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Evidence—Evidence of Disability Benefits Is Not Admissible for Determining Damages

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Division in *People v. Ariano*,[73] when it questioned the doctrine of the *Steinmetz* case.

The rule of the *Steinmetz* case was rejected within two years by a unanimous Supreme Court in *Kercheval v. United States*.[74] There the Court said, "The effect of the court's order permitting withdrawal was to adjudge that the plea of guilty be held for naught. Its subsequent use as evidence against petitioner was in direct conflict with that determination. . . . As a practical matter, it could not be received in evidence without putting petitioner in a dilemma utterly inconsistent with the determination of the court awarding him a trial."[75] That this is true is shown in the *Spitaleri* case. The Court of Appeals noted that with the proof of the earlier plea of guilty admitted, the defendant was in effect forced to take the stand in his own behalf. There he swore that he had pleaded guilty on his lawyer's advice, although protesting innocence, because the lawyer had promised to get him a suspended sentence. Furthermore, when the defendant objected to his former lawyer (not trial counsel) taking the stand and testifying that the defendant had confessed his guilt to him, the Court ruled that the defendant, by giving evidence as to his dealings with the lawyer, had waived the attorney-client privilege.[76]

Despite this record, the Court specifically declined to go as far as the federal court in *Wood v. United States*[77] in saying that using a plea of guilty as evidence forces a defendant in substance, if not in form, to testify against himself. Also, the Court did not say that a plea of guilty is not an admission of guilt under other circumstances. That it is has been well established.[78] A plea of guilty once withdrawn, however, may no longer be employed in the same case for any purpose, and admission of the plea in evidence constitutes reversible error.

T. C. L.

EVIDENCE OF DISABILITY BENEFITS IS NOT ADMISSIBLE FOR DETERMINING DAMAGES

In *Healy v. Rennert*,[79] plaintiff, who was a fireman operating an emergency vehicle, brought an action for personal injuries sustained in an intersectional collision, when he was proceeding through a traffic signal indicating 'stop.' The trial court entered judgment upon the verdict in favor of defendant, and the Appellate Division affirmed the judgment.[80] A unanimous Court of Appeals

73. 264 App. Div. 426, 35 N.Y.S.2d 818 (2d Dep't 1942).
74. Supra note 70.
75. Supra note 70 at 223-224.
76. People v. Spitaleri, supra note 63 at 173, 212 N.Y.S.2d at 36.
77. 128 F.2d 265, 274 (D.C. Cir. 1942).
78. Ando v. Woodberry, 8 N.Y.2d 165, 203 N.Y.S.2d 74 (1960), noted 10 Buffalo L. Rev. 187 (1960); People v. Bretagna, 298 N.Y. 323, 83 N.E.2d 537 (1949), cert. denied, 336 U.S. 919 (1949).
79. 9 N.Y.2d 202, 213 N.Y.S.2d 44 (1961).
80. 9 A.D.2d 927, 196 N.Y.S.2d 563 (2d Dep't 1960).

reversed the judgment and remanded for a new trial because of error in the trial court's ruling on the admissibility of certain evidence.

This decision is important in that it clarifies the New York position in three areas concerning evidence, bringing this state within the majority rule.

The first area is the admissibility of evidence showing that the injured plaintiff would receive a disability retirement pension and also compensation from health insurance because of his injury. In this case, defendant's counsel was allowed to cross-examine the plaintiff to show that he was able to receive such benefits even though this matter was not brought up on direct examination. The Court said that this was inadmissible, thus following the majority rule as stated by the Supreme Court. The rule is that he may recover in spite of such outside compensation,[81] and that a defendant is not entitled to show this in mitigation of damages.[82] The Court, in this case, also rejected as error the instruction that the jury may consider plaintiff's motive in applying for the pension, in that it might confuse the jury in considering the pension in mitigation of damages.

The next aspect of this case concerned the admissibility of testimony of a prior criminal act under Section 348 of the Civil Practice Act over the objection that here there was no identity of parties. This question depends upon two factors. One is whether the witness has become a non-resident of this State, as required by Section 348. The Court held that his unavailability because of non-residence may be established by letters mailed to him at his new address. At least its probative value should not be excluded from consideration by the court.[83] Secondly, the requirement of an identity of parties in the two actions is necessary only to offer the opposing counsel an adequate opportunity to cross-examine the witness. This has not been previously decided by this Court where the criminal action preceeded the civil suit, but from other cases similar to this one the Court applies the principle that where the issue is nearly identical, and the cross-examination is both instances would normally cover the same field, the testimony is admissible.[84]

Finally, the Court considered the nature of the right of way given to the operator of an emergency vehicle and the duty imposed upon drivers of ordinary vehicles in regard to the question of contributory negligence. The right of way granted by the New York City Traffic Regulations is not an absolute one under *Ward v. Clark*.[85] Even if established as a matter of law, the question of negligence or contributory negligence is still a question for the jury as to reasonable care in exercising this right. While plaintiff must still

81. Standard Oil Co. of Calif. v. United States, 153 F.2d 958 (9th Cir. 1946), aff'd, 332 U.S. 301 (1947).

82. Capital Products Inc. v. Romer, 252 F.2d 843 (D.C. Cir. 1958).

83. In re Newcomb's Estate, 192 N.Y. 238, 84 N.E. 980 (1908).

84. In re White's Will, 2 N.Y.2d 309, 160 N.Y.S.2d 841 (1957); Schindler v. Royal Ins. Co., 258 N.Y. 310, 179 N.E. 711 (1932); Walther v. News Syndicate Co., 276 App. Div. 169, 93 N.Y.S.2d 537 (1st Dep't 1949).

85. 232 N.Y. 195, 198, 133 N.E. 443, 444 (1921).

slow down if proceeding through a red light, the jury may still consider whether he may have assumed that the defendant would concede the right of way.

A final, and fatal error, was the refusal of the trial court to instruct the jury that a violation of an ordinance is evidence of negligence.[86] New York is in agreement with the majority rule in that such a violation, although not conclusive or presumptive of negligence, is nevertheless evidence of negligence.

R. A. O.

ERROR TO INTRODUCE QUESTIONS UNANSWERED BY DEFENDANTS

In *People v. Bianculli*,[87] the evidence produced at the trial was sufficient to sustain the defendants' convictions; however, a unanimous Court of Appeals reversed the convictions and ordered a new trial because of substantial error in admitting certain evidence. The prosecutor persistently interrogated police officers and one of the defendants in regard to certain questions asked by police officers to the defendants immediately after their arrest. The prosecutor also emphasized that the defendants refused to answer any of the questions.

On appeal, the defendants' contention was that the questions could not be admitted into evidence and did not form a foundation for an admission or a confession. The trial judge had ruled that each of the defendants was "under no obligation to speak [after his arrest], but whether or not he spoke may be a circumstance that the jury may want to know."[88] Conceding the truth of the trial judge's observation, the Court of Appeals declared that such questions followed by silence have a great impact on the minds of jurors. The jurors are led to believe that silence is equivalent to an admission of guilt, for if the defendants were innocent, they would have denied the charges. Such an inference is totally inconsistent with the defendants' exercising the right to remain silent, and the State must not be permitted to call to the attention of the jury that the defendants refused to answer incriminatory statements after arrest.[89] The probative value of such evidence is clearly negligible.

The decision represents no change in New York law, as the earlier decision, *People v. Travato*,[90] is directly in point.

Bd.

STANDARD FOR DIRECTED VERDICT

In *Woodson v. New York City Housing Authority*,[91] the plaintiff brought an action for assault, false arrest and false imprisonment. The plaintiff, an interested witness, and a disinterested observer, who corroborated the plaintiff's testimony, testified in regard to the factual circumstances, and the defendant rested at the conclusion of the plaintiff's case. In the charge to the jury, the

86. Major v. Waverly & Ogden, 7 N.Y.2d 332, 192 N.Y.S.2d 165 (1960).
87. 9 N.Y.2d 468, 215 N.Y.S.2d 33 (1961).
88. Respondent's Brief, 7779 Cases & Points, Case 6, p. 24.
89. People v. Travato, 309 N.Y. 382, 131 N.E.2d 557 (1955); Cf. People v. Rutigliano, 261 N.Y. 103, 184 N.E. 689 (1933).
90. Supra note 89.
91. 10 N.Y.2d 30, 217 N.Y.S.2d 31 (1961).