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Evidence--Admissibility of Specific Acts of Negligence

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EVIDENCE—ADMISSIBILITY OF SPECIFIC ACTS OF NEGLIGENCE

Generally evidence of the character of a party is not admissible in civil cases unless character has been placed in issue.[1] In actions which are brought against employers on the ground that they have retained in their service an incompetent person and have knowledge or notice of such incompetence, the character of such person becomes a fact in issue and may be shown by proper evidence. It must be noted that in such actions the evidence of character is concerned only with the competence of an employee as affecting the liability of his employer; those cases are not to be confused with situations in which the character of a person is offered to show that because he was negligent or prudent on previous occasions, he was probably negligent or prudent in *this* case. Evidence of character which is used for the latter purpose is generally held to be not admissible.[2]

After the negligence of the employee or other person has been shown to be the proximate cause of the act in the case at hand, the following question arises: In actions involving the general incompetence of an employee or other person, may specific acts of prior negligence be shown to prove (1) the fact of incompetence, and (2) knowledge of the master of such incompetence?

Evidence of specific acts to prove incompetence will be considered first. One of the leading cases which involves the question is *Guedon* v. *Rooney*.[4] Briefly the facts were these: an automobile owned by the defendant, *R*, and driven by *W*, crashed into an automobile in which the plaintiff was a passenger. In an action by the plaintiff against *R*, the trial court excluded evidence of other specific acts of recklessness on the part of the driver, but admitted evidence of the general reputation of *W* The Supreme Court of Oregon indicated that the evidence of specific acts should have been admitted, and said:

> "In cases in which it is sought to hold the owner of an automobile liable on the theory that his negligence in lending a car to an incompetent driver was in fact the cause of injury to the plaintiff, the better rule is to require such incompetence of the driver to be shown by specific acts of carelessness and recklessness committed by him."[5]

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[1] Adams v. Elseffer, 132 Mich. 100, 92 N. W 772 (1902) I WIGMORE, EVIDENCE (3d ed. 1940) sec. 64.

I WIGMORE, EVIDENCE (3d ed. 1940) sec. 80.

[3] I WIGMORE, EVIDENCE (3d ed. 1940) sec. 199, Kentucky follows the general rule. *See* Lexington Ry Co. v Herring, 29 Ky. Law Rep. 794, 796-797, 96 S. W 558, 560 (1906).

[4] 160 Ore. 621, 87 P 2d 209 (1939).

[5] 160 Ore, 621 at ——— 87 P 2d at 218.

It was also pointed out that the lower court committed error in admitting testimony as to the general reputation of the driver without laying a sufficient foundation by proof of specific acts. The court stated that evidence of prior acts was the better way to show the fact of incompetence, but from its examination of the cases an even stronger conclusion, such as that which follows, could also be applicable:

> "In those cases the great weight of authority is to the effect that proof of such incompetency or recklessness must be made by evidence of specific acts of negligence on the part of the servant claimed to be incompetent, and not by the general reputation of such servant for recklessness or incompetency"[6]

The statements in *Guedon* v. *Rooney* which are concerned with the proof of incompetence of an employee by means of specific acts are supported by a decision which the court cited, *Young* v. *Fresno Flume & Irrigation Co.*[7] In that case it was held that in an action for damages for the death of an employee which was caused by the negligence of a fellow servant, evidence of the reputation of the fellow servant as to carelessness was admissible only to impute to the employer knowledge of a fact which was generally known, and was not admissible until there had been proof of prior negligent acts which would constitute a sufficient foundation for a finding of the fact of incompetence of the fellow servant.[8]

Other cases may be helpful, not only to show that specific acts of incompetence have been admitted by the courts, but to illustrate the variety of situations which may arise. Evidence of the following acts has been admitted: particular acts of negligence on the part of the conductor of a train;[9] prior negligent acts of a street car motor-

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[6] 160 Ore. 621 at ——— 87 P 2d at 217.

[7] 24 Calif. App. 286, 141 Pac. 29 (1914)

[8] It will be noted that a fellow servant was involved in the *Young* case and that a third person, who was not an employee, sued in Guedon v. Rooney. In cases which involve suits by a fellow servant against the employer on the ground that the latter has knowingly retained in his service an incompetent employee, the fellow servant rule (which would bar recovery) does not apply. Coughlin v. Arms Textile Co., 94 N. H. 57, 46 A. 2d 130 (1946). The reason is that the basis of the action in cases such as Young v Fresno Flume & Irrigation Co. is not *respondeat superior* but is the negligence of the employer in retaining an incompetent servant when the employer has noticed that the servant is incompetent. However, the plaintiff has been allowed to plead both theories in the same action. Department of Water and Power of Los Angeles v Anderson, 95 F 2d 577 (C. C. A. 9th, 1938) *see* Clark v Stewart, 126 Ohio St. 263, 185 N. E. 71, 73 (1933).

[9] The Pittsburgh, Fort Wayne and Chicago Ry. Co. v Ruby, 38 Ind. 294, 10 Am. Rep. 111 (1871). (This case contains one of the best discussions of the problem that is to be found)

man,[10] the previous bursting of two similar pulleys which were made by the same employee;[11] the prior practice of a mail agent in throwing a mail bag;[12] previous collisions by the defendant's son with two buggies;[13] testimony that the defendant's son had four automobile accidents in the preceding two years;[14] and prior negligent acts of the driver of an automobile (in an action against the owner) [15]

From an examination of these cases it may be said that in actions against an employer or other person, the great weight of authority is to the effect that evidence of previous specific acts is admissible to show that an employee is incompetent.[16] One of the statements in *Guedon* v. *Rooney* would seem to indicate that evidence of specific acts is the only way in which incompetence may be shown, but other cases have allowed both specific acts and general reputation to be shown.[17] A decided minority of courts have excluded evidence of specific acts and have held that in actions against an employer on the ground that he employed or retained an incompetent employee, character for incompetence must be proved by evidence of general reputation alone.[18]

The second question which affects the liability of the employer is whether he has knowledge, actual or constructive, of the incompetence of the employee. Although *Guedon* v. *Rooney* indicated that evidence of specific acts was the sole or primary means of proving the fact of incompetence, the court established the following rule for the proof of knowledge on the part of the employer: "The car owner's knowledge of the driver's incompetence may be shown either by evidence that he in fact knew of such acts or by evidence tending to show that the driver's incompetence was generally known in the community"[19] it is uniformly held that the knowledge of the employer may be shown by evidence of the general reputation of the

[10] Robbins v. Lewiston, Augusta and Waterville St. Ry., 107 Me. 42, 77 Atl. 537 (1910)

[11] Wabash Screen Door Co. v Black, 126 Fed. 721 (C. C. A. 6th, 1903).

[12] Shaw v Chicago & G. T. Ry Co., 123 Mich., 629, 82 N. W 618 (1900).

[13] Linville v Nissen, 162 N. C. 95, 77 S. E. 1096 (1913).

[14] Laney v Blackburn, 25 Ala. App. 248, 144 So. 126 (1932).

[15] *See* Clark v Stewart, 126 Ohio St. 263, 185 N. E. 71, 74 (1933).

[16] Pittsburgh Railways Co. v Thomas, 174 Fed. 591, 595 (C. C. A. 3d, 1909) The Pittsburgh, Fort Wayne and Chicago Ry. Co. v Ruby, 38 Ind. 294, 318, 10 Am. Rep. 111, 117 (1871) Robbins v. Lewiston, Augusta and Waterville St. Ry., 107 Me. 42, 77 Atl. 537 (1910), Park v. New York Central & H. R. R. Co., 155 N. Y. 215, 49 N. E. 674 (1898).

[17] Metropolitan West Side Elev Ry Co. v. Fortin, 203 Ill. 454, 67 N. E. 977 (1903) Consolidated Coal Co. of St. Louis v. Seniger, 179 Ill. 370, 53 N. E. 733 (1899).

[18] Hatt v. Nay 144 Mass. 186, 10 N. E. 807 (1887), Frazier v. Pennsylvania R. R. Co., 38 Pa. St. 104, 80 Am. Dec. 467 (1860).

[19] 160 Ore. 621, 87 P 2d 209, 218 (1939).

employee,[20] and the general rule is that specific acts are admissible on this point.[21]

The requirement of knowledge of the employer is satisfied if he actually knows, or should know through the exercise of reasonable diligence, that the employee is incompetent.[22] For example, in *Louisville & Nashville R. R. Co.* v. *Wyatt's Adm'r.*,[23] it was held that the defendant company was liable for the death of a conductor which was caused by an incompetent train crew when the conductor had notified the yardmaster of the unfitness of the crew. And in *Owensboro Undertaking & Livery Ass'n.* v. *Henderson*,[24] in which a pedestrian sued the owner of a garage whose officials had rented an automobile to one Wimsatt, the Kentucky Court of Appeals said:

> "Therefore, if as a matter of fact Wimsatt was intoxicated at the time of the hiring, and his condition was apparent to a person of ordinary prudence, appellant's officials will be held to have had knowledge thereof, even though they were assured by Wimsatt that he had not been drinking."[25]

In other cases, however, in which the officials of the defendant do not have an opportunity to observe the incompetent person as they did in the *Henderson* case, the mere fact of incompetence is not sufficient to charge the defendant with notice. Professor Wigmore makes the following exception: "It would seem that where the act is so flagrant that it would ordinarily be observed by or reported to the employee's superior officer, no other evidence would be required as a condition precedent to admission."[26] If the act or acts are not flagrant, evidence other than that of incompetence alone should be considered in determining the question of whether the employer or other person had, or should have had, knowledge of the incompetence of the employee or person whose act caused the injury.[27]

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[20] II WIGMORE, EVIDENCE (3d ed. 1940) sec 249.

[21] Robbins v. Lewiston, Augusta and Waterville St. Ry., 107 Me. 42, 77 Atl. 537 (1910), Grube v. Missouri Pacific Railway Co., 98 Mo. 330, 11 S. W 736 (1889), II WIGMORE, EVIDENCE (3d ed. 1940) sec. 250.

[22] First National Bank of Montgomery v. Chandler, 144 Ala. 286, 39 So. 822 (1905), *see* Mulhern v. Lehigh Val. Coal Co., 28 Atl. 1087, 1088 (Pa. 1894)

[23] 29 Ky Law. Rep. 427, 93 S.W 601 (1906).

[24] 273 Ky. 112, 115 S. W 2d 563 (1938)

[25] *Id.* at 114, 115 S. W 2d at 564.

[26] II WIGMORE, EVIDENCE (3d ed. 1940) sec. 250.

[27] *Ibid.* A case which is to the same effect as Roblin v Kansas, St. J. and C. B. R. Co., 119 Mo. 476, 24 S. W 1011, 1013 (1894).

If knowledge of the employer or parent cannot be shown, the fact that the servant or child was in fact incompetent will not render the defendant employer (or other person) liable. Sanders v. Lakes, 270 Ky. 98, 109 S. W 2d 36 (1937), Brady v. B. & B. Ice Co., 242 Ky. 138, 45 S. W 2d 1051 (1931).

It may be asked, is one act of which the employer has notice a sufficient ground to render him negligent for retaining an incompetent employee? In *Pittsburgh Railways Co.* v. *Thomas,* it was said:

> "A man perfectly competent in all respects for the duty he undertakes to perform, may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence. It must be either shown that the so-called negligent acts were the result of incompetence, or were of such a character and so constantly committed as to constitute a habit of negligence, rendering the servant unfit to be retained in his position, for unfitness, as well as incompetency is a disqualification for employment."[28]

And in another case, *Baulec* v. *New York & Harlem R. R. Co.,* this language is found: "Character is formed and qualities exhibited by a series of acts, and not by a single act."[29] However, in *Smith* v. *Chicago, P & St. L. Ry. Co.,* the court said:

> "The mere happening of an accident would not ordinarily raise a presumption of incompetency but the conduct of a person on a single occasion may be entirely sufficient to demonstrate his unfitness, and, after such an occurrence, to charge the employer with a failure of duty in keeping him in the service."[30]

Thus it would seem that one or even more acts of the employee which are known to the employer do not necessarily make the latter liable, but a malicious act or a flagrant breach of duty may be sufficient to create liability No hard and fast rule can be established.

In conclusion it is submitted that in certain situations above discussed and particularly in actions which are based upon the negligence of a defendant who knowingly employs or retains in his service an incompetent person wnose acts have caused the injury in question, prior specific acts of negligence may be shown to prove (1) the fact of the incompetence of the employee, and (2) if such acts are flagrant, the knowledge of the employer of such incompetence. But without such knowledge, actual or constructive, the employer cannot be held to be liable.

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[28] 174 Fed. 591, 595 (C. C. A. 3d, 1909).
[29] 59 N. Y. 356, 364 (1874).
[30] 236 Ill. 369, 86 N. E. 150, 152 (1908).