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Torts—Defamation Per Se

Hugh Russ Jr.

Labor Law, where there is an agreement or covenant expressing an intention to indemnify a party for his own negligence, such intention being expressed in clear and unequivocal terms, such agreement controls.[15]

The dissent, based on the minority opinion in the Appellate Division[16] refused to recognize defendant as an independent contractor. Not being an independent contractor, he was not subject to statutory duty; further, it has been held that where an agent follows the instructions of his master, he may recover from the latter where he has to pay a judgment to the injured plaintiff.[17]

Thus it seems that the decision in the instant case does not rest so much on the violation of the statute, as on the Court's finding that Orlando was an independent contractor. Since Orlando was found to have been actively negligent, he would not have been entitled to indemnity in any event.

Defamation per se

A cause of action in defamation per se in New York will be given a plaintiff where the publication about him, either directly or through innuendo, describes his behaviour as a sort which might be thought immoral, seditious or dishonest by a reasonable man. This is so because of the unfavorable reputation the injured party will incur among the people who read or hear the publication.[18] Such a plaintiff may well get into court, however, if he is described inaccurately as being in impecunious financial straits. The reason for this allowance seems to be that the resultant pity for him may turn to contempt and aversion in those who know him or of him.[19] If, however, a plaintiff is unable to fit himself into such a category, he must allege special damages resulting from a publication to get to the jury.

Thus a plaintiff's case was given to a jury where he was reported as campaign

15. *Thompson-Starret Co. v. Otis Elevator Co.*, 271 N. Y. 36, 2 N. E. 2d 35 (1936).

16. *Rufo v. Orlando*, 286 App. Div. 88, 141 N. Y. S. 2d 24 (1st Dep't 1955).

17. *Howe v. Buffalo, N. Y. & Erie R. R. Co.*, 37 N. Y. 297, 4 Trans. App. 249 (1867). But if only an employee, defendant should have defended on grounds that plaintiff's action was limited to recovery under the Workmen's Compensation Law. *Kincer v. Kincer*, 280 App. Div. 850, 113 N. Y. S. 2d 325 (3d Dep't 1952).

18. "A writing is defamatory—that is, actionable without allegation or proof of special damage—if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community, even though it may impute no moral turpitude to him." *Mencher v. Chesley*, 297 N. Y. 94, 75 N.E. 2d 257 (1947). Also defamatory per se is any writing which tends to disparage a person in relation to his office, trade, or profession. *Kleeberg v. Sipser*, 265 N. Y. 87, 191 N.E. 845 (1934).

19. *Katapodis v. Brooklyn Spectator*, 287 N. Y. 17, 38 N.E. 2d 112 (1941).

manager for a Communist candidate.[20] A woman was allowed a cause of action where it was published she would be dismissed as a teacher if the facts about her "background" were known.[21] A charge that a pastor "juggled" collection money amounted to a good allegation of defamation per se.[22]

Causes of action have been dismissed where a plaintiff municipal employee was said to have a "snap" job and to be unnecessary to local government,[23] and where a lawyer was said to favor a lawsuit and be immune to opposing counsel's constructive suggestions. (Albeit he was awarded his complaint for allegations that he was trying to stir up lawsuits and that he had acted in bad faith.)[24] The reasoning of such cases seems to be that the publications are not of a sort that would inspire a reasonable man to shun or hold in contempt such a person.

In the recent case of *Nichols v. Item Publishers, Inc.*,[25] plaintiffs pastor and his church alleged defamation per se in an erroneous article which said he was no longer rector and inaccurately described an intra-congregational dispute. The Court of Appeals *held* (4-2) that plaintiff's complaint was insufficient to state a cause of action.

The majority said no reasonable reading of the article would result in adverse implication as to either plaintiff. Though false, the article was not defamatory per se, since a reader only would conclude from it that there was a church dispute with a rebellious faction contesting Nichols' claim to the pastorate. Such a conclusion would not lead to contempt or aversion.

In his dissent, Judge Conway argued a minister is in a peculiarly sensitive position in the public eye. Therefore, the cause should not have been dismissed as a matter of law, since a jury might find this article would subject Nichols to aversion. Finally, he said that the causes of the pastor and church were so intertwined fact-wise, that the church also should be allowed to press its case before a jury.

The opinion of the majority seems to have stayed within bounds set out by previous cases. Moreover, the result seems just, since it is doubtful that the minister's position is so highly sensitive as to be subject to defamation from a reportorial error of this sort.

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20. *Mencher v. Chesley, supra,* note 18.
21. *Rager v. McCroskey,* 305 N. Y. 75, 111 N.E. 2d 214 (1953).
22. *Curtis v. Argus Co.,* 171 App. Div. 105, 156 N. Y. Supp. 813 (3rd Dep't 1916).
23. *Rossiter v. New York Press Co.,* 141 App. Div. 339, 126 N. Y. Supp. 325 (1st Dep't 1910).
24. *Kleeberg v. Sipser, supra,* note 18.
25. *Nichols v. Item Publishers, Inc.,* 309 N. Y. 596, 132 N.E. 2d 860 (1956).