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Evidence of Habitual Carelessness Held Admissable to Establish Plaintiff's Negligence in Products Liability Action

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The decision in *United Bank* is in consonance with the plain language of the Code and in accord with prior case law.[223] It is submitted that in factual settings involving the fraudulent shipment of totally worthless merchandise, such as *United Bank*, the defrauded buyer should be afforded the protection of section 5-114 by having the onus of proving holder in due course status placed upon the party seeking payment. If this burden is not met, the party victimized by fraud in the transaction will be protected. On the other hand, should the holder carry the burden, his claim will be sustained in the face of an accusation of fraud. This is in keeping with the Code's underlying philosophy that as between two innocent parties, the one farthest from the fraud should be protected.[224] As a result of the *United Bank* decision, a practitioner pursuing an action in which he is seeking to claim holder in due course status in connection with article 5 of the Code must be prepared to carry the burden of proving such status.

DEVELOPMENTS IN NEW YORK PRACTICE

Evidence of habitual carelessness held admissible to establish plaintiff's negligence in products liability action.

New York courts uniformly have excluded evidence of habitual carelessness in negligence actions, deeming proof of such behavior

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nity to cross-examine. 41 N.Y.2d at 264, 360 N.E.2d at 951, 392 N.Y.S.2d at 273. The Court of Appeals reversed, holding that where the party serving the interrogatories does not have the opportunity to cross-examine or impeach the party offering the answers, the exception contained in CPLR 3117(a)(3)(ii) is not satisfied and the answers are inadmissible. Noting that the exception to CPLR 3117 requires that "the absence of a witness must not have been procured by the party seeking to offer a deposition or responses to interrogatories," the Court also found the answers inadmissible because the plaintiff banks had refused to produce a prospective witness and objected to a deposition. 41 N.Y.2d at 265, 360 N.E.2d at 952, 392 N.Y.S.2d at 274 (citing CPLR § 3117(a)(3)(ii)). In the Court's opinion, this was tantamount to procuring the absence of a witness from the jurisdiction. 41 N.Y.2d at 265, 360 N.E.2d at 952, 392 N.Y.S.2d at 274.

[223] *See* Banco Espanol de Credito v. State Street Bank & Trust Co., 409 F.2d 711 (1st Cir. 1969); Sztejn v. J. Henry Schroder Banking Corp., 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. N.Y. County 1941). In *Banco Espanol* the buyer and seller failed to agree upon the precise shipping documents required to collect on the letter of credit. Judge Coffin, in applying the Massachusetts Code, had no doubt that once a defense of improper documentation was established, § 5-114(2) and article 3 placed the burden of proof upon the party seeking to claim holder in due course protection.

[224] The *United Bank* Court noted that while contrary authority exists, the better view is that as between two innocent parties, the party who chooses to deal with fraudfeasors should bear the ultimate loss. Thus, fraud on the part of the seller may not be used by a buyer to defeat the rights of a holder in due course. 41 N.Y.2d at 261 n.6, 360 N.E.2d at 949 n.6, 392 N.Y.S.2d at 271 n.6. *See generally* N.Y.U.C.C. § 5-114, commentary at 686-89 (McKinney 1964).

nonprobative of a person's conduct on a particular occasion.[225] Recently, however, the Court of Appeals in *Halloran v. Virginia Chemicals, Inc.*,[226] reexamined the rationale behind this exclusion and concluded that under circumstances in which habitual carelessness is both deliberate and repetitive, it possesses sufficient probative value to warrant admissibility.[227]

Halloran was a products liability action instituted by an automobile mechanic to recover for injuries caused by the explosion of a pressurized can of refrigerant which he had been using to charge an automobile air-conditioning unit.[228] Plaintiff Halloran admitted on direct examination that he had placed the allegedly defective can in a pail of warm tap water to cause the gas to flow more freely, but further testified that he always read and complied with the temperature warnings printed on such cans. On the day of the explosion, according to his testimony, Halloran had checked the temperature of the water with a thermometer to insure that it was well below the prescribed 130 degree safety level.[229] In an attempt to establish contributory negligence, defendant, the packager of the freon refrigerant, sought to prove that it was plaintiff's practice to employ an electrically heated immersion coil to heat the water and thus accelerate the flow of the highly compressed gas. This practice clearly

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[225] *See, e.g.*, Zucker v. Whitridge, 205 N.Y. 50, 98 N.E. 209 (1912); Grenadier v. Surface Transp., 271 App. Div. 460, 66 N.Y.S.2d 130 (1st Dep't 1946). The admission of habit evidence to establish negligence may constitute reversible error in New York. *See, e.g.*, Morgan v. Robinson, 3 App. Div. 2d 216, 217-28, 159 N.Y.S.2d 639, 640-41 (1st Dep't 1957). *See generally* W. RICHARDSON, EVIDENCE § 186 (10th ed. J. Prince 1973).

Other jurisdictions are divided regarding the admissibility of habit evidence in negligence cases. *See, e.g.*, Strauss v. Douglas Aircraft Co., 404 F.2d 1152, 1158 (2d Cir. 1968) (systematic conduct admissible); Cincinnati, N.O. & T.P. Ry. v. Hare, 297 Ky. 5, 10, 178 S.W.2d 835, 838 (1944) (evidence of prior habits of care by deceased at railroad crossing held immaterial); Fissette v. Boston & Me. R.R., 98 N.H. 136, 142-43, 96 A.2d 303, 307 (1953) (decedent's habit of looking both ways at railroad crossing admissible); Glatt v. Feist, 156 N.W.2d 819, 828 (N.D. 1968) (proper to show decedent's habit of crossing outside the crosswalk); Fenton v. Aleshire, 238 Ore. 24, 37, 393 P.2d 217, 223 (1964) (evidence of deceased's habits held inadmissible where contradicted by eyewitness).

It should be noted that New York Courts admit habit evidence in actions not involving negligence. Therefore, evidence concerning an attorney's habit of properly following the execution procedure prescribed for wills has been admitted, *see In re* Will of Kellum, 52 N.Y. 517, 519-20 (1873), and evidence of a district attorney's regular practice of advising defendants of their rights at arraignment also has been admitted, *see* People v. Bombard, 5 App. Div. 2d 923, 172 N.Y.S.2d 1 (3d Dep't) (mem.), *cert. denied*, 358 U.S. 849 (1958).

[226] 41 N.Y.2d 386, 361 N.E.2d 991, 393 N.Y.S.2d 341 (1977), *rev'g* 50 App. Div. 2d 852, 377 N.Y.S.2d 132 (2d Dep't 1975) (mem.).

[227] 41 N.Y.2d at 389, 361 N.E.2d at 994, 393 N.Y.S.2d at 344.

[228] *Id.*

[229] *Id.* at 390, 361 N.E.2d at 994, 393 N.Y.S.2d at 344.

contravened warnings printed on the can.[230] Plaintiff denied ever having used an immersion coil, and defendant thereafter attempted to impeach plaintiff's credibility by offering a witness who allegedly had seen plaintiff use such a coil on prior occasions and had warned him of the dangers involved.[231] Halloran objected to the admission of this testimony, claiming that extrinsic evidence could not be introduced to impeach his testimony on a collateral matter such as habitual conduct.[232] The trial court sustained plaintiff's objection and the appellate division affirmed.[233]

In reversing the judgment of the appellate division, the Court of Appeals held that if it were plaintiff's practice to use an immersion coil during the routine charging of air-conditioning systems, evidence of that fact would be "logically probative" of the cause of the accident and not "collateral."[234] On remittal, if defendant could show such a practice, the habit evidence would be admissible to impeach plaintiff's testimony and as evidence in chief on defendant's direct case.[235] Chief Judge Breitel, writing for a unanimous panel, examined the rationale underlying previous decisions which

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[230] *Id.*

[231] *Id.*

[232] *Id.* at 390, 361 N.E.2d at 994, 393 N.Y.S.2d at 344-45. The fact that habit evidence presents a multiplicity of collateral issues not raised by the pleadings was one of the factors which led to its inadmissibility in New York negligence cases. *See* Zucker v. Whitridge, 205 N.Y. 50, 61, 98 N.E. 209, 212 (1912), (quoting Parsons v. Syracuse, B. & N.Y.R.R., 133 App. Div. 461, 462, 117 N.Y.S. 1058, 1059 (3d Dep't 1909)). In general, a fact is not considered collateral if it is relevant to an issue in the case. People v. Schwartzman, 24 N.Y.2d 241, 245, 247 N.E.2d 642, 644, 299 N.Y.S.2d 817, 821, *cert. denied,* 396 U.S. 846 (1969). If a fact is deemed collateral, a witness's testimony with respect to that fact may not be impeached through the use of extrinsic evidence unless the evidence offered is relevant to some other issue in the case or is independently admissible for impeachment purposes. *See* Potter v. Browne, 197 N.Y. 288, 90 N.E. 812 (1910); W. RICHARDSON, EVIDENCE § 491 (10th ed. J. Prince 1973).

[233] 50 App. Div. 2d at 852, 377 N.Y.S.2d at 132. A majority of the appellate division found the proffered habit evidence nonprobative of the plaintiff's conduct on the day of the accident and stated that its admission would give rise to collateral issues which could result in a trial within a trial. *Id.* at 852, 377 N.Y.S.2d at 134. The two dissenting justices stressed that since Halloran's testimony was uncorroborated, the defendant's evidence should be admissible to impeach Halloran's credibility "upon a material and most significant fact." *Id.* at 853, 377 N.Y.S.2d at 135 (Christ, J., dissenting).

[234] 41 N.Y.2d at 390, 361 N.E.2d at 995, 393 N.Y.S.2d at 345.

[235] *Id.* at 392, 361 N.E.2d at 995, 393 N.Y.S.2d at 346. The Court also noted that evidence concerning plaintiff's practice of recharging air-conditioners, even if considered a collateral matter, was made admissible and material by Halloran's own testimony on direct examination. The Court reasoned that since plaintiff had "opened the door" by testifying in respect to this issue, he could not be permitted to benefit from his own testimony while thwarting the introduction of rebuttal evidence by the defendant. 41 N.Y.2d at 393, 361 N.E.2d at 996-97, 393 N.Y.S.2d at 346-47. *See also* W. RICHARDSON, EVIDENCE § 490 (10th ed. J. Prince 1973).

had precluded the use of evidence concerning "prior instances of carelessness to create an inference of carelessness on a particular occasion."[236] Such a broad exclusionary doctrine, the Court reasoned, was fallacious in that it assumed an individual's habits never could be logically probative of conduct in a specific instance.[237] The Court found the rule particularly unwarranted in the instant case where the task performed by the plaintiff was essentially mechanical in nature, and the evidence at issue concerned proof of a "deliberate and repetitive practice."[238] In reforming the broad inadmissibility doctrine previously adhered to in New York, however, Chief Judge Breitel carefully limited the Court's holding to those cases wherein the evidence offered satisfies two important criteria: it must reflect a "deliberate repetitive practice,"[239] and demonstrate the existence of a habit not subject to deviations based on surrounding circumstances.[240]

It is submitted that the *Halloran* Court, in emphasizing the requirements of deliberate and repetitive action, correctly focused upon the frequency of an actor's conduct and his control of the circumstances. Application of the Court's limited holding, however, may not be a simple task given the obvious difficulties involved in recognizing those habits characterized by the requisite degree of deliberateness.[241] Nevertheless, the decision in *Halloran* appears to

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[236] 41 N.Y.2d at 388-89, 361 N.E.2d at 993, 393 N.Y.S.2d at 343-44.

[237] *Id.* at 389, 361 N.E.2d at 994, 393 N.Y.S.2d at 344. The problems encountered in admitting habit evidence are summarized succinctly in some questions posed by Professor Wigmore:

> Is it possible to believe that careless action can ever be anything more than casual or occasional? If it is, are we not really predicating a careless disposition, rather than a genuine habit, and . . . violating the rule against character [evidence] in civil cases . . .?

1 J. WIGMORE, EVIDENCE § 97 (3d ed. 1940). Professor Wigmore concluded, however, that these doubts are not well founded since habit evidence is more probative and less cumbersome to employ at trial than character evidence. *Id.* Professor McCormick similarly observed that "unquestionably the uniformity of one's response to habit is greater than the consistency with which one's conduct conforms to character or disposition." C. MCCORMICK, LAW OF EVIDENCE § 195 at 463 (2d ed. E. Cleary 1972).

[238] 41 N.Y.2d at 392, 361 N.E.2d at 995-96, 393 N.Y.S.2d at 346.

[239] *Id.* at 392, 361 N.E.2d at 995-96, 393 N.Y.S.2d at 346.

[240] *Id.*

[241] A few observations concerning the admissibility of habit evidence under the *Halloran* rule are possible. Thus, evidence of an individual's habit of jumping on moving trains, *see* Eppendorf v. Brooklyn City & N.R.R., 69 N.Y. 195 (1877) (per curiam), or looking both ways before crossing an intersection, *see* Zucker v. Whitridge, 205 N.Y. 50, 98 N.E. 209 (1912), is likely to remain inadmissible since such habits are not sufficiently deliberate and the actor in those situations lacks the requisite control of the circumstances. 41 N.Y.2d at 392, 361 N.E.2d at 996, 393 N.Y.S.2d at 346. In addition, Dean McLaughlin has submitted that a

be well reasoned and in agreement with the apparent trend in New York toward flexible application of the rules of evidence to meet the very practical problems encountered by both parties in a products liability suit.[242] As long as the habitual conduct evidence admitted involves a repeated particularized reaction by a person in control of a situation, it would seem that the considerations underlying the exclusion of general habit evidence will not be violated by continued application of the *Halloran* rule.

Evidence of subsequent repairs held admissible in products liability action.

New York courts consistently have ruled that proof of postoccurrence repairs is inadmissible to establish a defendant's negligence.[243] The admission of such evidence is deemed contrary to public policy on the ground that it tends to discourage reparative measures.[244] Recently, however, in *Barry v. Manglass,*[245] the Appellate Division, Second Department, held that these policy considerations do not require that evidence of postaccident repairs be excluded in products liability actions.[246]

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person's habit of smoking in bed probably is not sufficiently deliberate to be admissible. McLaughlin, *Evidence,* N.Y.L.J., Mar. 11, 1977, at 2, col. 2.

[242] The evidentiary problems encountered in products liability suits seem to encourage liberalization of the rules of evidence in such litigation. *See, e.g.,* Barry v. Manglass, 55 App. Div. 2d 1, 10, 389 N.Y.S.2d 870, 877 (2d Dep't 1976) (auto recall letters held admissible in a products liability action); Vincent v. Thompson, 50 App. Div. 2d 211, 223-25, 377 N.Y.S.2d 118, 130-31 (2d Dep't 1975) (dicta) (the continued viability of the hearsay rule in products liability cases questioned).

[243] *See, e.g.,* Getty v. Town of Hamlin, 127 N.Y. 636, 638, 27 N.E. 399, 399-400 (1891) (evidence of postaccident repair inadmissible to prove a defendant's negligence); Causa v. Kenny, 156 App. Div. 134, 137-38, 141 N.Y.S. 98, 100 (1st Dep't 1913) (repairs in structure not admissible to establish negligence). *See also* W. RICHARDSON, EVIDENCE § 168 (10th ed. J. Prince 1973).

Although subsequent repair evidence is not admissible to establish negligence, it may be used for other relevant purposes such as establishing who controlled a particular instrumentality. *See id.*

[244] *See* Causa v. Kenny, 156 App. Div. 134, 141 N.Y.S. 98 (1st Dep't 1913); MCCORMICK, EVIDENCE § 275 at 666 (2d ed. 1972). Postoccurrence repair evidence has also been condemned as prejudicial. For example, in Fraumberg v. Schmohl, 190 N.Y.S. 710 (Sup. Ct. App. T. 1st Dep't 1921), plaintiff suffered injuries when she fell on a stairway in a house owned by a defendant. The trial court permitted testimony which established that subsequent to the accident, the owner of the building caused repairs to be made. In overturning this ruling, the appellate court stated: "[S]uch evidence has universally and most frequently been condemned as inadmissible and *highly prejudicial." Id.* at 711. (emphasis added).

[245] 55 App. Div. 2d 1, 389 N.Y.S.2d 870 (2d Dep't 1976).

[246] Strict products liability was recognized as a viable cause of action in New York in Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). There, the Court of Appeals held that "under a doctrine of strict products liability, the manufacturer of a