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A review of these Washington cases will reveal that the only class of cases, outlined above, directly passed upon in Washington is the *Dominion* type of case; that there is an indirect holding on the treasury stock situation; that flagrant fraud will not be tolerated; and that the promoter owes a fiduciary duty to the corporation. Unfortunately, by an explicit statement, numerous dicta, and a direct holding in the *Gold Ridge* case, Washington seems lined up with the *Lewisohn* case. But since the cases as a whole contain little elaboration and discussion, especially of the conflicting policies and interests involved, it is hoped that the Washington court will allow this question to be reopened, with the consequent result of a turning over to the more desirable Massachusetts, *Bigelow* view.

MAURICE GERSEHON.

COMPETENCY OF PROOF OF "CUSTOMARY" NEGLIGENCE IN SUPPORT OF CHARGE OF SPECIFIC ACT OF NEGLIGENCE

It is no doubt accurate to say that the bar of this state has heretofore assumed (and justifiably so, in view of prior decisions of the court) that, generally speaking, a specific charge of negligence (e.g. excessive speed) may not be established by proof of prior or similar acts of negligence, nor even by proof of customary or habitual negligence of the same sort. Consequently, the opinion of the Washington Supreme Court in *Sheddy v. Inland Motor Freight*,¹ is of more than passing interest.

The case involved a head-on collision between the automobile in which the plaintiff was riding and a truck owned and operated by the defendant. Negligence was predicated, among other things, upon an allegation of excessive speed. As corroborative of plaintiff's own direct testimony on the point, he offered testimony to the effect that defendant's fleet of trucks was engaged in transporting steel from the railroad at Coulee City to the dam; that the steel was hauled on a tonnage basis, and that the compensation of defendant's drivers depended, in part, at least, upon the mileage which each made; that approximately five loads were transported each day, and that "more or less of a schedule had to be maintained on each trip, in order to obtain efficient results" for the defendant and for its drivers.

Evidence was also offered as to the speed capacity of the truck in question, the time "regularly" required to drive the truck, loaded as it was on this occasion, "from terminus to terminus, or from junction to junction, and the nature of the road as to curves grades and straight-aways."

All of this testimony was admitted by the trial court, and in affirming the judgment, the Washington Supreme Court found the evidence relevant and competent as "creating a background from which the inference could be drawn that, on a straight-away with a down grade, a speed of fifty miles per hour or thereabouts *would be customary*", and that the testimony "tended rather strongly to

¹89 Wash. Dec. 41, 68 P. (2d) 430 (1936).

corroborate the respondent's [plaintiff's] theory that at the time and place of the accident, the truck was travelling at from forty-five to fifty miles per hour."

The significance of the Court's reasoning, however, is considerably weakened by the following statement in the Court's opinion:

"The case of *Chilberg v. Parsons*, 109 Wash. 90, 186 Pac. 272, and others, to the effect that, to support a particular charge of negligence, it is not competent to show that the person charged is habitually careless and negligent, are not in point here. The testimony complained of was properly admitted."

The Court's approval of the admission of circumstantial evidence from which "customary" excessive speed may be inferred certainly justifies the conclusion that *direct* testimony of "customary" excessive speed would be at least equally relevant and competent. Consequently, it is suggested that in this brief discussion we may start with the assumption that the language quoted indicates the admissibility of direct evidence of "customary" excessive speed in proof of a charge of excessive speed on the particular occasion.

The Court's statement that its prior decisions excluding evidence that the party charged was "habitually careless and negligent" are not in point, is hardly understandable. We are justified in assuming that the Court does not intend to draw a significant distinction between "customary" negligence and "habitual" negligence. No doubt in the present situation the terms are, for practical purposes, synonymous. Wigmore apparently regards them as such.² If there is a distinction, it perhaps suggests that "habit" more nearly approaches *invariability* than does "custom". All of which seems to justify the assertion that if prior decisions of the court exclude "habit" evidence in negligence cases, "custom" evidence also should be excluded.

Before attempting a brief analysis of prior local decisions on the point, it is proper to observe that a good bit of this evidence was, no doubt, admissible on a more direct basis. For example, the fact that this particular truck on this trip was behind its schedule, the condition of the roadway, and the amount of the load of the truck, would seem relevant enough as establishing a basis, particularly in connection with the other evidence in the case, for a direct inference to excessive speed at the time and place of the accident.

What we are here concerned with, however, is the court's reasoning in justifying the admission of this evidence as affording the basis of an inference to "customary" excessive speed, and thence to excessive speed in the particular case. As already indicated, this seems to plainly suggest the admissibility, as a general rule, of direct evidence of "customary" excessive speed.

Chronologically, the history of the problem in this jurisdiction is about as follows:

In *Christensen v. Union Trunk Line*,³ in support of a charge of excessive speed of a street car, plaintiff was permitted to show

²1 WIGMORE, EVIDENCE (2d ed., 1923) §§ 92, 375.

³6 Wash. 75, 32 Pac. 1018 (1893).

that the particular motorman "had run his car at a high rate of speed upon other occasions." The court held the evidence should have been excluded as irrelevant, and upon the basis of unfair surprise.

In *Carter v. Seattle*,⁴ defendant's evidence indicated that the plaintiff was drunk at the time of the accident. In support of his denial, plaintiff, in rebuttal, introduced three witnesses who were permitted to testify to his "general reputation and character for sobriety." The Court held the admission of this evidence error on the ground of confusion of issues, and further stated that "The general and well settled rule in negligence cases is that it is not proper for a plaintiff, in order to rebut evidence of particular acts of negligence, to show that he is generally careful, cautious and prudent; nor can it be shown that a party is habitually careless to show a claim of negligence upon a particular occasion."

*Atherton v. Tacoma Railway & Power Company*⁵ meets even more directly the language of the Court in the case under consideration. There, on an issue of excessive speed of a street car, plaintiff offered to show "that the *customary* rate of speed of the said cars on Pacific Avenue was greater than the limit prescribed by the ordinance and a high and dangerous rate." Holding that such testimony has only "slight relevancy to the issue" and tends to divert the attention of the jury to extraneous matters, and citing *Christensen*, the Court approved the exclusion.

*Poler v. Poler*⁶ was a divorce action in which the defendant was "directly and specifically charged" with an act of sodomy, to meet which he offered evidence of his general reputation as a law abiding, moral man. The offered evidence was held properly excluded as "not an issue in the case."

*Kangley v. Rogers*⁷ involved an alleged act of negligence on the part of a notary public. The defendant offered evidence that he "was ordinarily careful in taking acknowledgments." Citing *Carter*, the Court held the exclusion of this evidence was proper, because "the act complained of was a specified act in which no question of probability entered * * *. The overwhelming weight of authorities excludes evidence of character offered for the purpose of raising an inference of conduct in actions charging negligent acts."

*Chilberg v. Parsons*⁸ referred to in the *Sheddy* case, was a negligence case growing out of the collision of two automobiles, the defendant charging in his cross-complaint not only that the plaintiff's son, who was driving the plaintiff's automobile at the time, was negligent in certain specified particulars, but also that the plaintiff himself was negligent "in permitting his car to be driven by his son, who was * * * an incompetent driver and habitually negligent in his operation of such vehicles." In support of this allegation, the trial court admitted testimony of a motorcycle policeman offered by the defendant as to the *customary* speed at

⁴19 Wash. 597, 53 Pac. 1102 (1898).

⁵30 Wash. 395, 71 Pac. 39 (1902).

⁶32 Wash. 400, 73 Pac. 372 (1903).

⁷85 Wash. 250, 147 Pac. 898 (1915).

⁸109 Wash. 90, 186 Pac. 272 (1919).

which the plaintiff's son drove. Notwithstanding the charge of incompetence in the cross-complaint, the Court, citing *Carter* and *Kangley*, held the admission of the evidence error, approving the rule of the prior cases as a salutary one, "tending to promote justice, and that any departure therefrom would invite the trial of cases on collateral issues * * *."

*Rossier v. Payne*⁹ involved a grade crossing accident, and on the issue of contributory negligence, plaintiff offered evidence tending to show that it was the "general custom and habit" of the deceased to stop and look for approaching trains when at the gate, and again to look just before crossing the track. Citing *Christensen*, *Carter*, *Atherton*, *Kangley* and *Chilberg*, the Court held the exclusion of the evidence proper, saying, "It is not competent for a party, in order to rebut evidence of negligence on a particular occasion, to show that he is generally careful, cautious and prudent"; and that it is likewise "not competent, in order to support a claim of negligence on the particular occasion, to show that the party is habitually careless and negligent."¹⁰

*Brooks v. Herd*¹¹ was a malpractice case in which the Court held it error to admit evidence tending to show negligence on the part of the defendant in the treatment of plaintiff's brother for the same disease.

The foregoing decisions are apparently in line with the weight of authority.¹² Plainly, they exclude evidence of "habitual" or "customary" negligence, whether the evidence is direct in character, or consists of proof of prior instances.

It is thus clear enough that they are pertinent to the Court's interpretation of the evidence in the *Sheddy* case, and consequently the action of the Court in brushing them aside without explanation is confusing.

On the other hand, there are at least three decisions of the Washington court which apparently approve the admission of habit evidence in cases of this character.

In *Allard v. Northwestern Contract Company*,¹³ on the question of plaintiff's contributory negligence in failing to get under cover after warning of an impending blast, the trial court excluded evidence that on previous occasions plaintiff had failed to get under

⁹125 Wash. 155, 215 Pac. 366 (1923).

¹⁰Reference to the briefs in this case discloses that plaintiff strongly relied upon the rule obtaining in some jurisdictions [(1922) 16 ILL. L. REV. 628; (1916) 14 MICH. L. REV. 411; (1916) 64 U. OF PA. L. REV. 403], notably in California, admitting evidence of the careful habits of the deceased where there are no eye witnesses, and cited to the court particularly *Wallis v. Southern Pacific Co.*, 184 Cal. 662, 195 Pac. 408 (1921). The opinion in *Rossier v. Payne* did not take note of this contention. While approving this rule, the *Wallis* case went much further, holding the habit evidence admissible, regardless of whether there were eye witnesses. This broad language has apparently since been repudiated [*Starr v. Los Angeles R. Co.*, 187 Cal. 270, 201 Pac. 599 (1921)], although the rule still obtains in California that the evidence is admissible where there are no eye witnesses.

¹¹144 Wash. 173, 257 Pac. 238 (1927).

¹²WIGMORE, EVIDENCE, 1934 SUPP., § 97; Annotations, (1921) 15 A. L. R. 125, (1922) 18 A. L. R. 1106.

¹³64 Wash. 14, 116 Pac. 457 (1911).

cover when blasts were fired, after warning, and that plaintiff had grown careless in this respect. The exclusion was held erroneous on appeal, the court saying that, "If the respondent [plaintiff] had, on different occasions theretofore, remained in an exposed position while the blast was being fired, after having received warning thereof, it afforded some ground for belief that such might have been his conduct on this occasion." The Court attempted to distinguish *Christensen* and *Atherton*, but the basis of the distinction, if there is any, is not substantial.¹⁴

In *Jaquith v. Worden*,¹⁵ one of the issues was whether or not defendant Murphy personally left his automobile in the street in an unlighted condition. Evidence was admitted tending to show that Murphy habitually stood his unlighted car in the street in front of his house after dark. Without reference to prior local decisions, the Court held the testimony was admissible "as a circumstance tending to prove that he personally left the car there on the night in question."¹⁶

In *Bown v. Tacoma*,¹⁷ upon an issue as to how the plaintiff got upon the rear bumper of a truck (plaintiff claimed he was struck by the backing truck and thrown on the bumper, while the defendant claimed that the plaintiff voluntarily climbed on the bumper), evidence was admitted in behalf of the defendant as to the boy's habit of riding on the bumpers of automobiles in the alley where the accident happened, and in adjoining streets. The Court held it was not error to admit the testimony, citing *Allard* (but no other case), and saying that, "On the issue of contributory negligence, while the boy's actions were not to be measured by the same rule that would be applied to adults, it was proper to show his habit in relation to cars, to be weighed by the jury under proper instructions."

It is suggested that it is impossible to reconcile the *Allard*, *Jaquith* and *Bown* cases with those previously referred to. And now the *Sheddy* case adds to the confusion.

There is no doubt something to be said for the admission of habit evidence in cases of this sort. Generally, says Wigmore, there can be no doubt "of the probative value of a person's habit or custom, as showing the doing on a specific occasion of an act which is the subject of the habit or custom. Every day's experience and reasoning makes it clear enough."¹⁸

And with particular reference to negligence cases, it is his view that, theoretically, "There is no reason why such a habit should not be used as evidential—either a habit of negligent action, or a habit of careful action."¹⁹ It is consequently his view that the doubts expressed in the precedents excluding habit evi-

¹⁴In *Rossier v. Payne*, *supra*, plaintiff cited and strongly relied upon the *Allard* case, but it was not referred to in the court's opinion.

¹⁵73 Wash. 349, 132 Pac. 33 (1913).

¹⁶It should be noted, however, that the evidence was held admissible upon another and somewhat more tenable ground.

¹⁷175 Wash. 414, 27 P. (2d) 711 (1933).

¹⁸1 WIGMORE, EVIDENCE (2d ed., 1923) § 92.

¹⁹*Id.* § 97.

dence are not well founded, and that such evidence often has substantial probative value.²⁰

Of course, if we mean by "habit" an *invariable* course of conduct,²¹ it is apparent that habit evidence possesses substantial probative value—certainly, so understood, it is more than "slightly" relevant, or, to apply Wigmore's test, it possesses "something more than a minimum of probative value."²²

But, as Wigmore observes, "In the ordinary affairs of life, a habit or custom seldom has such an invariable regularity. Hence, it is easy to see why, in a given instance, something that may be loosely called habit or custom should be rejected, because it may not, in fact, have sufficient regularity to make it probable that it would be carried out in every instance, or in most instances."²³

Moreover, as suggested in some of the cases, "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 then are we not violating the rule against character in civil cases in employing such evidence?"²⁴

In any event, conceding the relevancy, that is to say, the substantial probative value of evidence of this sort, considerations of undue prejudice, unfair surprise, and confusion of issues unquestionably represent potent and persuasive objections to departure from the rule of the prior excluding decisions, at least in so far as such a relaxation would operate to admit proof of prior specific instances.²⁵

The opinion in the *Sheddy* case rather indicates that the Court is flirting with the idea of relaxing the rule of most of the earlier decisions. Yet, in the absence of a more extended reference to these prior decisions, and a bolder statement of the Court's purpose, we suspect that this last pronouncement had better be taken *cum grano salis*.

JUDSON F. FALKNER.*

²⁰*Ibid.*

²¹Such is the "fixed method and systematic operation of the Government's Postal Service", which has "been long conceded to be evidence of the due delivery to the addressee of mail matter placed for that purpose in the custody of the authorities." The same principle has been recognized in admitting the usual course of business of a private person or commercial house to evidence the sending of a notice or the mailing of a letter. 1 WIGMORE, EVIDENCE (2d. ed., 1923) § 95.

²²1 WIGMORE, EVIDENCE (2d ed., 1923) § 28.

²³*Id.*, 92. Suppose plaintiff was injured in an accident which occurred on Saturday night, and defendant is contending that plaintiff was drunk at the time of the accident. Evidence offered by the defendant that plaintiff is an "habitual" drunkard should probably be excluded under Wigmore's reasoning, because here we are using the word "habit" somewhat loosely, that is to say, even an "habitual" drunkard is sober a good part of the time. But suppose the offered evidence showed that the plaintiff, over a period of years, habitually, that is *invariably*, got drunk on Saturday nights. Such evidence would have substantial probative value.

²⁴1 WIGMORE, EVIDENCE (2d ed., 1923) § 97.

²⁵*Id.*, § 199.

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