ARTICLE IV—RELEVANCY

Sec. 4-1. Definition of Relevant Evidence

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

COMMENTARY

Section 4-1 embodies the two separate components of relevant evidence recognized at common law: (1) probative value; and (2) materiality. *State* v. *Jeffrey*, 220 Conn. 698, 709, 601 A.2d 993 (1991); *State* v. *Dabkowski*, 199 Conn. 193, 206, 506 A.2d 118 (1986).

Section 4-1 incorporates the requirement of probative value by providing that the proffered evidence must tend "to make the existence of any fact . . . more probable or less probable than it would be without the evidence.'' See, e.g., *State* v. *Prioleau*, 235 Conn. 274, 305, 664 A.2d 793 (1995); *State* v. *Briggs*, 179 Conn. 328, 332, 426 A.2d 298 (1979), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980). Section 4-1's "more probable or less probable than it would be without the evidence'' standard of probative worth is consistent with Connecticut law. See, e.g., *State* v. *Rinaldi*, 220 Conn. 345, 353, 599 A.2d 1 (1991) (''[t]o be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion, *even to a slight degree*'' [emphasis added]); *State* v. *Miller*, 202 Conn. 463, 482, 522 A.2d 249 (1987) (''[e]vidence is not inadmissible because it is not conclusive; it is admissible if it has a tendency to support a fact relevant to the issues *if only in a slight degree*'' [emphasis added]). Thus, it is not necessary that the evidence, by itself, conclusively establish the fact for which it is offered or render the fact more probable than not.

Section 4-1 expressly requires materiality as a condition to relevancy in providing that the factual proposition for which the evidence is offered must be "material to the determination of the proceeding . . . .'' See *State* v. *Marra*, 222 Conn. 506, 521, 610 A.2d 1113 (1992); *State* v. *Corchado*, 188 Conn. 653, 668, 453 A.2d 427 (1982). The materiality of evidence turns upon what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law. See *Williams Ford, Inc.*

v. *Hartford Courant Co.*, 232 Conn. 559, 570, 657 A.2d 212 (1995). [; C. Tait & J. LaPlante Connecticut Evidence (2d Ed. 1988) § 8.1.2, pp. 226–27.]

Sec. 4-2. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the constitution of the United States, the constitution of [this state] the State of Connecticut, the Code, [or] the General Statutes or the common law. Evidence that is not relevant is inadmissible.

COMMENTARY

Section 4-2 recognizes two fundamental common-law principles: (1) all relevant evidence is admissible unless otherwise excluded; e.g., *Delmore* v. *Polinsky*, 132 Conn. 28, 31, 42 A.2d 349 (1945); see *Federated Dept. Stores, Inc.* v. *Board of Tax Review*, 162 Conn. 77, 82–83, 291 A.2d 715 (1971); and (2) irrelevant evidence is inadmissible. *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 569, 657 A.2d 212 (1995); see *State* v. *Mastropetre*, 175 Conn. 512, 521, 400 A.2d 276 (1978).

Reference in Section 4-2 to the federal and state constitutions includes [, by implication,] judicially created remedies designed to preserve constitutional rights, such as the [fourth amendment] exclusionary rule. See *State* v. *Marsala*, 216 Conn. 150, 161, 579 A.2d 58 (1990) (construing exclusionary rule under Connecticut constitution).

Sec. 4-3. Exclusion of Evidence on Grounds of Prejudice, Confusion or Waste of Time

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

COMMENTARY

Section 4-3 establishes a balancing test under which the probative value of proffered evidence is weighed against the harm likely to result from its admission. See, e.g., *State* v. *Rinaldi*, 220 Conn. 345, 356, 599 A.2d 1 (1991); *Farrell* v. *St. Vincent's Hospital*, 203 Conn. 554, 563, 525 A.2d 954 (1987); *State* v. *DeMatteo*, 186 Conn. 696, 702–703, 443 A.2d 915 (1982). The task of striking this balance is relegated to the

court's discretion. E.g., *State* v. *Paulino*, 223 Conn. 461, 477, 613 A.2d 720 (1992).

The discretion of a trial court to exclude relevant evidence on the basis of unfair prejudice is well established. E.g., *State* v. *Higgins*, 201 Conn. 462, 469, 518 A.2d 631 (1986). All evidence adverse to an opposing party is inherently prejudicial because it is damaging to that party's case. *Berry* v. *Loiseau*, 223 Conn. 786, 806, 614 A.2d 414 (1992); *Chouinard* v. *Marjani*, 21 Conn. App. 572, 576, 575 A.2d 238 (1990). For exclusion, however, the prejudice must be "unfair'' in the sense that it "unduly arouse[s] the jury's emotions of prejudice, hostility or sympathy''; *State* v. *Wilson*, 180 Conn. 481, 490, 429 A.2d 931 (1980); or "tends to have some adverse effect upon [the party against whom the evidence is offered] beyond tending to prove the fact or issue that justified its admission into evidence." *State* v. *Graham*, 200 Conn. 9, 12, 509 A.2d 493 (1986), quoting *United States* v. *Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980).

Common law recognized unfair surprise as a factor to be weighed against the probative value of the evidence. See, e.g., *State* v. *Higgins*, supra, 201 Conn. 469; *State* v. *DeMatteo*, supra, 186 Conn. 703. When dangers of unfair surprise are claimed to outweigh probative value, nothing precludes the court from fashioning a remedy other than exclusion, e.g., continuance, when that remedy will adequately cure the harm suffered by the opposing party.

Section 4-3 also recognizes the court's authority to exclude relevant evidence when its probative value is outweighed by factors such as confusion of the issues or misleading the jury; *Farrell* v. *St. Vincent's Hospital*, supra, 203 Conn. 563; see *State* v. *Gaynor*, 182 Conn. 501, 511, 438 A.2d 749 (1980); *State* v. *Sebastian*, 81 Conn. 1, 4, 69 A. 1054 (1908); or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. See, e.g., *State* v. *Parris*, 219 Conn. 283, 293, 592 A.2d 943 (1991); *State* v. *DeMatteo*, supra, 186 Conn. 702–703; *Hydro-Centrifugals, Inc.* v. *Crawford Laundry Co.*, 110 Conn. 49, 54–55, 147 A. 31 (1929).

Sec. 4-4. Character Evidence Not Admissible To Prove Conduct; Exceptions; Methods of Proof; Cross-Examination of a Character Witness

(a) Character evidence generally. Evidence of a trait of character of a person is inadmissible for the purpose of proving that the person acted in conformity with the character trait on a particular occasion, except that the following is admissible:

(1) Character of the accused. Evidence of a specific trait of character of the accused relevant to an element of the crime charged offered by an accused, or by the prosecution to rebut such evidence introduced by the accused.

(2) Character of the victim in a homicide or criminal assault case. Evidence offered by an accused in a homicide or criminal assault case, after laying a foundation that the accused acted in self-defense, of the violent character of the victim to prove that the victim was the aggressor, or by the prosecution to rebut such evidence introduced by the accused.

(3) Character of a witness for truthfulness or untruthfulness. Evidence of the character of a witness for truthfulness or untruthfulness to impeach or support the credibility of the witness.

(4) Character of a person to support a third-party culpability defense.

(b) Methods of proof. In all cases in which evidence of a trait of character of a person is admissible to prove that the person acted in conformity with the character trait, proof may be made by testimony as to reputation or in the form of an opinion. In cases in which the accused in a homicide or criminal assault case may introduce evidence of the violent character of the victim, the victim's character may also be proved by evidence of the victim's conviction of a crime of violence.

(c) Specific instances of conduct on cross-examination of a character witness. A character witness may be asked, in good faith, on cross-examination about specific instances of conduct relevant to the trait of character to which the witness testified to test the basis of the witness' opinion.

COMMENTARY

(a) Character evidence generally.

Subsection (a) adopts the well established principle that evidence of a trait of character generally is inadmissible to show conforming conduct. See, e.g., *Berry* v. *Loiseau*, 223 Conn. 786, 805, 614 A.2d 414 (1992) (civil cases); *State* v. *Moye*, 177 Conn. 487, 500, 418 A.2d 870, vacated on other grounds, 444 U.S. 893, 100 S. Ct. 199, 62 L. Ed. 2d 129 (1979) (criminal cases, character traits of defendant); *State* v. *Miranda*, 176 Conn. 107, 109, 405 A.2d 622 (1978) (criminal cases, character traits of victim).

Subsection (a) enumerates **[**three**]** four exceptions to the general rule. Subdivision (1) restates the rule from cases such as *State* v. *Martin*, 170 Conn. 161, 163, 365 A.2d 104 (1976). The language in subdivision (1), "relevant to an element of the crime charged," reflects a prerequisite to the introduction of character traits evidence recognized at common law. E.g., *State* v. *Blake*, 157 Conn. 99, 103–104, 249 A.2d 232 (1968); *State* v. *Campbell*, 93 Conn. 3, 10, 104 A. 653 (1918).

Subdivision (2) restates the rule announced in *State* v. *Miranda*, supra, 176 Conn. 109–11, and affirmed in its progeny. See, e.g., *State* v. *Smith*, 222 Conn. 1, 17, 608 A.2d 63, cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992); *State* v. *Gooch*, 186 Conn. 17, 21, 438 A.2d 867 (1982). Subdivision (2) limits the admissibility of evidence of the victim's violent character to homicide and assault prosecutions in accordance with Connecticut law. E.g., *State* v. *Carter*, 228 Conn. 412, 422–23, 636 A.2d 821 (1994) (homicide cases), overruled on other grounds by *Label Systems Corp.* v. *Aghamohammadi,* 270 Conn. 291, 313, 852 A.2d 703 (2004), **[**(homicide cases)**]**; *State* v. *Webley*, 17 Conn. App. 200, 206, 551 A.2d 428 (1988) (criminal assault cases); see also *State* v. *Gooch*, supra, 21 (assuming without deciding that evidence of victim's violent character is admissible in assault prosecutions to prove victim was aggressor).

Subdivision (2) does not address the admissibility of evidence of the victim's violent character offered to prove the accused's state of mind, where the accused's knowledge of the victim's violent character would be necessary. See *State* v. *Smith*, supra, 222 Conn. 17; *State* v. *Padula*, 106 Conn. 454, 456–57, 138 A. 456 (1927). The admissibility of such evidence is left to common-law development.

Subdivision (3) authorizes the court to admit evidence of a witness' character for untruthfulness or truthfulness to attack or support that witness' credibility. See, e.g., *State* v. *George*, 194 Conn. 361, 368, 481 A.2d 1068 (1984), cert. denied, 469 U.S. 1191, 105 S. Ct. 963, 83 L. Ed. 2d 968 (1985). Section 6-6 addresses the admissibility of such evidence and the appropriate methods of proof.

Subdivision (4) concerns proof of third party culpability. See *State* v. *Hedge*, 297 Conn. 621, 648, 1 A.3d 1051 (2010) (once third party evidence is allowed, evidence introduced by accused could include evidence of third person's character, past criminal

convictions or other prior bad acts).

Subsection (a) does not preclude the admissibility of character evidence when a person's character is directly in issue as an element to a charge, claim or defense. See, e.g., *Smith* v. *Hall*, 69 Conn. 651, 665, 38 A. 386 (1897). When a person's character or trait of character constitutes an essential element to a charge, claim or defense, Section 4-5 (c) authorizes proof by evidence of specific instances of conduct.

Character traits evidence admissible under subsection (a) nevertheless is subject to the relevancy standards and balancing test set forth in Sections 4-1 and 4-3, respectively. See *State* v. *Martin*, supra, 170 Conn. 165–66.

(b) Methods of proof.

Subsection (b) adopts the recognized methods of proving evidence of a trait of character. E.g., *State* v. *Martin*, supra, 170 Conn. 163; *State* v. *Blake*, supra, 157 Conn. 104–105.

Generally, neither the accused nor the prosecution may prove a character trait by introducing evidence of specific instances of conduct. *State* v. *Gooch*, supra, 186 Conn. 21; *State* v. *Miranda*, supra, 176 Conn. 112. However, subsection (b) must be read in conjunction with subsection (c), which authorizes, during cross-examination of a character witness, the introduction of specific instances of conduct relevant to the character trait to which the witness testified in order to test the basis of the witness' opinion. See *State* v. *McGraw*, 204 Conn. 441, 446–47, 528 A.2d 821 (1987); *State* v. *DeAngelis*, 200 Conn. 224, 236–37, 511 A.2d 310 (1986).

Notwithstanding the general exclusion of evidence of specific instances of conduct to prove a person's trait of character, subsection (b) sets forth one narrow exception recognized in *State* v. *Miranda*, supra, 176 Conn. 113–14, and its progeny. See *State* v. *Webley*, supra, 17 Conn. App. 206 (criminal assault cases). The convictions that form the basis of the evidence introduced under this exception must be convictions for violent acts. *State* v. *Miranda*, supra, 114. Evidence of violent acts not having resulted in conviction is not admissible. *State* v. *Smith*, supra, 222 Conn. 18.

(c) Specific instances of conduct on cross-examination of a character witness.

Subsection (c) is based on the rule set forth in *State* v. *Martin*, supra, 170 Conn. 165, which permits the cross-examiner to ask a character witness about relevant

instances of conduct to explore the basis of the character witness' direct examination testimony. Accord *State* v. *DeAngelis*, supra, 200 Conn. 236–37. The conduct inquired into on cross-examination must relate to the trait that formed the subject of the character witness' testimony on direct. *State* v. *Turcio*, 178 Conn. 116, 127, 422 A.2d 749 (1979), cert. denied, 444 U.S. 1013, 100 S. Ct. 661, 62 L. Ed. 2d 642 (1980); *State* v. *Martin*, supra, 165–66. Moreover, inquiries must be undertaken in good faith.

A court, in its discretion, may limit or proscribe such inquiries where the probative value of the specific instance evidence is outweighed by unfair prejudice or other competing concerns. *State* v. *Turcio*, supra, 178 Conn. 128; see Section 4-3.

Where the term "victim" is used in this section and elsewhere in the Code, the term includes an alleged victim in those circumstances in which a person's status as a victim is subject to proof.

Sec. 4-5. Evidence of Other Crimes, Wrongs or Acts Generally Inadmissible.

(a) General Rule. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b):

(b) When evidence of other sexual misconduct is admissible to prove propensity. Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect.

(c) When evidence of other crimes, wrongs or acts is admissible. Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common

plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony.

(d) Specific instances of conduct when character in issue. In cases in which character or a trait of character of a person in relation to a charge, claim or defense is in issue, proof shall be made by evidence of specific instances of the person's conduct.

COMMENTARY

(a) Evidence of other crimes, wrongs or acts generally inadmissible.

Subsection (a) is consistent with Connecticut common law. E.g., *State* v. *Santiago*, 224 Conn. 325, 338, 618 A.2d 32 (1992); *State* v. *Ibraimov*, 187 Conn. 348, 352, 446 A.2d 332 (1982). Other crimes, wrongs or acts evidence may be admissible for other purposes as specified in subsections (b) and (c), Section 4-4 (a) (4) and Section 4-5. Cf. *State* v. *Hedge*, 297 Conn. 621, 650–52, 1 A.3d 1051 (2010); see Conn. Code Evid. § 4-4 (a) (4), commentary. Although the issue typically arises in the context of a criminal proceeding; see *State* v. *McCarthy*, 179 Conn. 1, 22, 425 A.2d 924 (1979); subsection (a)'s exclusion applies in both criminal and civil cases. See, e.g., *Russell* v. *Dean Witter Reynolds, Inc.*, 200 Conn. 172, 191–92, 510 A.2d 972 (1986).

(b) When evidence of other sexual misconduct is admissible to prove propensity.

Subsection (a) specifically prohibits the use of other crimes, wrongs or acts evidence to prove a person's propensity to engage in the misconduct with which **[**he**]** the defendant has been charged. However, the court may admit evidence of a defendant's uncharged sexual misconduct to prove that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual behavior**[**;**]**. See *State v. DeJesus,* 288 Conn. 418, 953 A.2d 45 (2008)*; State v. Snelgrove,* 288 Conn. 742, 954 A.2d 165 (2008); *State v. Johnson,* 289 Conn. 437, 958 A.2d 713 (2008); see also *State* v. *Smith*, 313 Conn. 325, 337–38, 96 A.3d 1238 (2014); State v. *George A.*, 308 Conn. 274, 63 A.3d 918 (2013) (evidence of uncharged sexual misconduct committed by defendant against minor victim's mother held admissible); but see *State* v. *Gupta*, 297 Conn. 211, 998 A.2d 1085 (2010) (evidence that defendant physician had fondled other patients too dissimilar to be admissible). Although *State* v. *DeJesus* involved a sexual assault charge, later, the Supreme Court, in *State* v. *Snelgrove*, made it clear that the

DeJesus propensity rule is not limited to cases in which the defendant is charged with a sex offense. In *State* v. *Snelgrove*, the court stated: "We conclude that this rationale for the exception to the rule barring propensity evidence applies whenever the evidence establishes that both the prior misconduct and the offense with which the defendant is charged were driven by an aberrant sexual compulsion, regardless of whether the prior misconduct or the conduct at issue resulted in sexual offense charges." **[**288 Conn. 760.**]** *State* v. *Snelgrove*, supra, 760. The admission of the evidence of a defendant's uncharged sexual misconduct to prove that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual behavior should be accompanied by an appropriate cautionary instruction limiting the purpose for which it may properly be used. *State v. DeJesus,* supra**, [**at**]** 474**[**.**]**; *State* v. *George A.*, supra, 294–95.

(c) When evidence of other crimes, wrongs or acts is admissible.

Subsection (a) specifically prohibits the use of other crimes, wrongs or acts evidence to prove a person's bad character or criminal tendencies. Subsection (c) however, authorizes the court, in its discretion, to admit other crimes, wrongs or acts evidence for other purposes, such as to prove:

(1) intent; e.g., *State* v. *Lizzi*, 199 Conn. 462, 468–69, 508 A.2d 16 (1986);

(2) identity; e.g., *State* v. *Pollitt*, 205 Conn. 61, 69, 530 A.2d 155 (1987);

(3) malice; e.g., *State* v. *Barlow*, 177 Conn. 391, 393, 418 A.2d 46 (1979);

(4) motive; e.g., *State* v. *James*, 211 Conn. 555, 578, 560 A.2d 426 (1989);

(5) a common plan or scheme; e.g., *State* v. *Randolph*, 284 Conn. 328, 356, 933 A.2d 1158 (2007); *State* v. *Morowitz*, 200 Conn. 440, 442–44, 512 A.2d 175 (1986);

(6) absence of mistake or accident; e.g., *State* v. *Tucker*, 181 Conn. 406, 415–16, 435 A.2d 986 (1980);

(7) knowledge; e.g., *State* v. *Fredericks*, 149 Conn. 121, 124, 176 A.2d 581 (1961);

(8) a system of criminal activity; e.g., *State* v. *Vessichio*, 197 Conn. 644, 664–65, 500 A.2d 1311 (1985), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986);

(9) an element of the crime charged; e.g., **[***State* v. *Jenkins*, 158 Conn. 149, 152–

53, 256 A.2d 223 (1969)**]** *State* v. *Torres*, 57 Conn. App. 614, 622–23, 749 A.2d 1210, cert. denied, 253 Conn. 927, 754 A.2d 799 (2000); **[**or**]**

(10) to corroborate crucial prosecution testimony; e.g., *State* v. *Mooney*, 218 Conn. 85, 126–27, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991) **[**.**]**; or

(11) third party culpability by defendant's proffer of third party's other crimes, wrongs or acts; *State* v. *Hedge*, supra, 297 Conn. 650–52.

Admissibility of other crimes, wrongs or acts evidence is contingent on satisfying the relevancy standards and balancing test set forth in Sections 4-1 and 4-3, respectively. For other crimes, wrongs or acts evidence to be admissible, the court must determine that the evidence is probative of one or more of the enumerated purposes for which it is offered**[**,**]** and that its probative value outweighs its prejudicial effect. E.g., *State* v. *Figueroa*, 235 Conn. 145, 162, 665 A.2d 63 (1995); *State* v. *Cooper*, 227 Conn. 417, 425–28, 630 A.2d 1043 (1993).

The purposes enumerated in subsection (c) for which other crimes, wrongs or acts evidence may be admitted are intended to be illustrative rather than exhaustive. Neither subsection (a) nor subsection (c) precludes a court from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person's bad character or criminal tendencies, and the probative value of its admission is not outweighed by any of the Section 4-3 balancing factors.

(d) Specific instances of conduct when character in issue.

Subsection (d) finds support in Connecticut case law. See *State* v. *Miranda*, 176 Conn. 107, 112, 365 A.2d 104 (1978); *Norton* v. *Warner*, 9 Conn. 172, 174 (1832).

Sec. 4-6. Habit; Routine Practice

Evidence of the habit of a person or the routine practice of an organization is admissible to prove that the conduct of the person or the organization on a particular occasion was in conformity with the habit or routine practice.

COMMENTARY

While Section 4-4 generally precludes the use of evidence of a trait of character

to prove conforming behavior, Section 4-6 admits evidence of a person's habit or an organization's routine practice to prove conformity therewith on a particular occasion. See, e.g., *Birkhamshaw* v. *Socha*, 156 Conn. App. 453, 471, 115 A.3d 1 (2015); *Caslowitz* v. *Roosevelt Mills, Inc.*, 138 Conn. 121, 125–26, 82 A.2d 808 (1951); *State* v. *Williams*, 90 Conn. 126, 130, 96 A. 370 (1916); *Moffitt* v. *Connecticut Co.*, 86 Conn. 527, 530–31, 86 A. 16 (1913); *State* v. *Hubbard*, 32 Conn. App. 178, 185, 628 A.2d 626, cert. denied, 228 Conn. 902, 634 A.2d 296 (1993). The distinction between habit or routine practice and "trait of character'' is, therefore, dispositive. See *State v. Whitford*, 260 Conn. 610, 641–42, 799 A.2d 1034 (2002) (victim's violent acts inadmissible as habit evidence to establish defendant's claim of self-defense in criminal assault case). "Our case law concerning this type of evidence, although sparse, suggests that habit is not relevant to prove willful or deliberate acts." Id., 642.

"Whereas a trait of character entails a generalized description of one's disposition as to a particular trait, such as honesty, peacefulness or carelessness, habit is a person's regular practice of responding to a particular kind of situation with a specific type of conduct. . . .'' (Citations omitted; internal quotation marks omitted.) *Birkhamshaw* v. *Socha*, supra, 156 Conn. App 472 [. 1 C. McCormick, Evidence (5th Ed. 1999) § 195, p. 686; see also C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 8.6.1, p. 252(''[h]abit . . . refer[s] to a course of conduct that is fixed, invariable, unthinking, and generally pertain[s] to a very specific set of repetitive circumstances''). Habit refers to a "systematic course of conduct ripening into a fixed habit or definite custom." *Moffitt* v. *Connecticut Co.*, supra, 86 Conn. 531]; see *State* v. *Whitford*, supra, 260 Conn. 641. "Habit and custom refer to a course of conduct that is fixed, invariable, and unthinking, and generally pertain to a very specific set of repetitive circumstances." (Internal quotation marks omitted.) *Birkhamshaw* v. *Socha*, supra, 472. "Testimony as to the habit or practice of doing a certain thing in a certain way is evidence of what actually occurred under similar circumstances or conditions. . . . Evidence of *a regular practice* permits an inference that the practice was followed on a given occasion." (Emphasis in original; internal quotation marks omitted). Id. Routine practice of an organization sometimes referred to as a business custom or customary practice is equivalent to a habit of an individual for purposes of the foregoing standards. See *Maynard* v. *Sena*,

158 Conn. App. 509, 518, 125 A.3d 541, cert. denied, 319 Conn. 910, 123 A.3d 436 (2015).

Sec. 4-7. Subsequent Remedial Measures

(a) General rule. Except as provided in subsection (b), evidence of measures taken after an event, which if taken before the event would have made injury or damage less likely to result, is inadmissible to prove negligence or culpable conduct in connection with the event. Evidence of those measures is admissible when offered to prove controverted issues such as ownership, control or feasibility of precautionary measures.

(b) Strict product liability of goods. Where a theory of liability relied on by a party is strict product liability, evidence of such measures taken after an event is admissible.

COMMENTARY

(a) General rule.

Subsection (a) reflects the general rule announced in *Nalley* v. *Hartford Carpet Co.*, 51 Conn. 524, 532 (1884), and its progeny. E.g., *Hall* v. *Burns*, 213 Conn. 446, 456–57, 569 A.2d 10 (1990); *Rokus* v. *Bridgeport*, 191 Conn. 62, 65, 463 A.2d 252 (1983); *Carrington* v. *Bobb*, 121 Conn. 258, 262, 184 A. 591 (1936).

The rationale behind this exclusionary rule is twofold. First, evidence of subsequent remedial measures is of relatively slight probative value on the issue of negligence or culpable conduct at the time of the event. E.g., *Hall* v. *Burns*, supra, 213 Conn. 457–59 & n.3; *Waterbury* v. *Waterbury Traction Co.*, 74 Conn. 152, 169, 50 A. 3 (1901). Second, the rule reflects a social policy of encouraging potential defendants to take corrective measures without fear of having their corrective measures used as evidence against them. *Hall* v. *Burns*, supra, 457; see *Waterbury* v. *Waterbury Traction Co.*, supra, 169.

Evidence of subsequent remedial measures may be admissible for purposes other than proving negligence or culpable conduct. Such evidence is admissible as proof on issues such as ownership, control or feasibility of precautionary measures. See, e.g., *Williams* v. *Milner Hotels Co*., 130 Conn. 507, 509–10, 36 A.2d 20 (1944)

(control); *Quinn* v. *New York, N.H. & H. R. Co.*, 56 Conn. 44, 53–54, 12 A. 97 (1887) (feasibility). These issues must be ‘‘controverted,’’ however, before evidence of subsequent remedial measures is admissible. See *Wright* v. *Coe & Anderson, Inc*., 156 Conn. 145, 155, 239 A.2d 493 (1968); *Haffey* v. *Lemieux*, 154 Conn. 185, 193, 224 A.2d 551 (1966).

The list in subsection (a) of other purposes for which evidence of subsequent remedial measures may be offered is meant to be illustrative rather than exhaustive. See *Rokus* v. *Bridgeport*, supra, 191 Conn. 66. So long as the evidence is not offered to prove negligence or culpable conduct, it may be admitted subject to the court's discretion. See id., 66–67 (post-accident photograph of accident scene at which subsequent remedial measures had been implemented admissible when photograph was offered solely to show configuration and layout of streets and sidewalks to acquaint jury with accident scene); see **[**also**]** *Baldwin* v. *Norwalk*, 96 Conn. 1, 8, 112 A. 660 (1921) (subsequent remedial measures evidence also may be offered for impeachment purposes); see also *Duncan v. Mill Management Co. of Greenwich, Inc.,* 308 Conn. 1, 60 A.3d 222 (2013) (post-accident photograph of subsequent remedial measure improperly admitted for impeachment purposes in absence of balancing probative value against prejudicial effect).

(b) Strict product liability of goods.

Subsection (b) adopts the rule announced in *Sanderson* v. *Steve Snyder Enterprises, Inc*., 196 Conn. 134, 146–148, 491 A.2d 389 (1985). In *Sanderson*, the court stated two reasons for rendering the general exclusionary rule inapplicable in strict product liability cases. First, the court reasoned that the danger of discouraging subsequent corrective measures is not a chief concern in strict product liability cases: ‘‘The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability . . . .’’ Id., 146. **[**, quoting *Ault* v. *International Harvester Co*., 13 Cal. 3d 113, 120, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974).**]**

Second, it reasoned that because the [product's] defectiveness of mass produced goods is at issue in a strict product liability case, rather than the producer/defendant's negligence or culpable conduct, the probative value of the evidence is high. Id., 147. [*Sanderson* v. *Steve Snyder Enterprises, Inc.*, supra, 196 Conn. 147. Specifically, subsequent remedial measure evidence in strict product liability cases is probative of the issue of product defectiveness because it gives the fact finder a safer alternative design against which to compare the previous design. Id. Because the evidence is offered for purposes other than to prove negligence or culpable conduct, the policy for exclusion does not exist. See id.]

[*Sanderson* leaves open the question whether the rule is limited to cases involving remedial measures taken with respect to mass produced products or whether it extends to all products, regardless of production volume. Because of the uncertainty surrounding the issue, subsection (b) takes no position and leaves the issue for common-law development.]

Sec. 4-8. Offers To Compromise

(a) General rule. Evidence of an offer to compromise or settle a disputed claim is inadmissible on the issues of liability and the amount of the claim.

(b) Exceptions. This rule does not require the exclusion of:

(1) Evidence that is offered for another purpose, such as proving bias or prejudice of a witness, refuting a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution, or

(2) statements of fact or admissions of liability made by a party.

COMMENTARY

(a) General rule.

It is well established that evidence of an offer to compromise or settle a disputed claim is inadmissible to prove the validity or invalidity of the claim or its amount. See, e.g., *Jutkowitz* v. *Dept. of Health Services*, 220 Conn. 86, 97, 596 A.2d 374 (1991); *Simone Corp.* v. *Connecticut Light & Power Co.*, 187 Conn. 487, 490, 446 A.2d 1071 (1982); *Evans Products Co.* v. *Clinton Building Supply, Inc.*, 174 Conn. 512, 517, 391 A.2d 157 (1978); *Fowles* v. *Allen*, 64 Conn. 350, 351–52, 30 A. 144 (1894); *Stranahan* v. *East Haddam*, 11 Conn. 507, 514 (1836)[.]; c.f. *PSE Consulting, Inc.* v. *Frank*

Mercede & Sons, Inc., 267 Conn. 279, 332–33, 838 A.2d 135 (2004) (e-mail containing settlement discussion between defendant and third party admissible because Section 4-8 precludes only admission of evidence of settlement between parties at trial, not third parties).

The purpose of the rule is twofold. First, an offer to compromise or settle is of slight probative value on the issues of liability or the amount of the claim since a party, by attempting to settle, merely may be buying peace instead of conceding the merits of the disputed claim. *Stranahan* v. *East Haddam*, supra, 11 Conn. 514. **[**; 29 Am. Jur. 2d 589, Evidence § 508 (1994).**]**

Second, the rule supports the policy of encouraging parties to pursue settlement negotiations by assuring parties that evidence of settlement offers will not be introduced into evidence to prove liability or a lack thereof if a trial ultimately ensues. See *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, 221 Conn. 194, 198, 602 A.2d 1011 (1992); *Miko* v.*Commission on Human Rights & Opportunities*, 220 Conn. 192, 209, 596 A.2d 396 (1991). **[**; C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 11.5.4 (b), p. 336.**]**

(b) Exceptions.

Subdivision (1) recognizes the admissibility of evidence of settlement offers when introduced for some purpose other than to prove or disprove liability or damages. See *State* v. *Milum*, 197 Conn. 602, 613, 500 A.2d 555 (1986) (to show bias and effort to obstruct criminal prosecution). Section 4-8's list of purposes for which such evidence may be introduced is intended to be illustrative rather than exhaustive. See *Lynch* v. *Granby Holdings, Inc.*, 32 Conn. App. 574, 583–84, 630 A.2d 609 (1993), rev'd on other grounds, 230 Conn. 95, 644 A.2d 325 (1994) (evidence of offer to compromise admissible to show that parties attempted to resolve problem concerning placement of sign when trial court instructed jury that evidence did not indicate assumption of liability).

Subdivision (2) preserves the common-law rule permitting admissibility of statements made by a party in the course of settlement negotiations that constitute statements of fact or admissions of liability. See, e.g., *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, supra, 221 Conn. 198; *Hall* v. *Sera*, 112 Conn. 291, 298, 152 A. 148

(1930); *Hartford Bridge Co.* v. *Granger*, 4 Conn. 142, 148 (1822). A statement made in the course of settlement negotiations that contains an admission of fact is admissible ‘‘where the statement was intended to state a fact.’’ (Internal quotation marks omitted.) *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, supra, 198, quoting *Simone Corp.* v. *Connecticut Light & Power Co.*, supra, 187 Conn. 490. However, if the party making the statement merely ‘‘intended to concede a fact hypothetically for the purpose of effecting a compromise’’; *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, supra, 198, quoting *Evans Products Co.* v. *Clinton Building Supply, Inc.*, supra, 174 Conn. 517; the factual admission is inadmissible as an offer to compromise. See *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, supra, 198. If, considering the statement and surrounding circumstances, it is unclear whether the statement was intended to further a compromise or as a factual admission, the statement must be excluded. E.g., id., 199; *Simone Corp.* v. *Connecticut Light & Power Co.*, supra, 490. **[**; C. Tait & J. LaPlante, supra, § 11.5.4 (b), p. 337.**]**

(New) Sec. 4-8A. Pleas, Plea Discussions, and Related Statements

(a) Prohibited Uses. Evidence of the following shall not be admissible in a civil or criminal case against a person who has entered a plea of guilty or nolo contendere in a criminal case or participated in plea negotiations in such case, whether or not a plea has been entered:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in subsections (a) (3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

COMMENTARY

(a) Prohibited Uses.

Section 4-8A is consistent with Connecticut law. See *Lawrence* v. *Kozlowski*, 171 Conn. 705, 711–12 and 711 n.4, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977); see also *State v. Gary*, 211 Conn. 101, 105–107, 558 A.2d 654 (1989); *State v. Ankerman*, 81 Conn. App. 503, 514 n.10, 840 A.2d 1182, cert. denied, 270 Conn. 901, 853 A.2d 520, cert. denied, 543 U.S. 944, 125 S. Ct. 372, 160 L. Ed. 2d 256 (2004); *State v. Anonymous*, 30 Conn. Supp. 181, 182,186, 307 A.2d 785 (1973). This rule is also in accordance with Practice Book § 39-25, which provides for the inadmissibility of rejected pleas of guilty or nolo contendere or pleas which are later withdrawn. See *U.S.* v. *Roberts*, 660 F.3d 149, 157 (2d Cir. 2011), cert. denied, ___U.S.___, 132 S. Ct. 1640, 182 L. Ed. 2d 239 (2012) (discussion of Fed. R. Evid. 410 and waiver of such rights).

Further, the rule is consistent with Fed. R. Evid. 410, with the exception that Section 4-8A (a) (4) is not limited to "plea discussions with an attorney for the prosecuting authority"; Fed. R. Evid. 410 (a) (4); in recognition of the manner in which plea discussions are often conducted in Connecticut where victim advocates, judges and others may also be present during such discussions. Excluding offers to plead guilty or nolo contendere assists in the promotion of disposition of criminal cases by compromise. "Effective criminal law administration . . . would hardly be possible if a large proportion of the charges were not disposed of by such compromises." (Internal quotation marks omitted.) Fed. R. Evid. 410, advisory committee's notes.

In *Kercheval v. United States*, 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 (1927), withdrawn pleas of guilty were held inadmissible in federal prosecutions. The Court stated that "[w]hen the plea was annulled it ceased to be evidence. . . . As a practical matter, [the withdrawn plea] could not be received as evidence without putting the petitioner in a dilemma utterly inconsistent with the determination of the court awarding him a trial." (Citation omitted.) Id., 224.

As the Advisory Committee Notes indicate, rule 410 of the Federal Rules of Evidence "gives effect to the principal traditional characteristic of the nolo plea, i.e. avoiding the admission of guilt which is inherent in pleas of guilty. This position . . . recogniz[es] the inconclusive and compromise nature of judgments based on nolo pleas." Fed. R. Evid. 410, advisory committee's notes.

(b) Exceptions.

The rule permits the use of such statements for the limited purposes of subsequent perjury or false statement prosecutions. Cf. *State* v. *Rodriguez*, 280 N.J. Super. Ct. App. Div. 590, 598, 656 A.2d 53 (1995) (construing state rule of evidence analogous to Fed. R. Evid. 410); *State* v. *Bennett*, 179 W. Va. 464, 469, 370 S.E.2d 120 (1988). Thus, the rule is inapplicable to a statement made in court on the record in the presence of counsel when the statement is offered in a subsequent prosecution of the declarant for perjury or false statement. See Fed. R. Evid. 410, advisory committee's notes.

Sec. 4-9. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is inadmissible to prove liability for the injury.

COMMENTARY

Section 4-9 is consistent with Connecticut law. *Danahy* v. *Cuneo*, 130 Conn. 213, 216, 33 A.2d 132 (1943); see *Prosser* v. *Richman*, 133 Conn. 253, 257, 50 A.2d 85 (1946); *Sokolowski* v. *Medi Mart, Inc.*, 24 Conn. App. 276, 280, 587 A.2d 1056 (1991).

The two considerations upon which Section 4-9 is premised are similar to those underlying Sections 4-7 and 4-8. First, such evidence is of questionable relevancy on the issue of liability because an offer to pay or actual payment of medical or similar expenses may be intended as an "act of mere benevolence" rather than an admission of liability. *Danahy* v. *Cuneo*, supra, 130 Conn. 216; accord *Murphy* v. *Ossola*, 124 Conn. 366, 377, 199 A. 648 (1938). Second, the rule fosters the public policy of encouraging assistance to an injured party by eliminating the possibility that evidence of such assistance could be offered as an admission of liability at trial. See *Danahy* v. *Cuneo*,

supra, 217.

Section 4-9 covers the situation addressed by General Statutes § 52-184b (c), which provides that evidence of any advance payment for medical bills made by a health care provider or by the insurer of such provider is inadmissible on the issue of liability in any action brought against the health care provider for malpractice in connection with the provision of health care or professional services. Section 4-9's exclusion goes further by excluding offers or promises to pay in addition to actual payments.

Section 4-9, by its terms, excludes evidence of a promise or offer to pay or a furnishing of medical, hospital or similar expenses, but not admissions of fact accompanying the promise, offer or payment. Furthermore, nothing in Section 4-9 precludes admissibility when such evidence is offered to prove something other than liability for the injury.

Unlike Section 4-8, Section 4-9 does not expressly require the existence of a disputed claim as to liability or damages when the offer or promise to pay, or actual payment, is made, for the exclusion to apply.

Sec. 4-10. Liability Insurance

(a) General rule. Evidence that a person was or was not insured against liability is inadmissible upon the issue of whether the person acted negligently or otherwise wrongfully.

(b) Exception. This section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

COMMENTARY

(a) General rule.

Section 4-10 is consistent with Connecticut law. See, e.g., *Magnon* v. *Glickman*, 185 Conn. 234, 242, 440 A.2d 909 (1981); *Walker* v. *New Haven Hotel Co.*, 95 Conn. 231, 235, 111 A. 59 (1920); *Nesbitt* v. *Mulligan*, 11 Conn. App. 348, 358–59, 527 A.2d 1195 (1987).

The exclusion of such evidence is premised on two grounds. First, the evidence is of slight probative value on the issue of fault because the fact that a person does or

does not carry liability insurance does not imply that that person is more or less likely to act negligently. *Walker* v. *New Haven Hotel Co.*, supra, 95 Conn. 235–36. Second, Section 4-10, by excluding evidence of a person's liability coverage or lack thereof, prevents the jury from improperly rendering a decision or award based upon the existence or nonexistence of liability coverage rather than upon the merits of the case. See id., 235.

(b) Exception.

In accordance with common law, Section 4-10 permits evidence of liability coverage or the lack thereof to be admitted if offered for a purpose other than to prove negligent or wrongful conduct. *Muraszki* v. *William L. Clifford, Inc.*, 129 Conn. 123, 128, 26 A.2d 578 (1942) (to show agency or employment relationship); *Nesbitt* v. *Mulligan*, supra, 11 Conn. App. 358–60 (to show motive or bias of witness); see *Holbrook* v. *Casazza*, 204 Conn. 336, 355–56, 528 A.2d 774 (1987) (same), cert. denied, 484 U.S. 1006, 108 S. Ct. 699, 98 L. Ed. 2d 651 (1988); see also *Vasquez* v. *Rocco*, 267 Conn. 59, 68, 836 A.2d 1158 (2003) (evidence of insurance admissible to prove "substantial connection" between insurer and witness). The list of purposes for which evidence of insurance coverage may be offered is meant to be illustrative rather than exhaustive.

Sec. 4-11. Admissibility of Evidence of Sexual Conduct

''In any prosecution for sexual assault under sections 53a-70, 53a-70a, and 53a-71 to 53a-73a, inclusive, no evidence of the sexual conduct of the victim may be admissible unless such evidence is (1) offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, pregnancy or injury, or (2) offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct, or (3) any evidence of sexual conduct with the defendant offered by the defendant on the issue of consent by the victim, when consent is raised as a defense by the defendant, or (4) otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights. Such evidence shall be admissible only after **[**a**]** an in camera hearing on a motion to offer such evidence containing an offer of proof. **[**On motion of either party the court may order such hearing held in camera, subject to the provisions of [General Statutes §] 51-164x.**]** If the proceeding is a trial

with a jury, such hearing shall be held in the absence of the jury. If, after a hearing, the court finds that the evidence meets the requirements of this section and that the probative value of the evidence outweighs its prejudicial effect on the victim, the court may grant the motion. The testimony of the defendant during a hearing on a motion to offer evidence under this section may not be used against the defendant during the trial if such motion is denied, except that such testimony may be admissible to impeach the credibility of the defendant if the defendant elects to testify as part of the defense.'' General Statutes (Supp. 2016) § 54-86f (a).

COMMENTARY

Section 4-11 quotes General Statutes § 54-86f (a), which covers the admissibility of evidence of a victim's sexual conduct in prosecutions for sexual assault and includes a procedural framework for admitting such evidence. In 2015, § 54-86f was amended by adding subsections (b) through (d). Those subsections address procedural matters, rather than admissibility and, therefore, are not included in Section 4-11. See General Statutes § 54-86f (b) through (d), as amended by No. 15-207, § 2 of the 2015 Public Acts (concerning, inter alia, sealing transcripts and motions filed in association with hearing under § 54-86f and limiting disclosure by defense of state disclosed evidence).

Although Section 4-11, by its terms, is limited to criminal prosecutions for certain enumerated sexual assault offenses, the Supreme Court has applied the exclusionary principles of § 54-86f to prosecutions for risk of injury to a child brought under General Statutes § 53-21, at least when the prosecution also presents sexual assault charges under one or more of the statutes enumerated in § 54-86f. See *State* v. *Kulmac*, 230 Conn. 43, 54, 644 A.2d 887 (1994). The court reasoned that the policies underlying the rape shield statute were equally applicable when allegations of sexual assault and abuse form the basis of both the risk of injury and sexual assault charges. See id., 53–54. Although the Code **[**takes**]** expresses no position on the issue, Section 4-11 does not preclude application of the rape shield statute's general precepts, as a matter of common law, to other situations in which the policies underlying the rape shield statute apply. See *State* v. *Rolon*, 257 Conn. 156, 183–85, 777 A.2d 604 (2001) (five part test for determining the admissibility of evidence of child's previous sexual abuse to show

alternate source of child's sexual knowledge).