unless there is a sound policy reason for exclusion.[12]

A. RELEVANT EVIDENCE

Sections 350 and 351[13] are the keystone of the Code. They state that only relevant evidence is admissible, and that all relevant evidence should be admitted unless otherwise excluded by statute.[14] Sections 350 and 351 have been construed to prohibit judicial development of additional exclusionary rules, while encouraging wider admissibility of relevant evidence.[15]

The Code defines as relevant evidence that which has ". . . any tendency in reason to prove or disprove any disputed fact that is of consequence to the action."[16] This definition joins two concepts.

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[12]J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 530 (1898) [hereinafter cited as THAYER]. Both the UNIFORM RULES OF EVIDENCE, on which the Code was based, 7 LAW REV. COMM'N, *supra* note 11 *passim*, and the MODEL CODE were founded on Thayer's basic postulate. *See* James, *Relevancy, Probability and the Law*, in SELECTED WRITINGS ON THE LAW OF EVIDENCE AND TRIAL (W.T. Fryer ed. 1957) [hereinafter cited as SELECTED WRITINGS], and Gard, *The New Uniform Rules of Evidence*, in SELECTED WRITINGS, *id.* at 1169. The new federal rules share this origin. *See* 1 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE 402-4 (1975) [hereinafter cited as 1 WEINSTEIN]. Numerous commentators have elaborated on this basic theory of evidence law, including: E. CLEARY *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 185 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)]; WITKIN, *supra* note 2, §§ 303-04; Green, *Relevancy and Its Limits*, LAW AND THE SOCIAL ORDER 531 (1969); Peterfreund, *Relevancy and Its Limits, etc.*, 25 RECORD N.Y.C.B.A. 80 (1970); Slough, *Relevancy Unraveled* (pts. 1-4), 5 KAN. L. REV. 1, 404, 675 (1956), 6 KAN. L. REV. 38 (1957) [hereinafter cited as Slough].

[13]CAL. EVID. CODE §§ 350 and 351 (West 1968). Section 350 provides: "No evidence is admissible except relevant evidence." Section 352 provides: "Except as otherwise provided by statute, all relevant evidence is admissible." Federal rule 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, *supra* note 10.

[14]The Law Revision Commission's comment to section 351, CAL. EVID. CODE § 351, Law Rev. Comm'n Comment (West 1968), lists statutory exceptions, as does the Federal Advisory Committee's note to federal rule 402. *See* 1 WEINSTEIN, *supra* note 12, at 402-3 to 402-5.

[15]7 LAW REV. COMM'N, *supra* note 11, at 34.

[16]CAL. EVID. CODE § 210 (West 1968). The comparable federal rule provides:

> "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, *supra* note 10.

The differences in language between section 210 and rule 401 are not substantive. Judge Weinstein's comment on the elimination of reason as the basis

The first, known at common law as "materiality,"[17] is contained in the phrase ". . . any disputed fact that is of consequence . . . ." To be "of consequence" evidence must seek to prove, or disprove, an issue that is properly, and genuinely, at issue.[18] The substantive law, the parties' pleadings,[19] and in some cases the rules of evidence,[20] determine the provable issues in a case.

The second concept, which in this article will be termed "logical relevance," is defined as ". . . any tendency in reason to prove or disprove a disputed fact . . . ."[21] This phrase refers to the relationship between an item of evidence and the issue it addresses. At common law evidence which had any tendency to resolve a disputed issue was called "relevant." The Code, however, uses the term "relevant" to describe both common law materiality and relevance.

Logical relevance is not an intrinsic quality of evidence; it rests on the circumstances of each case, not on predetermined formulae. To be logically relevant evidence only need have *some* probative tendency. If the desired result is more probable with the evidence than without it, the requirement of logical relevance is met.[22] Whether evidence has this quality is a matter of reason and common sense.[23] Under so minimal a test much evidence may be logically relevant. Logical relevance alone, however, does not guarantee admission.[24] Material and logically relevant evidence is also subject to a number of exclusionary rules.

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for relevance in the federal rule is helpful for an understanding of both rules:

> The elimination of any reference to a basis for determining relevance underscores the conclusion that, in the final analysis, relevancy depends on the individual judge's evaluation of probability in the individual case.

1 WEINSTEIN, *supra* note 12, at 401-29.

[17] The Code abandons the term "material" in favor of the phrase "of consequence to the action" because its drafters felt that the ambiguities surrounding the use of the common law term should be avoided. 6 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES 10-11 (1964) [hereinafter cited as 6 LAW REV. COMM'N].

[18] *See, e.g.*, Armenta v. Churchill, 42 Cal. 2d 448, 457, 267 P.2d 303, 308 (1954), where the plaintiff offered evidence of an agent's prior traffic citations in an action against the principal for the agent's negligent driving. The evidence was excluded as immaterial because the defendant had conceded vicarious liability, and the theory of the offer was that the principal was negligent in allowing the agent to continue driving.

[19] MCCORMICK (2d ed.), *supra* note 12, § 185, at 435.

[20] For example, § 1101 limits the use of circumstantial evidence of character.

[21] CAL. EVID. CODE § 210 (West 1968).

[22] MCCORMICK (2d ed.), *supra* note 12, § 185.

[23] *See, e.g.*, Traxler v. Thompson, 4 Cal. App. 3d 279, 286, 84 Cal. Rptr. 211, 217 (3d Dist. 1970); Larson v. Solbakken, 221 Cal. App. 2d 410, 419, 34 Cal. Rptr. 450, 455 (1st Dist. 1963).

[24] MCCORMICK (2d ed.), *supra* note 12, § 185.

B. DISCRETIONARY EXCLUSION

The Code restricts the admission of material and logically relevant evidence for a variety of policy reasons. For certain evidence the policy implications of admitting the evidence are definite enough to permit express exclusionary rules.[25] For other evidence, including most similar facts evidence, this crystallization has not occurred. The policy questions arising with such evidence are so intimately bound up with the conduct of individual litigation that articulation of formal rules is impossible, and, indeed, undesirable. Instead, the Code commits these questions, in section 352,[26] to the discretion of the trial judge for resolution on a case by case basis.

Section 352 vests broad discretion in the trial judge to exclude material and logically relevant evidence.[27] It establishes a balancing test in which the judge must first determine the probative value of the evidence. Probative value is the extent to which the evidence proves, or disproves, a disputed fact. It is axiomatic that logically

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[25] Virtually all the subsequent sections of the Code are exclusionary rules fashioned to further some auxiliary or extrinsic policy: Division 6, "Witnesses"; Division 7, "Opinion Testimony & Scientific Evidence"; Division 8, "Privileges"; Division 9, "Evidence Affected or Excluded by Extrinsic Policies"; Division 10, "Hearsay Evidence"; and Division 11, "Writings."

[26] CAL. EVID. CODE § 352 (West 1968). Section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The federal counterpart, federal rule 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, *supra* note 10.

The federal rule explicitly incorporates "cumulativeness" as a factor in the exercise of judicial discretion, which section 352 does not. In superseding CODE CIV. PROC. § 2044, which pertained to exclusion of cumulative evidence, however, section 352 implicitly incorporates this element. *See* CAL. EVID. CODE § 352, Law Rev. Comm'n Comment (West 1968).

[27] For judicial construction of the breadth of this discretion *see, e.g.*, Calif. School Employees' Ass'n v. Sunnyvale, 36 Cal. App. 3d 46, 70, 111 Cal. Rptr. 433, 448 (1st Dist. 1973); Garfield v. Russell, 251 Cal. App. 2d 275, 279, 59 Cal. Rptr. 379, 381 (2d Dist. 1967).

The propriety of vesting such broad authority in the trial court was debated widely, and heatedly, when these provisions were first formulated in the Uniform Rules of Evidence. The debate was resolved in favor of the vesting, both because the trial court was considered the most effective forum to resolve these questions, and because it was in accord with the common law. *See* Swietlik & Henrickson, *Rule 303: The Keystone of the [Model] Code*, in SELECTED WRITINGS, *supra* note 12, at 117; 6 LAW REV. COMM'N, *supra* note 17, at 642. For discussion of the court's discretion at common law *see* THAYER, *supra* note 12, at 516-17.

relevant evidence has some probative value. Whether this minimum suffices to allow admission of the evidence depends on the judge's second assessment, the dangers involved in admitting the evidence.

Section 352 lists four dangers: undue consumption of time, undue prejudice, confusion of the issues and misleading the jury.[28] Consideration of these factors in admitting evidence is based on two policies that have long concerned courts: expediting trial and avoiding undue prejudice.[29] Evidence which raises collateral issues,[30] or is cumulative,[31] unnecessarily delays trial, and may confuse the issues. Evidence may also prejudice unduly. All evidence, of course, to some degree damages a party.[32] However, when evidence is excessive in its appeal to the emotion, rather than to the reason, of the jury, courts will find it unduly prejudicial.[33] With certain kinds of evidence this appeal is so inherent that the Code explicitly limits its use.[34] For most evidence, however, any limits on its admissibility rest on the trial judge's discretion and the nature of the evidence.

Probative value, and the dangers of admitting evidence, are matters about which judges could reasonably differ, and which vary with each case.[35] Therefore, wide discretion under section 352 is accorded the trial judge. Appellate review of discretionary exclusion is limited to inquiring whether there has been an abuse of discretion, and error is infrequently found.[36] This is particularly significant for similar facts evidence, since with few exceptions the only exclusionary rule applicable to such evidence is section 352.[37]

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[28] CAL. EVID. CODE § 352 (West 1968).

[29] *See* WITKIN, *supra* note 2, §§ 309-10.

[30] *See, e.g.*, Braly v. Midvalley Chemical Co., 192 Cal. App. 2d 369, 379, 13 Cal. Rptr. 366, 373 (4th Dist. 1961); Firlotte v. Jesse, 76 Cal. App. 2d 207, 210, 172 P.2d 710, 712 (3d Dist. 1946); WITKIN, *supra* note 2, § 310.

[31] *See, e.g.*, Agnew v. Foell, 113 Cal. App. 2d 575, 577, 248 P.2d 758, 760 (2d Dist. 1952).

[32] *See* Thor v. Boska, 38 Cal. App. 3d 566, 567, 113 Cal. Rptr. 296, 302 (2d Dist. 1974), where the court emphasized that undue prejudice and detriment are not equivalent. *See also* MCCORMICK (2d ed.), *supra* note 12, § 185, at 436 n. 31.

[33] *See, e.g.*, Campodomico v. State Auto Parks, Inc., 10 Cal. App. 3d 803, 808, 89 Cal. Rptr. 270, 273 (2d Dist. 1970); Gee v. Fong Poy, 88 Cal. App. 627, 635, 264 P. 564, 568 (1st Dist. 1928).

[34] *See* text accompanying note 42, *infra*, for discussion of the limits placed on use of character evidence by section 1101.

[35] MCCORMICK (2d ed.), *supra* note 12, § 185, at 440; Swietlik & Henrikson, *Rule 303: The Keystone of the [Model] Code*, in SELECTED WRITINGS, *supra* note 12, at 120.

[36] *See, e.g.*, Hrnjak v. Graymar, Inc., 4 Cal. 3d 725, 729, 94 Cal. Rptr. 623, 626, 484 P.2d 599, 604 (1970); Larson v. Solbakken, 221 Cal. App. 2d 410, 421, 34 Cal. Rptr. 450, 456 (1st Dist. 1963); Moody v. Peirano, 4 Cal. App. 411, 417, 88 P. 380, 382 (1st Dist. 1906).

[37] Other exclusionary rules which apply directly to similar facts evidence are section 1101, *see* text accompanying note 42, *infra*, and section 801, *et seq.*, *see* notes 43 and 133, *infra*.

In sum, the Code sets out three basic determinants of admissibility: materiality, logical relevance and discretionary exclusion. Of the three, materiality presents the fewest problems. It is a function of the substantive law and the parties' pleadings, and thus easily determined. Logical relevance and discretionary exclusion, however, are apt to raise difficult issues, since they involve the assessment of intangibles. Both require determining probative value. A second intangible, the dangers of admitting evidence, must be balanced against probative value under section 352. Thus, central to these two determinants, logical relevance and discretionary exclusion, are the concepts of probative value and the dangers of admission. The remainder of this article discusses these concepts as they relate to similar facts evidence.

III. PROBATIVE VALUE

The probative value of an item of evidence determines whether the evidence is logically relevant, as well as the outcome of the balancing test under section 352. Minimal probative value satisfies the requirement of logical relevance. Whether, under section 352, more than this minimum is necessary for admission of the evidence depends on the probable dangers threatened by the evidence.

Determining the relative probative value of evidence can be difficult. For similar facts evidence, as for all circumstantial evidence, this value rests on the strength of the inference supplied by the evidence in supporting one side of a disputed issue. No absolute guide exists for measuring the presence of, or the strength of this inference. The standard is that of ". . . logic, reason, experience, reasonable inference and common sense to be applied in each individual case."[38]

Over the years courts developed tests for applying this standard to various categories of similar facts evidence. The traditional approach to this evidence was to categorize it, then to apply the admissibility test which had developed for that category.[39] This approach had two defects. First, it unduly emphasized the adherence to precedent, and to admissibility tests which, in some instances, were based on faulty reasoning.[40]

Second, the focus on tests for admissibility obscured the distinction between logical relevance and discretionary exclusion as determinants of admission. In the earlier cases there is considerable confusion in the justification given for excluding similar facts evidence. Whether exclusion was based on logical irrelevance, or on

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[38] B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 20.3, at 228 (1972) [hereinafter cited as JEFFERSON].

[39] *See, e.g.*, the approach taken to similar facts evidence in WITKIN, *supra* note 2, §§ 350-63.

[40] *See* text accompanying note 87, 99 and 142, *infra*.

dangers outweighing the evidence's probative value is often unclear.[41]

Despite its often mechanistic, and frequently confusing application, the categorical approach to similar facts evidence is helpful. Although this kind of evidence is diverse, various kinds of similar facts evidence share common characteristics which raise distinct problems in assessing probative value. In adopting a categorical framework, however, a careful line must be drawn between its prescriptive and descriptive rules. Allowing the label attached to prescribe the fact of proffered evidence is contrary to the principle that probative value rests solely on the circumstances of the individual case. A categorical approach which is descriptive, however, can help to illustrate the factors which have aided courts to assign a probative value to similar facts evidence. Thus, the following discussion of probative value adopts the categorical framework.

A. THE OTHER ACTS OF A PARTY[42]

Other acts evidence is one of the few categories of similar facts evidence which the Code treats expressly.[43] In section 1101 the Code limits the use of evidence of other acts of a party to issues other than character.[44] The Code does not, however, prohibit the use of such evidence to prove some other material fact. The Code suggests that

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[41] *See, e.g.*, Kopfinger v. Grand Central Public Market, 60 Cal. 2d 852, 860, 37 Cal. Rptr. 65, 70, 389 P.2d 529, 534 (1964), where the court said: "[H]ere the circumstances of the proffered accidents were dissimilar to the facts of the case. (citations omitted) This being so, the trial court was well within its discretion in excluding such evidence." From this statement it is unclear whether the jusification for exclusion was logical irrelevance, or the presence of some unstated danger outweighing the evidence's slight probative value. *Compare* Deward v. Clough, 245 Cal. App. 2d 439, 449, 54 Cal. Rptr. 68, 75 (3d Dist. 1966), where the court clearly distinguished the analysis of logical relevance from discretionary exclusion.

[42] *See* MCCORMICK (2d ed.), *supra* note 12, §§ 189, 190 and 197; WITKIN, *supra* note 2, §§ 350 and 357.

[43] Few of the Code's provisions apply expressly to similar facts evidence. Division 9, which applies to evidence affected or excluded by extrinsic policies, contains section 1101, section 1105, pertaining to habit or custom evidence, and section 1151, which applies to evidence of subsequent remedial repairs. (*See* Comment, *Evidence of Subsequent Repairs: Yesterday, Today and Tomorrow*, this volume.) Sections 801, *et seq.*, control use of other sales evidence in condemnation proceedings. (*See* note 133, *infra.*)

[44] CAL. EVID. CODE § 1101 (West 1968) provides:

> (a) Except as provided [elsewhere], evidence of a person's character or trait of his character (. . . in the form of . . . evidence of specific instances of his conduct) is inadmissible when offered to prove his conduct on a specific occasion.
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> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such act.

the evidence may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[45]

Whether the other act evidence has probative value on any of these issues depends on the reasonableness of inferring like behavior on separate occasions.[46] In testing for this inference courts consider two factors: the nature of the acts, and the time interval between them.[47] The first factor is expressed in the requirement that the acts be of "like character."[48] This requirement varies with the context. When the act is a prior fraud offered to prove fraudulent intent, the court will look to the subject matter, the purpose, and the parties involved in assessing how alike the acts are.[49] When, in a products liability action, the acts are other defects in the product, the court will require that the prior defects relate to the specific defect alleged.[50]

Whether the acts are close enough in time to be admissible depends as much on the circumstances as on the absolute time between the acts. In *Estate of Fosselman.*[51] evidence of the testatrix's acts over a five year period were admitted as tending to show her incompetence at the time she executed her will. Similarly, in *Messerall v. Rubin*,[52] evidence of prior misrepresentations two and five years earlier was admitted. In both cases, underlying circumstances suggesting continuity in the party's behavior were present. In *Fosselman* the testatrix suffered, throughout the period, from declining mental capacity due to illness.[53] In *Messerall* the acts were repeated, and were identical to the misrepresentation at issue.[54] Absent such cir-

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[45] CAL. EVID. CODE § 1101 (West 1968). These issues may arise in a variety of contexts. *See, e.g.*, State Rubbish Collectors' Ass'n v. Siliznoff, 38 Cal. 2d 330, 339, 240 P.2d 282, 286 (1952) (to show a plan of unfair methods to prevent competition); Scott v. Times-Mirror Co., 181 Cal. 345, 357, 184 P. 672, 678 (1919) (to show malice in a libel suit); Janisse v. Winston Investment Co., 154 Cal. App. 2d 580, 588, 317 P.2d 48, 54 (1st Dist. 1957) (to show usurious intent).

[46] *See, e.g.*, Blank v. Coffin, 20 Cal. 2d 457, 463, 126 P.2d 868, 871 (1942).

[47] *See, e.g.*, The Atkins Corp. v. Tourny, 6 Cal. 2d 206, 215, 57 P.2d 480, 485 (1936).

[48] *Id.*

[49] Evans v. Gibson, 220 Cal. 476, 482, 31 P.2d 389, 391 (1934); Domarad v. Fisher & Burke, Inc., 270 Cal. App. 2d 543, 563, 76 Cal. Rptr. 529, 542 (1st Dist. 1969); A.F.C., Inc. v. Brockett, 257 Cal. App. 2d 40, 44, 64 Cal. Rptr. 771, 774 (1st Dist. 1967).

[50] Marocco v. Ford Motor Co., 7 Cal. App. 3d 84, 90-92, 86 Cal. Rptr. 526, 529-31 (1st Dist. 1970). In *Marocco* the court found evidence of other defects in the same model car, which the defendant had corrected in response to complaints, irrelevant because none of the other defects related to the alleged defect in the car's shifting mechanism. The court treated the evidence as falling within section 1101, as evidence of other acts.

[51] 48 Cal. 2d 179, 308 P.2d 336 (1957).

[52] 195 Cal. App. 2d 497, 16 Cal. Rptr. 107 (3d Dist. 1961).

[53] 48 Cal. 2d 179, 185, 305 P.2d 336, 340 (1957).

[54] 195 Cal. App. 2d 497, 501, 16 Cal. Rptr. 107, 110 (3d Dist. 1961).

cumstances courts seem unwilling to admit evidence of acts remote in time.[55]

The cases suggest that close scrutiny of this kind of evidence is necessary.[56] Such evidence can have a highly prejudicial effect on a jury.[57] This potential may tempt counsel to plead issues not actually present on the facts, or press for admission of probatively weak evidence.[58] Courts should approach other acts evidence cautiously to ensure that it is material, and that its probative value outweighs any danger of undue prejudice.[59]

B. OTHER ACCIDENTS[60]

The probative value of other accidents evidence, like that of other

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[55] *See* Larson v. Solbakken, 221 Cal. App. 2d 410, 419, 34 Cal. Rptr. 450, 454 (1st Dist. 1963), where evidence of the defendant's "near miss" at the same location and under similar circumstances as the accident at issue was excluded because there was an interval of ten days. The implication is that any appreciable interval places evidence of an isolated act, absent underlying circumstances suggesting continuity, at the outer limits of relevance, hence, subject to discretionary exclusion. In many cases reviewing other acts evidence the evidentiary acts occurred contemporaneously, or nearly so, with those at issue. *See, e.g.*, Evans v. Gibson, 220 Cal. 475, 482, 31 P.2d 389, 391 (1934); Matthews v. Dudley, 212 Cal. 58, 59, 297 P. 544, 545 (1931); Ungefug v. D'Ambrosia, 250 Cal. App. 2d 61, 64, 58 Cal. Rptr. 223, 225 (4th Dist. 1967); Janisse v. Winston Investment Co., 154 Cal. App. 2d 580, 587, 317 P.2d 48, 54 (1st Dist. 1957).

[56] Error occurs frequently in the admission of other acts evidence which is immaterial, or which has slight probative value in relation to its dangers. *See, e.g.*, Dewey v. Tassi, 21 Cal. 2d 109, 122, 130 P.2d 389, 396 (1942) (evidence improperly admitted, but no reversal); Marocco v. Ford Motor Co., 7 Cal. App. 2d 84, 94, 86 Cal. Rptr. 526, 530 (1st Dist. 1970) (evidence improperly admitted, but no reversal); Vise v. Rossi, 150 Cal. App. 2d 224, 227, 309 P.2d 538, 541 (4th Dist. 1925); Larson v. Larsen, 72 Cal. App. 169, 172, 236 P. 979, 981 (1st Dist. 1925).

[57] For example, in Atwood v. Villa, 25 Cal. App. 3d 145, 151-57, 101 Cal. Rptr. 508, 512-17 (2d Dist. 1972), the plaintiff alleged wanton conduct on the defendant's part in an auto accident in apparent anticipation of a close case as to his own contributory negligence. To support the allegation the plaintiff offered evidence that the defendant had indecently exposed himself shortly before the accident on the theory that in his flight he was acting recklessly. The trial court admitted the evidence. The appellate court pointed to the absence of any evidence in the record of recklessness in the defendant's manner of driving. Thus, wantonness was not actually at issue, and the evidence of the indecent exposure was immaterial. Moreover, even if material the evidence was so highly prejudicial that the appellate court thought that section 352 should have been invoked to bar the evidence.

[58] *See* A.F.C., Inc. v. Brockett, 257 Cal. App. 2d 40, 44, 64 Cal. Rptr. 771, 774 (1st Dist. 1967), where the trial court excluded evidence of prior frauds in real estate transactions in an action for attachment of personal property. The principal issue was ownership of the property, to which the evidence of prior frauds was only tenuously related.

[59] *See* MCCORMICK (2d ed.), *supra* note 12, § 190, at 453. *See* the discussion of the effects of other acts evidence at CAL. EVID. CODE § 1101, Law Rev. Comm'n Comment (West 1968).

[60] *See* JEFFERSON, *supra* note 38, § 21.7 (1972, Supp. 1975); MCCORMICK (2d ed.), *supra* note 12, § 200; WITKIN, *supra* note 2, §§ 351-52.

acts, rests on a comparison of two events. The tests used by courts to determine probative value are also alike: the similarity of the accidents, and their relationship in time.[61] The application of these tests, however, is considerably more complex than for other acts evidence.

To compare two events in terms of all the possible variables affecting them would be an insuperable task, and certainly more than is necessary to demonstrate the probative value of the evidence of another accident.[62] Thus, courts require only that the accidents be substantially similar in their general character.[63] To apply this test courts refer to various factors: location, external conditions, the behavior and physical characteristics of the victims, the accidents' causes, and the way the accidents occurred.[64] Which of these factors the court emphasizes depends not only on the circumstances of the particular case, but also on the purpose for offering the evidence.[65]

When other accidents are offered to prove the existence of a dangerous condition, courts generally apply the substantial similarity test most strictly.[66] Direct evidence of a dangerous condition is usually available, including a description from which the jury can draw its own conclusions.[67] Thus, the court may insist on greater similarity between the accidents than when offered on other issues. In *Martindale v. City of Mountain View*,[68] for example, the court barred evidence of prior accidents. Although occurring at the same location, the other accidents happened when the road was partially barricaded for construction. The accident at issue happened when the road was free of obstruction.[69] The court thought that this difference interjected too many variables to support adequately the inference that the accidents showed the presence of a dangerous condition in the road.

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[61] *See* Ault v. International Harvester Co., 13 Cal. 3d 113, 121, 117 Cal. Rptr. 812, 817, 528 P.2d 1148, 1153 (1974), discussed in Comment, *Evidence of Subsequent Repairs*, this volume.

[62] *See* Gilbert V. Pessin Grocery Co., 132 Cal. App. 2d 212, 216-21, 282 P.2d 148, 153-56 (2d Dist. 1955).

[63] *See, e.g.*, Hicks v. Ocean Shore R.R., 18 Cal. 2d 773, 782, 117 P.2d 850, 855 (1941); Leighton v. Dodge, 236 Cal. App. 2d 54, 58, 45 Cal. Rptr. 820, 822 (1st Dist. 1965); Jaehne v. Pacific Tel. & Tel. Co., 105 Cal. App. 2d 683, 689, 234 P.2d 165, 169 (2d Dist. 1951).

[64] *See* Kopfinger v. Grand Central Public Market, 60 Cal. 2d 852, 860, 37 Cal. Rptr. 65, 70, 389 P.2d 529, 534 (1964) (location, cause, manner of occurence); McCormick v. Great Western Power Co., 214 Cal. 658, 664, 8 P.2d 145, 147 (1932) (cause, circumstances); Post v. Camino Del Properties, 173 Cal. App. 2d 446, 453, 343 P.2d 294, 298 (4th Dist. 1959) (location, character and behavior of the victims).

[65] *See* Gilbert v. Pessin Grocery Co., 132 Cal. App. 2d 212, 221, 282 P.2d 148, 156 (2d Dist. 1955); MCCORMICK (2d ed.), *supra* note 12, § 200. at 473.

[66] MCCORMICK (2d ed.), *supra* note 12, § 200, at 473.

[67] *Id.* at 474-75.

[68] 208 Cal. App. 2d 109, 25 Cal. Rptr. 148 (1st Dist. 1962).

[69] *Id.* at 116, 25 Cal. Rptr. at 152.

Courts are willing, however, to admit evidence of other accidents to show a dangerous condition when substantial similarity exists, even though there is a discrepancy between some factors. For example, in *Magnuson v. City of Stockton*,[70] evidence of earlier drownings at a lake was admitted to show a dangerous condition in a wrongful death action, although there was no proof that the accidents happened in the same way or at the same location. Probative value rested on other similarities between the accidents: they all involved children playing on the lake's shore, which was uniformly steep, slippery and unprotected.[71] In *Gilbert v. Pessin Grocery Co.*,[72] the plaintiff had tripped on a concrete parking lot divider under inadequate lighting conditions. The trial court refused to admit evidence of a prior mishap involving the same divider and similar lighting conditions because there was no proof that the divider caused the prior accident, that the victims had similar physical characteristics, or that climactic conditions were similar. In reversing, the appellate court held that such a showing was too burdensome, and that the plaintiff had established sufficient probative value when the similarity of the critical factors — the lighting conditions and the involvment of the divider — was shown.[73]

When offered to show causation, courts appear to apply the substantially similar test less strictly than if the evidence is offered to show a dangerous condition. Causation is an elusive issue, on which direct evidence is seldom available, and circumstantial evidence particularly appropriate.[74] In *Johnson v. Yolo County*,[75] for example, the plaintiff offered evidence of a prior accident to show that the cause of his accident was the configuration of a curve. The plaintiff's accident happened while approaching the curve from the north. The prior accident occurred after an approach from the south, where a narrow bridge immediately before the curve tended to slow traffic. Despite this difference, the plaintiff's showing that the curve had the same geometry regardless of the direction of approach established sufficient similarity to admit the evidence. The court thought that the difference between the two accidents could be argued to, and understood by, the jury.[76]

In actions founded on strict liability for a defective product, the relaxation of the test to prove causation is most evident. In *Ault v. International Harvester Co.*,[77] the California Supreme Court sus-

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[70] 116 Cal. App. 532, 3 P.2d 30 (3d Dist. 1931).
[71] *Id.* at 535, 3 P.2d at 31.
[72] 132 Cal. App. 2d 212, 282 P.2d 148 (2d Dist. 1955).
[73] *Id.* at 221, 282 P.2d at 156.
[74] MCCORMICK (2d ed.), *supra* note 12, § 200, at 474.
[75] 274 Cal. App. 2d 46, 79 Cal. Rptr. 33 (3d Dist. 1969).
[76] *Id.* at 59, 79 Cal. Rptr. at 42.
[77] 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974), discussed in Comment, *Evidence of Subsequent Repairs*, this volume.

tained admission of other accidents evidence to show causation even though the accidents had occurred under substantially dissimilar circumstances. The alleged cause of the accident at issue was a defective gearbox. Once the same defect was established as a cause of the other accidents, and all the gearboxes were shown to have the same mechanical and physical properties, the evidence was admissible. This showing sufficed for the narrow issue of causation, and the differing circumstances of the accidents did not negate their probative value.[78]

The purpose in offering the evidence affects the test for probative value most profoundly when the issue is the party's knowledge of a danger.[79] Evidence of prior accidents suffices to prove notice when they are similar enough to have attracted the party's attention to the dangerous condition.[80] For example, in *Post v. Camino Del Properties*,[81] evidence of prior accidents involving juveniles playing at various locations in and near a swimming pool was offered to prove the dangerous condition. The court found the circumstances too dissimilar for this purpose, since the accident in question involved an adult who slipped at a different location near the pool. The court noted, however, that the same evidence would have been admissible to show the defendant's knowledge of the dangerous condition.[82]

The theory underlying this test appears to be that a reasonably careful person, who is aware of a danger, would investigate. The person investigating could be expected to discover other dangers related, but not identical, to those involved in the prior accidents. The duty to investigate makes it reasonable to infer knowledge from a prior accident which is but generally similar to the one at issue. This inference arises, of course, only if investigation is possible. It would be unrealistic, and unfair, to hold a person to notice based on a prior accident involving a danger which is impermanent.[83] Therefore, courts have restricted this test to accidents involving static conditions, which occurred in the general vicinity of the accident at issue, but whose exact location or cause is unknown, or different.[84]

The time between the accidents also affects the probative value of similar accidents evidence. As with other acts evidence, the absolute time separating the accidents is less important than the events that have transpired in the interval. At issue in *McCormick v. Great West-*

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[78] *Id.* at 121, 117 Cal. Rptr. at 817, 528 P.2d at 1153.
[79] MCCORMICK (2d ed.), *supra* note 12, § 200, at 475.
[80] Laird v. T.W. Mather, Inc., 51 Cal. 2d 210, 220, 331 P.2d 617, 623 (1958).
[81] 173 Cal. App. 2d 446, 343 P.2d 294 (4th Dist. 1959).
[82] *Id.* at 453, 343 P.2d at 298.
[83] Slough, *supra* note 12, at 5 KAN. L. REV. 695.
[84] *See* Laird v. T.W. Mather, Inc., 51 Cal. 2d 210, 220, 331 P.2d 617, 623 (1958); Hilts v. County of Solano, 265 Cal. App. 2d 161, 169, 71 Cal. Rptr. 275, 281 (1st Dist. 1968).

ern Power Co.,[85] was the defendant's negligence in installing power lines which the plaintiff, a construction worker, had come into contact with while working at a site. The plaintiff offered evidence that one year before the accident at issue a similar accident had occurred. The court admitted the evidence.[86] Given the permanence of the condition, and the presumably infrequent exposure to it under these exact circumstances, the year's passage had little effect on the value of the evidence. If, however, hundreds of people were exposed daily to an alleged danger, a single accident one year earlier would have less probative value.

C. SUBSEQUENT ACCIDENTS

The distinction between accidents occurring before and after the accident at issue should not affect the probative value of the accidents to show causation or existence of a dangerous condition.[87] It seems equally possible to infer causation or the existence of a danger in either situation. The distinction between prior and subsequent accidents has importance only on the issue of notice. A subsequent accident is logically irrelevant to this issue. Other jurisdictions have followed this reasoning, allowing subsequent accident evidence to prove causation or the presence of a danger, subject to the tests for probative value applied to prior accidents.[88] The California courts' position is not entirely clear.

In *McCormick v. Great Western Power Co.*,[89] the plaintiff attempted to introduce evidence of prior and subsequent accidents. The court refused to admit the subsequent accidents, saying that "obviously the happening of the subsequent accident could not have tended to prove that by reason thereof the company might reasonably have anticipated the injury to plaintiffs."[90] Whether the court was referring to use of the evidence to prove notice or to its use generally is unclear. Later courts have construed the case as barring subsequent accident evidence for any purpose.[91] The defect in this analysis is its failure to account for the possible value of such evidence on the issues of causation and existence of a danger.[92]

The current viability of this rule, however, is open to question.[93]

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[85] 214 Cal. 658, 8 P.2d 145 (1932).
[86] *Id.* at 664, 8 P.2d at 147.
[87] JEFFERSON, *supra* note 38, § 21.7 (1972, Supp. 1975); WITKIN, *supra* note 2, § 353.
[88] Slough, *supra* note 12, at 5 KAN. L. REV. 692; Annot., 81 A.L.R. 685 (1932).
[89] 214 Cal. 658, 8 P.2d 145 (1932).
[90] *Id.* at 668, 8 P.2d at 149.
[91] *See* Trust v. Arden Farms, 50 Cal. 2d 217, 224, 324 P.2d 583, 587 (1958).
[92] WITKIN, *supra* note 2, § 353.
[93] Jefferson treats prior and subsequent accident evidence alike, except when offered to show notice, for which subsequent accidents are, of course, irrelevant.

In two recent decisions, *Kopfinger v. Grand Central Public Market*,[94] and *Ault v. International Harvester Co.*,[95] the California Supreme Court did not distinguish between prior and subsequent accidents to show causation and the existence of a dangerous condition. The court analyzed both solely according to the similarity of circumstances and remoteness in time tests. In *Kopfinger* the court excluded both kinds of evidence,[96] while in *Ault* it sustained admission of both.[97] Although the *McCormick* rule was not expressly repudiated in either case, as a practical matter subsequent accidents evidence probably now is admissible subject to the same tests applied to prior accidents evidence.[98]

D. THE ABSENCE OF ACCIDENTS: SAFETY HISTORY EVIDENCE

Knowing that a particular location or instrumentality has been safe in the past, people usually assume its continued safety and act accordingly. Matters of common experience, however, are not necessarily cognizable at law. Despite commentators' urgings that safety history evidence has value, courts in California and other jurisdictions have been reluctant to admit this kind of evidence.[99]

The rationale for excluding safety history evidence in California is unclear. The principal authority is *Oakland v. Pacific G. & E. Co.*,[100] where the court summarily excluded the evidence because it has no "reasonable tendency to relieve a tortfeasor."[101] The court also held that the evidence would be admissible in certain narrow situations: to rebut a plaintiff's *res ipsa loquitur* case of negligence, or a claim that an instrumentality had been used a reasonable number of times and found safe.[102] The contradiction in these statements is troubling. If such evidence has "no reasonable tendency" to prove the lack of

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JEFFERSON, *supra* note 38, § 21.7 (1972, Supp. 1975).

[94] 60 Cal. 2d 852, 37 Cal. Rptr. 65, 389 P.2d 529 (1964).

[95] 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974).

[96] 60 Cal. 2d 852, 860, 37 Cal. Rptr. 65, 70, 389 P.2d 529, 534 (1964).

[97] 13 Cal. 3d 113, 121, 117 Cal. Rptr. 812, 817, 528 P.2d 1148, 1153 (1974).

[98] Any doubt about the current rule is based on the California Supreme Court's holding in Trust v. Arden Farms, 50 Cal. 2d 217, 224, 324 P.2d 583, 587 (1958), which repeated the *McCormick* rule without elaborating on its application. If limited to use of the evidence to show notice the rule is appropriate, but if the court meant that it should bar all use of subsequent accident evidence the rule is erroneous and should be repudiated.

[99] MCCORMICK (2d ed.), *supra* note 12, § 200, at 476; WITKIN, *supra* note 2, § 354; Morris, *Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205, *passim* (1948); Slough, *supra* note 12, at 5 KAN. L. REV. 698.

[100] 47 Cal. App. 2d 444, 118 P.2d 328 (1st Dist. 1941).

[101] *Id.* at 448, 118 P.2d at 330.

[102] *Id.*

negligence, how is it useful in the narrow exceptions mentioned?[103]

Other California courts have agreed on the exclusion of safety history evidence without agreeing on the rationale. One court barred the evidence because the circumstances of the safe use were dissimilar to those of the accident.[104] This approach implies that under different circumstances the evidence would be admissible. Still other courts have held that safety history evidence should be *per se* excluded, because it lacks probative value,[105] or raises too great a danger of collateral issues.[106]

The danger that safety history evidence will raise collateral issues relates to the discretion of the court to exclude evidence under section 352, not to the possible probative value of such evidence. There is no inherent reason why this danger is so great as to warrant *per se* exclusion.

Determining probative value is analytically the same whether the evidence is of other accidents, or of their absence. Either way probative value depends on a comparison of two experiences to find if one has a reasonable tendency to prove something about the other. With evidence of safe history, the problem is to determine whether the circumstances of the past use allow a reasonable inference that the accident in question was due to something other than the location or instrumentality. When the range of variables possibly affecting this determination is large, the danger of collateral issues may be too great. In other cases it may be insignificant.

Until recently the exclusion of safety history evidence in California was not criticized. In *Beauchamp v. Los Gatos Golf Course*,[107] however, the court examined the issue at length. The court noted that since enactment of the Code previous limitations on the admissibility of material and logically relevant evidence were abolished, thus opening the way for safety history evidence.[108] Where identity of circumstances would be difficult to show, or where confusing collateral issues would be raised, the court said that the evidence could be properly excluded. The court thought, however, that generally the evidence should be admissible in negligence actions.[109]

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[103] *See* Beauchamp v. Los Gatos Golf Course, 273 Cal. App. 2d 20, 38, 77 Cal. Rptr. 914, 926 (1st Dist. 1969), where the court noted this contradiction in the earlier court's analysis.

[104] Nungaray v. Pleasant Valley Lima Bean G. & W. Assn, 142 Cal. App. 2d 653, 664, 300 P.2d 285, 292 (2d Dist. 1956).

[105] *See* Thompson v. B.F. Goodrich Co., 48 Cal. App. 2d 723, 729, 120 P.2d 693, 696 (1st Dist. 1941).

[106] *See* Shehan v. Hammond, 2 Cal. App. 371, 376, 84 P. 340, 342 (1st Dist. 1905); WITKIN, *supra* note 2, § 354.

[107] 273 Cal. App. 2d 20, 77 Cal. Rptr. 914 (1st Dist. 1969).

[108] *Id.* at 37, 77 Cal. Rptr. at 926.

[109] *Id.* at 36, 77 Cal. Rptr. at 925.

The analysis in *Beauchamp* was, strictly speaking, dictum, since the case fell within one of the exceptions recognized by the court in *Oakland*.[110] Nevertheless, Jefferson has cited the decision as authority for the general admissibility of safety history evidence.[111] He suggests that the earlier cases are no longer good authority, and proposes two tests for determining probative value. First, the circumstances of the prior or subsequent use must be similar to those existing in the case at issue. Second, a reasonable volume of use over a sufficiently long period must be shown. Once these criteria are met, and the court is satisfied that section 352 should not be invoked, the evidence should be admissible to prove any of the issues provable by evidence of other accidents.

E. SIMILAR CONDITIONS

The existence of a condition before or after an event at issue may support an inference that the same condition existed at the time of the event.[112] Whether such an inference can be drawn, and the strength of the inference, depends on the time interval between the separate observations of the condition, and on the likelihood of intervening variables affecting the condition.[113] These factors, are often interrelated: the likelihood of intervening variables may increase as time passes. Thus, the probative value is greatest when the condition is observed almost contemporaneously with the event at issue.[114]

The difficulty in establishing any probative value when the evidence is remote in time was illustrated in *Hoover v. City of Fresno*.[115] There the plaintiff was injured by the explosion of a buried fuel tank located near where he was working. The defendant's liability turned on the precise location of the exploded tank. The defendant's evidence concerned the location of a fuel tank discovered five years after the accident. In reversing summary judgment for the defendant based on this evidence, the appellate court pointed to the lack of any showing that the tank discovered was the same as that causing the accident. There was no evidence that the tank's location had not changed as a result of the explosion, or for some other reason.[116]

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[110] *Id.* at 38, 77 Cal. Rptr. at 926. The plaintiff in *Beauchamp* presented a *res ipsa loquitur* case of negligence.

[111] JEFFERSON, *supra* note 38, § 21.8 (1972).

[112] *See* Taylor v. Centennial Bowl, Inc., 65 Cal. 2d 114, 125, 52 Cal. Rptr. 561, 568, 416 P.2d 793, 796 (1966); Blank v. Coffin, 20 Cal. 2d 457, 463, 126 P.2d 868, 871 (1942); Banducci v. Frank T. Hickey, Inc., 93 Cal. App. 2d 658, 663, 209 P.2d 398, 401 (4th Dist. 1949).

[113] WITKIN, *supra* note 2, § 355.

[114] *See, e.g.*, Roddiscraft, Inc. v. Skelton Logging Co., 212 Cal. App. 2d 784, 800, 28 Cal. Rptr. 277, 287 (1st Dist. 1969).

[115] 272 Cal. App. 2d 7, 77 Cal. Rptr. 146 (5th Dist. 1969).

[116] *Id.* at 12, 77 Cal. Rptr. at 150.

Absent this showing, there was no reasonable basis to attach any probative value to the evidence. The court did not preclude the possibility that evidence so temporally remote could have value. It merely required that the interval, and the effect of intervening circumstances, be accounted for.[117]

F. SIMILAR CUSTOM OF OTHERS[118]

When a standard of conduct is at issue, the custom of others in a party's class may be offered as evidence of the appropriate standard.[119] In determining whether such evidence has value as proof of the standard which should be applied to the party's conduct two factors are considered. First, the practice of others must be sufficiently widespread to constitute a "custom." A few instances of like conduct are usually not sufficient.[120] Secondly, the custom and the conduct at issue must occur in similar settings.[121]

Assuming these tests are met, such evidence seems highly probative. That others consistently act in the same way in similar situations certainly goes far toward establishing reasonable conduct. This

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[117] *Accord*, Deward v. Clough, 245 Cal. App. 2d 439, 449, 54 Cal. Rptr. 68, 75 (3d Dist. 1966). *Compare* Slovick v. James I. Barnes Const. Co., 142 Cal. App. 2d 618, 624, 298 P.2d 923, 928 (2d Dist. 1956), where evidence of the faulty condition of a catwalk at the time of an accident was admitted to show the probable condition at the time it was constructed. Although there was a one week interval, the court thought that over so short a period this kind of condition had probably remained unaltered.

[118] Use of evidence of the custom or habit of a *party* is beyond the scope of this article. For a discussion of such use *see* WITKIN, *supra* note 2, §§ 336-39; Comment, 20 CAL. L. REV. 208 (1931-32); Slough, *supra* note 12, 5 KAN. L. REV. 404. Section 1105 of the Code applies generally to all custom or habit evidence. This section is technically unnecessary, but was added to underscore the admissibility of such evidence under the general provisions of the Code. CAL. EVID. CODE § 1105, Law Rev. Comm'n Comment (West 1968); 6 LAW REV. COMM'N, *supra* note 17, at 619.

[119] Evidence of others' custom is typically used as proof of the legal standard of conduct in negligence actions. *See, e.g.*, Tucker v. Lombardo, 47 Cal. 2d 457, 464, 303 P.2d 1041, 1045 (1956); Bouse v. Madonna Const. Co., 201 Cal. App. 2d 26, 29, 19 Cal. Rptr. 823, 825 (2d Dist. 1962). The issue of what standard to measure a party's conduct by may arise, however, in other contexts, prompting use of such evidence. *See, e.g.*, Cucinella v. Western Biscuit Co., 42 Cal. 2d 71, 73, 265 P.2d 513, 515 (1954) (to show the average speed of motorists at a particular location in establishing contributory negligence); Estrada v. Darling Crose Machine Co., 275 Cal. App. 2d 681, 682, 80 Cal. Rptr. 266, 267 (1st Dist. 1969) (to show the industry's custom in fixing salesmen's commissions); Blank v. Palo-Alto Stanford Hosp. Center, 234 Cal. App. 2d 377, 383, 44 Cal. Rptr. 572, 576 (1st Dist. 1965) (to show the practices of other hospitals in permitting outsiders to use their facilities). *See* WITKIN, *supra* note 2, § 358.

[120] Hercules Powder Co. v. Automatic Sprinkler Corp. of America, 151 Cal. App. 2d 387, 400, 311 P.2d 907, 916 (1st Dist. 1957); Burke v. John E. Marshal, Inc., 42 Cal. App. 2d 195, 203, 108 P.2d 738, 743 (2d Dist. 1940).

[121] Hercules Powder Co. v. Automatic Sprinkler Co. of America, 151 Cal. App. 2d 387, 400, 311 P.2d 907, 916 (1st Dist. 1957).

observation has prompted the arguments that evidence of conformance with the custom of others is *per se* proof of due care,[122] and that such evidence should be admitted even when a contrary statutory standard applies.[123] Courts have rejected both arguments. Although highly probative, conformance with others' custom is merely evidence of due care.[124] Juries are free to adopt a different standard.[125] And, in situations where a statute governs, evidence of a contrary custom is simply immaterial; the statute removes the legal standard of care from issue.[126]

G. SIMILAR EXPERIENCES OF OTHERS

Others' experiences may tend to prove some fact related to the party's experience which is at issue. Relatively few appellate cases discuss the use of this kind of evidence. Whether another's experience has probative value depends on the similarity of the situations producing the two experiences. For example, in *Sill Properties v. CMAG*,[127] a lessor refused to comply with a term in the lease obligating him to rebuild the premises if destroyed by fire. The lessee sought damages for this refusal. To prove that little damage was actually suffered, the lessor was allowed to introduce evidence that the lessee's predecessor had operated the same kind of business at a loss.[128] On the other hand, in *Braly v. Midvalley Chemical Co.*,[129] evidence of other farmers' crop failures was excluded as evidence of negligent fertilizer application because there was no proof that the same soil and planting conditions were common to the plaintiff and the other farmers.[130]

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[122] *See, e.g.*, Bouse v. Madonna Const. Co., 201 Cal. App. 2d 26, 29, 19 Cal. Rptr. 823, 825 (2d Dist. 1962).

[123] *See, e.g.*, Hurtel v. Cohn, 5 Cal. 2d 145, 148, 52 P.2d 922, 924 (1936); Transamerica Title Ins. Co. v. Green, 11 Cal. App. 3d 693, 702, 89 Cal. Rptr. 915, 920 (1st Dist. 1970).

[124] Bouse v. Madonna Const. Co., 201 Cal. App. 2d 26, 29, 19 Cal. Rptr. 823, 825 (2d Dist. 1962).

[125] *Id.*

[126] *See* Ortega v. Garner, 218 Cal. App. 2d 823, 826, 32 Cal. Rptr. 632, 634 (5th Dist. 1963), where the appellate court said that evidence of motorcyclists' custom of leaning into sharp curves, thus extending their bodies beyond the center line, should be excluded. The legal standard in this situation is fixed by a statute prohibiting intrusions into the on-coming traffic lane, and evidence of contrary custom is inadmissible. *See* Hayward Tamkin & Co. v. Carpenteria Inv. Co., 265 Cal. App. 2d 617, 624, 71 Cal. Rptr. 462, 466 (2d Dist. 1968); WITKIN, *supra* note 2, § 359.

[127] 219 Cal. App. 2d 42, 53, 33 Cal. Rptr. 155, 161 (5th Dist. 1963).

[128] *Id.* at 54, 33 Cal. Rptr. at 162.

[129] 192 Cal. App. 2d 369, 379, 13 Cal. Rptr. 366, 372 (4th Dist. 1961).

[130] *Id.* at 379, 13 Cal. Rptr. at 373. *See also* Ruiz v. 3-M Co., 15 Cal. App. 3d 462, 467, 93 Cal. Rptr. 270, 274 (2d Dist. 1971).

H. OTHER SALES OF PROPERTY

To show the value of property a party may offer evidence of the price paid for the same or similar property in an earlier sale. The probative value of this evidence depends on how accurately the sale reflects the present value of the property.[131] The factors used to determine probative value vary with the kind of property involved.

The principal factor affecting sales of the *same* real or personal property is time. Conditions influencing the property's value may change over time.[132] The cases indicate, however, that within rather broad limits a prior sale has probative value even if quite remote in time. In *Foreman & Clark Corp. v. Fallon*,[133] for example, the court admitted evidence of prior leases of the same premises made two years earlier. The California Supreme Court said that the interval was a factor in assessing the weight of the evidence, but not its admissibility.[134] This tolerance reflects the realities of commercial life. Changing conditions and their impact on value usually can be objectively shown. By recognizing this the court can admit potentially useful information, while inviting rebuttal evidence tending to prove a change in value.[135]

When evidence of sales of *similar* property is offered, a more restrictive test for probative value is necessary. The accuracy of the sale as a reflection of present value depends not only on time, and possible changes in value, but also on how similar the two pieces of property are.

At one time evidence of sales of similar *real* property was excluded in California, partly on the theory that land is intrinsically unique.[136] However, in *Los Angeles v. Faus*,[137] this rule was abandoned. There the court recognized that the sale of a similar parcel may have probative value if the two parcels are sufficiently similar. The court noted

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[131] *See* discussion in Bagdasarian v. Gragnon, 31 Cal. 2d 744, 755, 192 P.2d 935, 941 (1948); WITKIN, *supra* note 2, §§ 361-63.

[132] Bagdasarian v. Gragnon, 31 Cal. 2d 744, 757, 192 P.2d 935, 943 (1948); Jones v. Kaufman, 264 Cal. App. 2d 857, 866, 71 Cal. Rptr. 10, 16 (1st Dist. 1968).

[133] 3 Cal. 3d 875, 886, 92 Cal. Rptr. 162, 169, 479 P.2d 362, 369 (1971). *See also* L.A. County Flood, etc., Dist. v. McNulty, 59 Cal. 2d 333, 337, 29 Cal. Rptr. 13, 15, 379 P.2d 493, 495 (1963), a condemnation case. Use of other sales evidence in condemnation proceedings is governed by the Code, section 180, *et seq.*, and is reviewed by other commentators. *See* WITKIN, *supra* note 2, § 363.

[134] *See also* Newhart v. Pierce, 254 Cal. App. 2d 783, 790, 62 Cal. Rptr. 553, 558 (1st Dist. 1967).

[135] *See* L.A. County Flood, etc., Dist. v. McNulty, 59 Cal. 2d 333, 337, 29 Cal. Rptr. 13, 15, 379 P.2d 493, 495 (1963).

[136] *See* Bagdasarian v. Gragnon, 31 Cal. 2d 744, 757, 192 P.2d 935, 942 (1948); MCCORMICK (2d ed.), *supra* note 12, § 199, at 471; WITKIN, *supra* note 2, § 363.

[137] 48 Cal. 2d 672, 312 P.2d 680 (1957).

several factors significant to this showing: time, the location of the property, its useability, and any improvements.[138]

With sales of similar *personal* property, the analysis is less complex. The property's similarity may be apparent, or easily ascertained. Consequently, evidence of other sales of ordinary personal property on the open market or privately is readily admitted once its similarity is shown.[139]

The final factor used to assess the probative value of other sales evidence is independent of the kind of property involved. For any such evidence the sale must have been *bona fide.*[140] The accuracy of the sale as a reflection of present value depends on the sale occuring between parties acting freely and with full information.[141]

I. SIMILAR TRANSACTIONS

Whether other transactions may be used to prove the terms of a second transaction is a question that has long troubled courts. When the same parties are involved in both transactions, courts have readily admitted evidence of one transaction to prove facts about the other.[142] When, however, the evidence is of transactions between a party and third persons, courts have been more hesitant.[143] In California the authority on this issue is contradictory. At one time the probative value of such evidence was determined in a manner similar to other similar facts evidence. The statement in *Moody v. Peirano*,[144] is illustrative:

> [S]uch testimony [of warranties in prior sales] would be relevant for the purpose of showing [the defendant's] course of business in selling the wheat, and it would tend to create a probability that he had made the same warranty in his sale to the plaintiff. The number and frequency of the sales in which the warranty had been made, and their proximity in time to the sale made to the plaintiff, would be circumstances addressed to the discretion of the court in determining the relevance of the testimony.[145]

The court in *Lande v. Southern California Freight Lines*,[146] however, stated a more restrictive test:

> It is the general rule that in the absence of a common plan, scheme, habit or usage, contracts between different parties have no probative

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[138] *Id.* at 678, 312 P.2d at 683.
[139] *See* Holman v. Stockton Sav. & Loan Bank, 49 Cal. App. 2d 500, 510, 122 P.2d 120, 125 (3d Dist. 1942) (unlisted shares of stock).
[140] Bagdasarian v. Gragnon, 31 Cal. 2d 744, 755, 192 P.2d 935, 942 (1948).
[141] *See* MCCORMICK (2d ed.), *supra* note 12, § 199, at 472.
[142] *See* MCCORMICK (2d ed.), *supra* note 12, § 198; Slough, *supra* note 12, 6 KAN. L. REV. at 38 n. 529.
[143] *Id.*
[144] 4 Cal. App. 411, 88 P. 380 (1st Dist. 1906).
[145] *Id.* at 419, 88 P. at 382.
[146] 85 Cal. App. 2d 416, 193 P.2d 144 (2d Dist. 1948).

> value in the consideration of other and different contracts even though one of the parties may be common to both.[147]

The court also reasoned that such evidence should be admitted only *against* the common party to the transaction, on the theory that the evidence was "in the nature of admissions against interest."[148]

At least one commentator has criticized the *Lande* rule as without foundation in prior case law.[149] The opinion in *Firlotte v. Jessee*,[150] decided two years earlier than *Lande*, but not cited by the *Lande* court, illustrates this criticism.[151] In *Firlotte* evidence of the defendant's single offer to a third party was admitted to prove a similar term in the contract at issue. The court, relying on *Moody*, found the evidence logically relevant,[152] and construed the admissibility question as turning on the danger that collateral issues would be raised by admission of the evidence. Since avoiding this danger is a matter for the trial court's discretion, admission of the evidence was sustained.[153]

The hesitance to admit evidence of third party dealings originated with the early courts' reluctance to ascribe any probative value to such evidence. This reluctance, expressed in the Latin maxim *res inter alios acta*, barred this kind of evidence completely.[154] As McCormick and others have observed, however, such a rigid exclusionary rule is unjustified when reason and common sense dictate otherwise.[155]

Using third party transactions to prove a seperate transaction has certain difficulties.[156] The involvement of a third person may weaken the inference that the common party acted uniformly on the two occasions. For this inference to be strong enough to warrant admission may require a stronger similarity between the transactions than when both parties are common.[157] Thus, if a party is commercially

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[147] *Id.* at 422, 193 P.2d at 148.

[148] *Id.* at 423, 193 P.2d at 148.

[149] Comment, *Admissibility of Similar Transactions to Prove the Principal Transaction*, 2 U.C.L.A. L. REV. 394 (1954).

[150] 76 Cal. App. 2d 207, 172 P.2d 710 (3d Dist. 1946).

[151] Despite this criticism and the availability of contrary authority, at least two courts have followed the *Lande* rule. *See* McKee v. State, 172 Cal. App. 2d 560, 569, 342 P.2d 951, 958 (3d Dist. 1959); Overman v. Bright, 166 Cal. App. 2d 515, 516, 333 P.2d 247, 248 (2d Dist. 1958).

[152] 76 Cal. App. 2d at 210, 172 P.2d at 711.

[153] *Id.* at 211, 172 P.2d at 712.

[154] This maxim, meaning literally "things done between others," stood for the proposition that third-party dealings have no probative value. *See* Slough, *supra* note 12, 6 KAN. L. REV. at 39. As authority for this rule Professor Slough, and the *Lande* and *Firlotte* courts, mention the case of Hollingham v. Head, 4 C.B. n.s. 388 (1858).

[155] *See* MCCORMICK (2d ed.), *supra* note 12, § 198; Slough, *supra* note 154.

[156] *See* Slough, *supra* note 154.

[157] *Id.*

active, inferring identity in its transactions may be unreasonable unless there is evidence of a pattern of dealings. Under other circumstances, however, as in *Firlotte*, the inference may reasonably arise with evidence of a single offer made to a third person. The question in either situation is a matter of common sense and logic, and should not depend on such an inflexible rule as that announced in *Lande*.

In limiting admissibility of other transactions evidence to that offered against the common party, the *Lande* court raised an objection distinct from logical relevance. The court's theoretical basis for this limitation was an analogy to admissions,[158] which reflects a concern with the possibly self-serving nature of such evidence if offered by the common party.[159] This objection concerns the credibility of the evidence. Generally, credibility is for the jury to weigh, and not an independent basis for exclusion. Doubtful credibility, of course, diminishes the probative value of evidence, and, if severe, may justify exclusion under section 352. But it would seem preferable for the issue to be decided case by case under section 352, rather than mechanistically as under the *Lande* rule.[160]

IV. THE DANGERS OF ADMISSION

Once the court has determined that probative value exists, and has ascertained its extent, it must consider any offsetting dangers. When these dangers substantially outweigh the evidence's probative value, section 352 permits exclusion of the evidence. The Code lists four dangers which may accompany admission of any evidence: undue delay, undue prejudice, confusion of the issues and misleading the jury.[161] Earlier courts attached various labels to the first three of these dangers, referring to the excluded evidence as cumulative, collateral or too remote.[162] Underlying the terms applied are two basic justifications for excluding material and logically relevant evidence: expediting trial and avoiding undue prejudice.[163]

Similar facts evidence threatens delay, and perhaps confusion, whenever offered. Inquiry into collateral matters is always necessary to establish the probative value of similar facts evidence. These in-

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[158] McCormick points out that this analogy is inapt since such evidence is not offered as an assertion. *See* MCCORMICK, *supra* note 12, § 198, at 470 n. 18.

[159] 85 Cal. App. 2d at 423, 193 P.2d at 148.

[160] *See, e.g.*, McKee v. State, 172 Cal. App. 2d 560, 569, 342 P.2d 951, 958 (3d Dist. 1959), where the court excluded the state's evidence of other transactions involving the same subject matter as the transaction at issue. The court cited *Lande* for the rule barring such evidence offered by the common party, despite the fact that the evidence showed a consistent pattern in the state's dealings over a period before and after the transaction in question.

[161] CAL. EVID. CODE § 352 (West 1968).

[162] *See* 6 LAW REV. COMM'N, *supra* note 17, at 640; WITKIN, *supra* note 2, §§ 309-10.

[163] WITKIN, *supra* note 2, §§ 309-10.

herent dangers explain why courts have often excluded probatively weak similar facts evidence without citing any specific dangers.[164] The value of weak inferences is simply too slight to justify the inevitable threat to expeditious trial.

Despite these inherent dangers, some kinds of similar facts evidence are admitted more readily than others. Evidence of the custom of others and of other sales are two examples.[165] Courts seem to admit both kinds of evidence freely once materiality and logical relevance are shown.[166] Evidence of others' custom concerns an issue, the legal standard of conduct, which is difficult to prove and certain to occupy much of the court's time. Similarly, proving the value of property is time consuming and complicated regardless of the kind of evidence used. On the other hand, both kinds of similar facts evidence seem highly probative on their respective issues. The custom of others is a good reflection of reasonable conduct under similar circumstances. Evidence of other sales is an indication of value on which the business world relies daily.

Evidence is unduly prejudicial if it appeals to the jury's emotions, tempting them to judge a party for reasons other than the facts proven.[167] This potential varies among the kinds of similar facts evidence. Evidence of custom or of other sales seldom, if ever, presents the danger of undue prejudice. The threat inheres, however, in evidence of a party's other acts, particularly wrongful acts.[168] Courts have long attempted to strike a balance between the acknowledged value of other acts evidence and its prejudicial tendencies.[169] The Code relieves courts of a portion of this responsibility

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[164] *See, e.g.*, Kopfinger v. Grand Central Public Market, 60 Cal. 2d 852, 860, 37 Cal. Rptr. 65, 70, 389 P.2d 529, 534 (1964); A.F.C., Inc. v. Brockett, 257 Cal. App. 2d 40, 44, 64 Cal. Rptr. 771, 774 (1st Dist. 1967) (also unstated was the danger of prejudice associated with evidence of prior frauds); Hoover v. City of Fresno, 272 Cal. App. 2d 7, 13, 77 Cal. Rptr. 146, 150 (5th Dist. 1969); Larson v. Solbakken, 221 Cal. App. 2d 410, 421, 34 Cal. Rptr. 450, 456 (1st Dist. 1963).

[165] *See* text accompanying note 118 and 131, *supra*.

[166] *See* Alber v. Owens, 66 Cal. 2d 790, 800, 59 Cal. Rptr. 117, 124 (1967) (custom); Bagdasarian v. Gragnon, 31 Cal. 2d 744, 755, 192 P.2d 935, 941 (1948) (other sales); Estrada v. Darling Crose Machine Co., 275 Cal. App. 2d 681, 684, 80 Cal. Rptr. 266, 268 (1st Dist. 1969) (custom); Newhart v. Pierce, 254 Cal. App. 2d 783, 790, 62 Cal. Rptr. 553, 558 (1st Dist. 1967) (other sales); Hargrave v. Acme Tool & Tester Co., 125 Cal. App. 2d 34, 39, 269 P.2d 913, 917 (2d Dist. 1954) (custom); Holman v. Stockton Savings & Loan Bank, 49 Cal. App. 2d 500, 510, 122 P.2d 120, 125 (3d Dist. 1942) (other sales).

[167] *See, e.g.*, Adkins v. Brett, 184 Cal. 252, 259, 193 P. 251, 254 (1920); Campodomico v. State Auto Parks, 10 Cal. App. 3d 803, 808, 89 Cal. Rptr. 270, 273 (2d Dist. 1970); Gee v. Fong Poy, 88 Cal. App. 627, 638, 264 P. 564, 568 (1st Dist. 1928).

[168] *See* CAL. EVID. CODE § 1101, Law Rev. Comm'n Comment (West 1968).

[169] *See, e.g.*, Gee v. Fong Poy, 88 Cal. App. 627, 638, 264 P. 564, 568 (1st Dist. 1928).

by proscribing the use of such evidence solely to prove character.[170] The Code does not, however, lift the entire burden. It remains for courts to apply the sanction of section 352 when other statutory limits on the use of other acts evidence are inadequate protection for a party.[171]

The tolerance of courts for delay, confusion and undue prejudice varies, of course, with the predilections of the judge and the circumstances of the case.[172] An important factor for all similar facts evidence is the availability of other evidence on a disputed issue. When the offered similar facts evidence is cumulative, the trial judge is well within the limits of discretion to exclude it.[173] On the other hand, if the evidence is vital to the proponent's case, courts appear more willing to admit the evidence despite some attendant danger.[174] The admissibility of evidence whose probative value is significant, but which carries equally significant dangers, may well depend on the judge's perception of the proponent's need for the evidence.

V. CONCLUSION

Questions of probative value and any offsetting dangers of admission can be resolved only on a case by case basis. Unlike the earlier courts' attempts to apply relatively rigid rules to similar facts evidence, the Code has implicitly adopted an *ad hoc* approach to such evidence. In adopting this approach the Code creates flexibility in the application of basic principles of admissibility to the exigencies of each case.[175] This article has outlined the elements significant in applying these principles to similar facts evidence. Whether similar facts evidence is admitted in a given case depends on the effective-

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[170] CAL. EVID. CODE § 1101 (West 1968). *See* text accompanying note 42, *supra*.

[171] *See, e.g.*, Marocco v. Ford Motor Co., 5 Cal. App. 3d 84, 94, 86 Cal. Rptr. 526, 532 (1st Dist. 1970).

[172] *See, e.g.*, Braly v. Midvalley Chemical Co., 192 Cal. App. 2d 369, 379, 13 Cal. Rptr. 366, 372 (4th Dist. 1961); Moody v. Peirano, 4 Cal. App. 411, 417, 88 P. 380, 382 (1st Dist. 1906).

[173] *See* Tip Top Food, Inc. v. Lyng, 28 Cal. App. 3d 533, 554, 104 Cal. Rptr. 718, 732 (1st Dist. 1972); Atkins v. Besigier, 16 Cal. App. 3d 414, 425, 94 Cal. Rptr. 49, 56 (4th Dist. 1971); Campodomico v. State Auto Parks, 10 Cal. App. 3d 803, 808, 89 Cal. Rptr. 270, 273 (2d Dist. 1970); Agnew v. Foell, 113 Cal. App. 2d 575, 577, 248 P.2d 758, 760 (2d Dist. 1952). *See* 6 LAW REV. COMM'N, *supra* note 17, at 644.

[174] In Adkins v. Brett, 184 Cal. 252, 259, 193 P. 251, 254 (1920), the court noted that the need of the offering party for the evidence was a factor in the exercise of discretion. *See also* Thor v. Boska, 38 Cal. App. 3d 558, 568, 113 Cal. Rptr. 296, 303 n.8 (2d Dist. 1974); Ruiz v. 3-M Co., 15 Cal. App. 3d 462, 467, 93 Cal. Rptr. 270, 274 (2d Dist. 1971).

[175] *See* Granville v. Parsons, 259 Cal. App. 2d 298, 305, 66 Cal. Rptr. 149, 154 (2d Dist. 1968), where the court says that "Section 352 tells [trial courts] that in the field of relevance *stare decisis* takes a back seat to justice."

ness of counsel in applying basic evidentiary principles, and the wisdom of the bench in exercising its broad discretion.

Darrell Worm