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HALLORAN v. VIRGINIA CHEMICALS, INC.:
THE ADMISSIBILITY OF HABIT EVIDENCE IN
NEW YORK TO PROVE NEGLIGENCE

Frank and Barbara Halloran brought this personal injury suit against Virginia Chemicals after a can of Freon packaged by the defendant inexplicably exploded. The accident occurred at the Hillcrest Service Station where Frank Halloran, an experienced automobile mechanic,¹ was employed. His duties included servicing and charging automobile air-conditioning units. Halloran had installed a new air-conditioning compressor on a 1967 Chrysler and had begun to charge the unit. The first two cans of the refrigerant, Freon, flowed into the system easily, but the third can did not flow as quickly and required acceleration. Halloran testified that he filled an empty coffee tin with warm tap water, used a thermometer to determine that the water temperature was between 90° and 100° Fahrenheit, and then inserted the third can of Freon into the coffee tin. He testified on direct examination that this technique was his regular practice when using Freon.² When he encountered the same problem with the fourth can of Freon, he dropped it into the water to accelerate its flow. Halloran noticed that the pressure gauge registered a rapid increase in pressure upon the immersion of the fourth can. Realizing that "something was wrong," he attempted to remove the can from the water;³ but before he could reach it, the can exploded and injured Halloran. Since Halloran was alone at the time of the explosion, he was the only eyewitness to the accident.

On cross-examination Halloran denied ever using an immersion coil to heat the water in the coffee tin. The defendant, however, offered a witness who would testify that he had seen Halloran use an immersion coil on several occasions and that he had warned him of the danger of explosion if the Freon overheated. Defendant was trying to impeach plaintiff's credibility as a witness by establishing that plaintiff had lied about never using a heating coil. Defendant was also trying to establish that an act not attributable to the defendant may have caused the explosion. Halloran objected to the admissibility of this testimony on the ground that prior use of an immersion coil was a collateral

1. Frank Halloran has been an automobile mechanic since 1955. According to his testimony, he has serviced "hundreds" of air-conditioning units and used "thousands" of cans of Freon.

2. 41 N.Y.2d 386, 393, 361 N.E.2d 991, 996, 393 N.Y.S.2d 341, 347 (1977).

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

issue, and that extrinsic evidence cannot be used to impeach a witness on collateral matters. The trial judge agreed, sustained Halloran's objection and excluded the testimony. The jury rendered a verdict in plaintiff's favor, and the appellate division, with two justices dissenting, affirmed the trial court's exclusion of testimony concerning Halloran's previous use of an immersion coil.⁴ Both courts had assumed that the evidence would not be admissible on another ground—that of using prior instances of carelessness to create an inference that a person was careless on a particular occasion.⁵ There was no indication that defendant sought to have the evidence admitted on this ground either. Nevertheless, the New York Court of Appeals unanimously reversed, holding that evidence of habit may be used to infer negligence on a particular occasion. The court also held that plaintiff's use of an immersion coil was a material issue in the case. The court of appeals remitted the case for a new trial in which the evidence will be admissible to infer that Halloran used an immersion coil on the day of the accident, but only if the defendant offers sufficient evidence to warrant a finding that Halloran's use of the coil was so regular as to constitute a habit. *Halloran v. Virginia Chemicals, Inc.*, 41 N.Y.2d 386, 361 N.E.2d 991, 393 N.Y.S.2d 341 (1977).

The probative value of habit evidence stems from the likelihood that one who has demonstrated a consistent response under specific circumstances will repeat that response when again faced with those circumstances.⁶ New York courts have generally admitted habit evidence to show that a person acted in accordance with that habit on a specific occasion,⁷ but have not admitted evidence of the habit in a civil case to infer the presence or absence of negligence on a specific

4. 50 A.D.2d 852, 377 N.Y.S.2d 132 (1975).

5. 41 N.Y.2d at 389, 361 N.E.2d at 994, 393 N.Y.S.2d at 344.

6. For a detailed rationale of habit evidence, see generally Lewan, *The Rationale of Habit Evidence*, 16 SYRACUSE L. REV. 39 (1964).

7. *In re Kellum*, 52 N.Y. 517 (1873) (An attorney's testimony of his uniform custom of drafting and executing wills was admissible to prove that he had executed the will in issue according to his habit, even though he had drafted it eleven years earlier and had no recollection of it at the time of trial); *Miller v. Hackley*, 5 Johns. 375 (N.Y. Sup. Ct. 1810) (Notary's testimony that it was his consistent practice to send notice to the endorser of a protested bill on the evening of the day of the protest was sufficient to support the averment of due notice having been given to the defendant in this case. Although not supported by his memory of the specific notice in issue, the notary's testimony as to his habit was admissible to prove that he had posted notice to the defendant). *Contra*, *Dubois v. Baker*, 30 N.Y. 355 (1864) (Evidence of the defendant's habit of carrying an inkstand was not admissible to show that he had one with him on the day the note was drawn.

[H]is habit to have one was not legal evidence that he had one at that time.

It is not as convincing proof of the fact, as evidence of the habit of a usurer to

occasion.⁸ In contrast, if the habit is in one's business or profession⁹ it has generally been admissible, but not if there was an eyewitness to the act.¹⁰

take usury, is that a contract made by him is usurious; and evidence of such a habit has been held to be incompetent.

Id. at 369 (Mullin, J., dissenting)).

8. *Zucker v. Whitridge*, 205 N.Y. 50, 98 N.E. 209 (1912); *Eppendorf v. Brooklyn City & N. R.R.*, 69 N.Y. 195 (1877); *Warner v. New York Cent. R.R.*, 44 N.Y. 465 (1871).

9. *Beakes v. Da Cunha*, 126 N.Y. 293, 27 N.E. 251, 12 N.Y.S. 351 (1891); *In re Kellum*, 52 N.Y. 517 (1873); *People v. Bombard*, 5 A.D.2d 923, 172 N.Y.S.2d 1, *cert. denied*, 358 U.S. 849 (1958); *People v. Bean*, 284 A.D. 922, 134 N.Y.S.2d 483 (1954); *Lisanti v. William F. Kenny Co., Inc.*, 225 A.D. 129, 232 N.Y.S. 103 (1928), *aff'd*, 250 N.Y. 621, 166 N.E. 347 (1929); *People v. Mavis*, 5 Misc. 2d 943, 154 N.Y.S.2d 220 (Sup. Ct. 1956); *Thalhimer v. Brinckerhoff*, 6 Cow. 90 (N.Y. 1826); *Miller v. Hackley*, 5 Johns. 375 (N.Y. Sup. Ct. 1810).

10. *Zucker v. Whitridge*, 205 N.Y. 50, 98 N.E. 209 (1912). Plaintiff's intestate was struck and killed by a trolley car. Plaintiff had the burden of furnishing some evidence that decedent had exercised some care in attempting to cross the track. Four eyewitnesses to the accident testified rather uniformly that plaintiff had not appeared to exercise caution at the crossing. *Id.* at 55-56, 98 N.E. at 210. Plaintiff offered in evidence the testimony of a witness who had known the decedent for eight years, and during that time had often walked with him through the streets of New York. The witness was willing to testify to decedent's habit of carefully crossing railroad tracks: "When we were about to cross railroad tracks, he usually looked to the right and to the left of him and put a restraining hand on my arm before crossing, to make sure that there were no vehicles of any kind coming." *Id.* at 59, 98 N.E. at 211. Defendant objected. The court stated that:

[t]he weight of authority seems to be against admitting evidence of general conduct under proven circumstances to show conduct of the same kind under similar circumstances on a particular occasion, *when there were eye-witnesses of the occurrence*, including the person injured if he survived the accident. We are *not* now called upon to decide whether evidence of the habits of a decedent in crossing railroads is competent when there is no eye-witness of the event.

Id. at 64-65, 98 N.E. at 213 (emphasis added).

Eyewitness testimony is superior to habit evidence because its probative value derives from personal observation of the actual occurrence. In comparison, the probative value of habit evidence derives from mere probability, *i.e.*, that because the act in question has been a predictable or consistent response in given circumstances, it was probably the response in the given circumstances in issue.

Cf. *Gibson v. Casein Mfg. Co.*, 157 A.D. 46, 141 N.Y.S. 887 (1913); *Parsons v. Syracuse B. & N.Y. R.R.*, 205 N.Y. 226, 99 N.E. 331 (1912). Judge Kellogg in *Gibson* interpreted *Parsons* as holding that evidence of habit is also inadmissible where there are no eyewitnesses to the occurrence. However, the court in *Parsons* distinguishes the evidence offered in it from the evidence offered in *Zucker*, describing the *Zucker* evidence as "more direct than (the evidence) here presented." *Id.* at 229, 98 N.E. at 332. In *Zucker*, the evidence of decedent's care in crossing railroad tracks was specific; the friend's testimony went directly to Zucker's habit of carefully crossing tracks, his looking both ways and his placing a restraining hand on the friend's arm. The evidence in *Parsons* was simply testimony in general terms that the decedent was a man of prudent character, well acquainted with the crossing, and that a few moments before the accident was conducting himself and managing his horse in a careful, prudent manner. This evidence is not equivalent to the more specific evidence offered in *Zucker*; it applies only to decedent's general character, and should have been inadmissible as character evidence offered in a civil case when character was not formally in issue.

How the court defines habit will greatly affect admissibility. Dean Wigmore defines habit for evidentiary purposes as conduct "involving an invariable regularity of action."¹¹ Strict adherence to this definition avoids confusing habit for evidentiary purposes with habits in the colloquial sense. Since few human actions are invariably regular, many offers of habit evidence are excluded because they fail to achieve the status of habit, either because of insufficient number or regularity,¹² or the variable nature of the act or the circumstances surrounding it. For example, the propensity to drink heavily, although colloquially known as a "habit," has not been accorded the status of habit for evidentiary purposes; evidence or proof of a person's intemperate behavior on previous occasions has not been admissible to show that the person was intoxicated at the time of the incident in issue.¹³ Nor has evidence of a party's frequent intemperate behavior been admissible to raise the inference that the party was negligent on the occasion in issue.¹⁴ This evidence is excluded because it does not meet the definitional standard of habit—a repeated response to particular cir-

11. 1 WIGMORE, WIGMORE ON EVIDENCE § 92, 520 (3d ed. 1940).

12. *Yarmove v. Robinson*, 3 A.D.2d 864, 161 N.Y.S.2d 815 (1957). On the fact issue of whether appellant Yarmove had been employed as a broker by respondents, testimony by respondent that he had prepared or assisted in the preparation of about 40 contracts involving real estate and corporate transactions, and that, in the transactions in which there was a broker, he had always either named the broker or had a separate letter of agreement with him "fell far short of establishing a habit or custom on respondent Robinson's part with respect to contracts involving brokers. . . ." *Id.* at 865, 161 N.Y.S.2d at 816.

13. *See* *People v. Holliday*, 38 N.Y.2d 763, 343 N.E.2d 770, 381 N.Y.S.2d 53 (1975) (evidence of prior instances of intemperance could not be considered in determining whether defendant had the requisite intent or was in an intoxicated condition at the time of the stabbing); *Del Toro v. Carroll*, 33 A.D.2d 160, 306 N.Y.S.2d 95 (1969) (admission of portions of hospital records showing two prior incidents of intoxication of driver of automobile offered and admitted so that jury could infer that driver was intoxicated at time of accident was prejudicial and a new trial was ordered); *Kowalczyk v. Krum*, 19 A.D.2d 803, 243 N.Y.S.2d 254 (1963) (prejudicial error found in allowing testimony concerning injured plaintiff's arrests and convictions for intoxication in past years offered to show that plaintiff was drunk when he ran into path of the car); *McQuage v. City of New York*, 285 A.D. 249, 136 N.Y.S.2d 111 (1954) (proof of injured plaintiff's intoxication on prior occasions inadmissible to prove he was intoxicated at the time of the accident even though the attending physician had diagnosed delirium tremens some hours after the accident and plaintiff had admitted to having had "a couple of drinks" that day).

14. *Cleghorn v. N.Y. Cent. & H.R.R.R.*, 56 N.Y. 44 (1874); *Warner v. N.Y. Cent. R.R.*, 44 N.Y. 465 (1871); *Senecal v. Thousand Islands Steamboat Co.*, 79 Hun 574, 29 N.Y.S. 884 (Sup. Ct. 1894). However, evidence that an employee who, known to the defendant employer, had intemperate "habits" was held admissible on the issue of defendant's liability in negligence for exemplary damages claimed by an injured plaintiff when the employee's intoxication at the time of the accident had been established in fact by other evidence. *Cleghorn v. N.Y. Cent. & H.R.R.R.*, 56 N.Y. 44 (1874).

cumstances. Furthermore, some habit evidence might unfairly prejudice the jury against the person about whom it is offered. Even if highly probative, the evidence is properly excluded when there is a strong risk that the jury will base its verdict on evidence unrelated to the actual controversy.

It is important to distinguish evidence of habit, which is generally admissible in civil cases, from evidence of character, which is not.¹⁵ Character is more general than habit. It is a composite of personal traits describing one's disposition either generally or in respect to a trait. In contrast, a habit is specific; it is the repeated, automatic or semiautomatic response under given circumstances that is so regular as to be almost predictable. Unless character is in issue,¹⁶ character evidence that attempts to prove how a person acted on a specific occasion is prohibited in civil cases.¹⁷ This prohibition has three goals: to avoid possible prejudice against a party, to eliminate the waste of court time in proving the offers of character evidence, and to prevent distraction of the trier of fact.¹⁸

Activities exercised in the course of one's business or profession are more likely to be characterized as habit than are non-business acts. Although evidence of habit in business is admittedly based on personal acts, the routine elements are emphasized. In part, the probative value of such evidence comes from the frequency of its performance in the course of business. Further, the danger of prejudice against a person is not likely to be created in these cases.¹⁹ Consequently, the protective purpose of the prohibition of character evidence in civil cases (*i.e.*, to protect persons from being judged on their general character rather than on their actual behavior) is inapposite. The probative value of the evidence outweighs the danger of possible prejudice, and thus the evidence of the business habit is admissible.

15. 1 WIGMORE, *supra* note 11, at §92.

16. Defamation and slander are two examples of suits in which the character of one of the parties is directly in issue.

17. Noonan v. Luther, 206 N.Y. 105, 108, 99 N.E. 178, 179 (1912) (error committed by trial judge in his permitting witnesses to testify to plaintiff's good habits, that "she never went out nor drank anything"); Engel v. United Traction Co., 203 N.Y. 321, 96 N.E. 731 (1911) (Negligence of defendant was determinable from the facts causing the accident. An act of defendant motorman subsequent to and dissociated from the facts causing the accident was wholly incompetent and immaterial. Nor did the foolishness or immorality of the act which caused defendant motorman's discharge tend to prove that he negligently caused the accident in issue. The general rule stated was that the character of a party or witness in a civil cause cannot be used as evidence that he did or did not do an act charged.)

18. FED. R. EVID. 404 (Advisory Committee's Notes to Rule 404).

19. See note 9 *supra*.

Unlike the business sphere where habit and character are easily discernible, there is a fine line between habit and character evidence in the non-business sphere. In the non-business sphere, the habit evidence relates to the acts of a person rather than to the routine operation of a business. A major objection to the admission of evidence of any personal habit outside the business sphere is its similarity to character evidence, admission of which would violate the well-established rule excluding character evidence in civil suits.

The degree of care that a person exercises in a particular situation is arguably a function of his character. At the same time, an individual's careful or careless responses to certain circumstances may be sufficiently numerous and invariably regular as to constitute a habit. Based partially on the rule against admitting character evidence in civil cases, New York courts have held consistently that evidence of "habits" in respect to use of care²⁰ is inadmissible in negligence cases to raise the inference that the person exercised his habitual care on a specific occasion.²¹ Further support for the exclusion of habit evidence of one's

20. Habits in respect to use of care include habits involving both carefulness and carelessness.

21. "Habits" is in quotes to indicate that the evidence referred to as habit evidence in at least two of these cases is arguably not evidence of invariable regularity, as habit is defined in this Note. However, the cases are cited in support of the principle that in negligence cases New York courts have been unwilling to admit habit evidence if it is offered to show that the person exercised the same amount of carefulness or carelessness on a specific occasion, since each cited case vocalizes this principle. *See* Zucker v. Whitridge, 205 N.Y. 50, 98 N.E. 209 (1912). Evidence of decedent's careful manner of crossing tracks offered through the testimony of an old friend of decedent's and based upon his and decedent's many walks together was not sufficient evidence to constitute a habit of invariable regularity in terms of decedent's manner of crossing railroad tracks. There was no indication of the number of times decedent and witness crossed tracks together. Second, given the number of potential variables involved in crossing tracks, *e.g.*, weather conditions, speed of train and time of day, it would be difficult to conceive of the possibility of a substantial number of track crossings under similar circumstances necessary to establish an invariably regular pattern of conduct. However, if this evidence were sufficient to constitute habit evidence, the habit it would establish would be decedent's habit of crossing the tracks when he was with his friend, and not be probative of his actions when he was alone. Habit evidence has probative value only when it is carefully circumscribed to repeated conduct under similar circumstances. The friend's presence is sufficient alteration of the circumstances as to render the offered "habitual" conduct of Zucker irrelevant to the facts of the accident in issue. *Eppendorf v. Brooklyn City & N. R.R.*, 69 N.Y. 195 (1877).

The offer of defendant's counsel to show that plaintiff was in the habit of jumping on defendant's cars when in motion was properly excluded. . . . It was not offered to show that the plaintiff was generally careless or reckless, and if it had been, it would have been incompetent. The simple fact that he was in the habit of jumping upon moving cars could have no bearing in this case. The sole question to be determined here, so far as relates to plaintiff's alleged contributory negligence, was the character of the plaintiff's acts under the circumstances existing at the time; and what he may have done at some other time *under other circumstances*, could have no bearing upon that question.

care has been that such evidence greatly complicates and prolongs the trial, and may create prejudice.

If a party is attempting to use a habit as an alibi or defense, there must be an absence of volition in the party's performance of the act.²² The "invariable" requirement of habit evidence is strictly enforced in such cases to prevent a party from establishing a "habit" and then consciously using it defensively.²³ The probative value of habit evidence comes from the invariable nature of the underlying act, and if performance of the act is subject to personal whim, the invariable aspect arguably is eliminated.

In *Halloran v. Virginia Chemicals, Inc.*, the major issue was whether evidence that Frank Halloran had previously used an immersion coil to heat Freon should be admissible to show that on the day of the accident he used the coil. The court of appeals unanimously concluded that proof of a deliberate repetitive practice by one in complete control of the circumstances is highly probative and should be admissible,²⁴ whether or not proffered to establish negligence.²⁵ The party offering the evidence, however, must prove sufficient instances of the conduct to warrant its characterization as a habit or regular usage.²⁶

The court's distinction between evidence of individual prior acts and evidence of habit is determinative. When negligence is at issue,

Id. at 197-98 (emphasis added). Due to the fact that the circumstances involved in one's boarding a moving car are variable and not all within the boarder's control, *e.g.*, the driver of the car applying the brakes and otherwise controlling the speed and direction of the street car, it would be difficult to match circumstances of the accident with circumstances of prior boardings. Even if the boarder had acted in accordance with his habit and even if his habit were a careless one, there are still too many other factors involved in the circumstances to admit this evidence to prove that boarder's negligence either caused or contributed to the accident. On the occasion of the accident the boarder's act of boarding the street car while it was still moving may not have been an imprudent one. *Warner v. N.Y. Cent. R.R.*, 44 N.Y. 465, 472 (1871) (evidence of flagman's former intemperate "habits" not admissible to show that he was negligent on the date of the accident).

22. *Levin v. United States*, 338 F.2d 265 (D.C. Cir. 1964). Testimony of the religious "habits" of the accused, offered as tending to show that he was at home observing the Sabbath and not out obtaining money through larceny by trick, was excluded. "[T]he very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value." *Id.* at 272.

23. *Id.* Naturally the invariable requirement of habit evidence also demands that there be an absence of volition on the part of a person who asserts a habit offensively. The *Levin* case demonstrates the possible misuse of any habit evidence and emphasizes the importance of the invariability standard.

24. 41 N.Y.2d at 392, 361 N.E.2d at 995-96, 393 N.Y.S.2d at 346.

25. *Id.* at 391, 361 N.E.2d at 995, 393 N.Y.S.2d at 345.

26. *Id.* at 392, 361 N.E.2d at 996, 393 N.Y.S.2d at 346.

the court agreed with the case law²⁷ that evidence of isolated, prior acts is not admissible to create an inference that such conduct was repeated at the time in question.²⁸ However, if the acts constitute a "habit," they are admissible. By implicitly adopting Wigmore's definition of habit as conduct of invariable regularity the court disagreed with the looser definition of habit used by previous courts.²⁹ *Zucker v. Whitridge*³⁰ and *Eppendorf v. Brooklyn City & Newton R.R. Co.*³¹ are the two seminal New York cases holding that evidence of habit may not be offered in negligence cases to prove that the person acted in conformity with his habit on a particular occasion. However, Judge Breitel distinguished those cases by pointing out that the plaintiff's activity in each case did not constitute a "habit" in the Wigmore sense. The testimony concerning Zucker's careful approach of the railroad tracks when he was with his friend and the evidence of the plaintiff's habit of jumping on moving street cars in *Eppendorf* are not sufficient to establish habit; "[o]n no view, under traditional analysis, can conduct involving not only oneself but particularly other persons or independently controlled instrumentalities produce a regular usage because of the likely variation of the circumstances in which such conduct will be indulged."³²

The opinion does not cite any cases as examples of conduct that would constitute a habit. Because of the nature of the circumstances, Halloran's practice of using an immersion coil may qualify as habitual, provided there are sufficient prior instances of the conduct. Halloran was in complete control, unlike the plaintiffs in *Zucker* and *Eppendorf*. His practice was deliberate and had been repeated on many occasions in the course of his trade as a mechanic. From his testimony regarding his practice of accelerating slow-flowing Freon, Judge Breitel deduced that Halloran followed a routine in servicing the units and stated that if part of the routine was the use of an immersion coil, the jury should be allowed to consider such evidence.³³

Halloran was the only eyewitness to the accident. As the plaintiff in a strict liability action, Halloran has only to prove that the product

27. *Zucker v. Whitridge*, 205 N.Y. 50, 98 N.E. 209 (1912); *Eppendorf v. Brooklyn City & N. R.R.*, 69 N.Y. 195 (1877); *Warner v. New York Cent. R.R.*, 44 N.Y. 465 (1871); *Grenadier v. Surface Transp. Corp. of N.Y.*, 271 A.D. 460, 66 N.Y.S.2d 130 (1946); *Lefcourt v. Jenkinson*, 258 A.D. 1080, 18 N.Y.S.2d 160 (1940).

28. 41 N.Y.2d at 391, 361 N.E.2d at 995, 393 N.Y.S.2d at 345.

29. *See, e.g.*, *Eppendorf v. Brooklyn City & N. R.R.*, 69 N.Y. 195 (1877).

30. 205 N.Y. 50, 98 N.E. 209 (1912).

31. 69 N.Y. 195 (1877).

32. 41 N.Y.2d at 392, 361 N.E.2d at 996, 393 N.Y.S.2d at 346.

33. *Id.*

did not perform as intended and to exclude all causes of the accident not attributable to the defendant. If he meets this burden, the fact finder may infer that the accident could have occurred only through some defect in the product or its packaging, and the court may hold the defendant liable, even though no defect has been found.³⁴ If the evidence of the immersion coil is presented and the jury finds that Halloran used one the day he was injured, then Halloran will be unable to eliminate all possible causes of the accident not attributable to Virginia Chemicals. Judge Breitel hinted at the significance to plaintiff's case of excluding this evidence: "Of course, had an immersion heating coil been used at the time of the accident the unexplained and thus far unexplainable explosion would have been fully explained."³⁵ The thermometer allegedly used by Halloran was not introduced in evidence or otherwise accounted for at trial. This might have been an unsettling circumstance taken into account by the court of appeals in its decision to admit the defense witness's testimony, if substantiated. The introduction of the thermometer would have supported Halloran's alleged practice of using it to safely heat slow cans of Freon.

There is an alternative ground supporting the admissibility of the testimony. Halloran testified concerning his practice of accelerating Freon on direct examination; the court of appeals determined that this made his practice a material issue of the case³⁶ to which contradictory evidence is permitted even if solely for the purpose of impeaching Halloran's credibility.³⁷ Thus the evidence offered by the defense witness that Halloran used an immersion coil on several prior occasions will be admissible on a second ground, if it is offered to refute plaintiff's stated practice. Therefore, the court need not have considered the question of the admissibility of habit evidence at all.

The court declared that "the statement that evidence of habit or regular usage is never admissible to establish negligence is too broad"³⁸ and then determined when such evidence will be admissible to prove negligence. The threshold requirements (before substantiation becomes an issue) are that the habit involve conduct of invariable regularity, and that the person exercising his or her habit have complete control of the circumstances. Adhering to these stringent requirements

34. *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 662, 345 N.Y.S.2d 461 (1973).

35. 41 N.Y.2d at 390, 361 N.E.2d at 994, 393 N.Y.S.2d at 345.

36. *Id.* at 393, 361 N.E.2d at 996-97, 393 N.Y.S.2d at 346-47.

37. *Id.*

38. *Id.* at 392, 361 N.E.2d at 995, 393 N.Y.S.2d at 345-46.

will preclude confusion of evidence resembling that offered in both *Zucker* and *Eppendorf* with habit evidence.

Narrowing the definition of habit has the effect of increasing the potential admissibility of habit evidence to show negligence on a specific occasion. Before this redefinition, habit evidence was subsumed by prior specific acts of care and was inadmissible if offered to create an inference of negligence on a specific occasion under *Zucker* and *Eppendorf*. Judge Breitel's establishment of the identity of habit evidence, as distinct from evidence of prior specific acts of care, prevents future confusion of the two.

Admitting evidence of habit to infer negligence may be a conscious step by the New York courts in the direction of the Federal Rules of Evidence. Federal Rule 406 on Habit and Routine Practice reads: "Evidence of the habit of a person . . . whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit or routine practice." The Advisory Committee Comment following this rule states that the rule adopts Wigmore's definition of habit as conduct involving invariable regularity.

Admitting habit evidence as indicium of a party's negligence on a specific occasion may reduce the imbalance of the scales presently weighted in favor of plaintiffs in strict product liability actions. A plaintiff situated similarly to *Halloran* will have more difficulty eliminating all possible causes of the accident not attributable to the defendant. Defendants will be likely to probe very diligently into the plaintiff's prior use of their product to discover any improper use potentially admissible as a negligent habit. Even if the use of habit evidence does not become a strong defensive weapon in strict product liability actions, *Halloran*, at least, will prevent plaintiffs from shielding evidence of their negligent habits that may have contributed to the accident.

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