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Torts—Admissibility of Evidence of Adverse Reaction in Aid of General Damages in Libel Action

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plaintiff by the defendant was the proceeds of an illegal act committed by the plaintiff.

In affirmance of the lower tribunals[40] this Court held, (6-1) that public policy forbids recovery in the instant case.[41] The settled law of this jurisdiction is that one may not evoke the assistance of a court of law to permit him to profit or take advantage of his own wrongdoing.[42]

Hofferman v. Simmons[43] cited by the majority and dissent, held that by statute[44] one who has wagered with a gambler never parts with title to the money and thus having no title to the money, gamblers may not replevin their wagers.[45] In the instant case the Court pointed out that while there was no such statute covering the fact situation presently before them, it long has been settled by public policy that courts should withhold their sanction to titles and possessery rights founded only on law breaking. Answering the position taken by the dissent that such withholding was equivalent to a confiscation, the majority stressed they were by no means attempting to exact property without due process of law in that the defense of illegality was allowed not for the protection of the defendant but as a disability to the plaintiff.[46]

Admissibility Of Evidence Of Adverse Reaction In Aid of General Damages In Libel Actions

Macy v. New York World-Telegram Corporation,[47] a libel action, was based upon an article allegedly charging that plaintiff attempted to obtain nomination as United States Senate candidate by threatening disclosure of a letter describing certain questionable political transactions. Judgment for plaintiff at Trial Term was affirmed by the Appelate Division[48] and defendant appealed by permission of the Court of Appeals which reversed and granted a new trial. The decisive issue, over which the Court split (4-3), concerned the admissability of evidence

40. 126 N.Y.S.2d 7 (County Ct. 1956); 285 A.D.2d 968, 138 N.Y.S.2d 682 (2d Dep't 1956).
41. Flegenheimer v. Brogan, 284 N.Y. 268, 30 N.E.2d 591 (1940); Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).
42. Stone v. Freeman, 298 N.Y. 268, 82 N.E.2d 571 (1948).
43. 290 N.Y. 449, 49 N.E.2d 523 (1943).
44. N.Y. PENAL LAW §994.
45. People v. Stedeker, 175 N.Y. 57, 67 N.E. 132 (1903).
46. Reiner v. North American Newspaper Alliance, 259 N.Y. 250, 181 N.E. 561 (1932).
47. 2 N.Y.2d 416, 161 N.Y.S2d 55 (1957).
48. Macy v. New York World-Telegram Corp., 1 A.D.2d 652, 147 N.Y.S.2d 677 (1955).

as to damages.[49] Plaintiff had alleged only general damages, but at the trial was allowed to testify that, following publication of the alleged libel, he had received derogatory letters, he had been cartooned as a skunk, his membership in a country club had been cancelled, members and leaders of Congress had made derogatory remarks about him, and that the refusal of the House of Representatives to seat him in 1951 was to some degree the result of the alleged libel.

The problem, most generally, is whether the presumption of injury to reputation as a basis for general damages may be supported by evidence tending actually to prove such consequences, and if so, what restrictions are to be placed on the types of evidence admissable for this purpose? A relatively early New York case[50] eliminated the possibility of admission of opinions of third persons as to the gravity of the alleged libel, on the ground that injection of such issues would unduly complicate and prolong trials, and would enable a defendant to defame another with impunity by showing that his own reputation was so low or his victim's reputation so high that no one believed him.[51] The question of admissability of the type of evidence involved in the present case, evidence of specific instances of aversion or contempt, was first considered in New York in *Bishop v. New York Times*,[52] where the court stated, "We are inclined to the view that a plaintiff is not compelled to rely upon a favorable presumption with which the law endows his cause of action but that he may prove if he can that he has been avoided and shunned by former friends and acquaintances as the direct and well-connected result of the libel." But the court there did not squarely base its decision on this view, and the Court in the present case considered it to be only a dictum. In a recent case,[53] the Court of Appeals indicated that it would accept this position, but it based its decision on other grounds.

In the instant case, the Court indicated acceptance of the position stated in *Bishop v. New York Times* but again refused to give it explicit recognition as controlling law. The majority held that the testimony in question "even if not inadmissable by its nature, was presented in such form and quantity as to violate

49. The Court also split on the admission into evidence of proof of a reprint of part of the article in a small local newspaper, the majority holding the admission to be error because it would allow the jury to charge against defendant a separate libel, and the minority contending that since the reprint was offered only to show the widespread publication of defendant's libel, its admission could not be held to constitute harmful error.

50. Linehan v. Nelson, 197 N.Y. 482, 90 N.E. 114 (1910).

51. This argument was rejected in *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2d Cir. 1949) in which it was held that a fair sample of the effect upon readers of the libel could be put before the jury by calling individual readers and asking them what impresssion it left in their minds.

52. 233 N.Y. 446, 155 N.E. 906 (1922).

53. Julian v. American Business Consultants, Inc., 2 N.Y.2d 1, 155 N.Y.S.2d 1, 6 BUFFALO L. REV. 224 (1956).

the rights of defendant." Some of it was considered objectionable as pure hearsay, as statement of conclusion not susceptible of proof, and as proof of special damages not pleaded. But the overall ground for ruling it inadmissable was the lack of proof that these reactions were directly caused by the alleged libel. It was held that even if the *Bishop* position were to be taken as law, this evidence of aversion failed to meet its standards; the incidents were not sufficiently shown to be "the direct and well-connected result of the libel." The Court was particularly concerned with the inability of a defendant adequately to meet such testimony by a plaintiff and suggested that testimony by those persons supposed to have acted adversely to plaintiff, and demonstration through such testimony of connection to the libel, if such demonstration be possible, would be more acceptable because it would afford defendant an adequate opportunity of cross examination.

In the dissent, evidence of aversion manifested as a consequence of libel was held admissable to show general damages, a conclusion with which the majority did not disagree. It is not clear whether the minority felt that the incidents described by plaintiff had been sufficiently proven as direct results of the alleged libel, or whether they felt that proof of direct causality was unnecessary to allow such evidence. The admission of the evidence in question was considered harmless, since it did not touch on the primary issue at the trial, and it was not considered to have been adequately objected to.

Macy v. New York World-Telegram Corporation has to some extent clarified the law as to the admissability of evidence to support the presumption of general damage in libel actions. The Court was careful not to commit itself but made it apparent that evidence of adverse reaction to plaintiff following the alleged libel may be introduced if it is in the proper form. If the evidence of aversion is in the form of testimony by those persons supposed to have manifested the aversion and meets the usual rules of evidence, then it would probably be held admissable. But if the examples of aversion are to be put before the jury by the testimony of plaintiff, then a clear showing of direct causal connection to the alleged libel would seem to be required for admission of the testimony into evidence.

Admissibility Of Evidence Of Religious Faith In Certain Libel Actions

In *Toomey v. Farley*,[54] a libel action, defendants were respectively the incumbent Democratic Party office holder and several members of his organization who, during a primary campaign, published a political "newspaper" containing statements allegedly to the effect that plaintiffs, who were an opposing candidate and one of his workers respectively, were Communists or fellow travellers. Verdict and judgment of the Trial Term were for plaintiffs. The Appellate

54. 2 N.Y.2d 71, 156 N.Y.S.2d 84 (1956).