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Torts—Admissibility of Evidence of Religious Faith in Libel Action

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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).

Division,[55] upon plaintiff's consent to a reduction in the amount of the verdict, ordered that the judgment appealed from be modified, and as so modified, affirmed.

The issue over which the Court of Appeals split (4-3) concerned the admission of evidence as to the religious affiliation and activities of plaintiffs.[56] Defendants had conceded that plaintiffs were not Communists and that this fact was not in issue. Nor had defendants attempted to show that plaintiffs were of bad reputation in order to mitigate damages. Plaintiffs were allowed to testify rather extensively, however, that they were members of the Catholic Church, attended faithfully, and were active in various collateral church organizations. Upon the first objection to this testimony, the trial judge allowed it on the ground that it went to show that plaintiffs were not Communists. But when defendants persisted in their objections, he stated that he was allowing the testimony as bearing upon the question of damages.

The majority held that, while ordinarily the injection into the trial of the religious faith and observances of a party would constitute ground for reversal, in this case such testimony was competent "to show the circumstances surrounding the plaintiff, and as bearing upon the hurtful tendency of the libel, and the general damage to which he was exposed,"[57] especially because charges of attachment to Communism while participating in church affairs would picture plaintiffs as hypocrites; and thus that, since such evidence was admissable, the extent of examination of the subject was discretionary with the trial judge, and in this case could not be said to have improperly influenced the verdict or to have constituted an abuse of discretion as to require reversal.

In the dissenting opinion it was granted that allowing of testimony of membership in the Catholic Church, even though an encroachment on traditional policy against the entry of race and creed as factors in trials, did not constitute legal error in this case; but it was felt, however, that the testimony was allowed to exceed the limits of its proper function of establishing church membership and to go so far as to become in fact an appeal to the sympathy of the jury in

55. Toomey v. Farley, 286 App. Div. 1084, 147 N.Y.S.2d 672 (1st Dep't 1955).

56. There was no disagreement as to the holding that one of the defendants was not improperly deprived of his right to counsel in the selection of the jury. Counsel for his fellow defendant had acted in behalf of his office associate, who was himself a defendant but was acting as counsel for the objecting defendant, in the impanelment and had apparent authority to do so. On the objection the next day no attempt was made to deny that he did not have authority to represent the objecting defendant.

57. The court is quoting *Morey v. Morning Journal Ass'n*, 123 N.Y. 207, 210, 25 N.E. 161, 162 (1890).

order to gain punitive damages. Several cases[58] were cited in which there had been a reversal because of the improper injection into the trial of the religion or nationality of a party or witness. None of these were libel actions, however, and in none of these cases did religion have any relevance whatsoever. But it was felt by the dissenting judges that the testimony in the instant case had taken on the improper character that brought about reversal in the cases cited.

There seemed to be no substantial disagreement in the Court of Appeals as to the general principles applicable to the admissability of this type of testimony; the split in opinion resulted from a difference in emphasis and interpretation of the circumstances of the trial. It is well settled in most jurisdictions that a plaintiff can show his position in the community as bearing on the question of general damages.[59] The case[60] mainly relied upon by the majority was a libel action based on a newspaper article to the effect that plaintiff was faced with the possibility of a "breach of promise" suit in which it was held that evidence that plaintiff was a married man was properly admitted "to show the circumstances surrounding the plaintiff, and as bearing upon the hurtful tendency of the libel, and the general damage to which he was exposed." This was a leading case in New York and its ruling was extended in *Saunders v. Post Standard Co.*[61] in which it was held proper for the trial court to allow evidence that plaintiff was supervisor of his town, a member of the State Legislature, and a trustee of the Methodist Episcopal Church, as bearing upon general damage caused by an allegation of cruelty to animals. The problem of religious bias was not raised in this case, however.

The testimony in the instant case, in referring to the extent of plaintiffs' activity in their church, went well beyond that of any precedent New York libel cases. Since the testimony was at least to a certain extent relevant as to general damages, especially since belief in Communism while participating in church affairs would constitute hypocrisy, the Court was confronted with the problem of whether such evidence is of sufficient probative value, as weighed against the danger of its abuse to inject religious prejudice, as to be admissable at all. *Toomey v. Farley* held that its admission requires reversal only when it appears that religious prejudice has actually become an element in the particular case. But on the basis of this holding it seems that each new case will be tested

58. Malinski v. People of State of New York, 324 U.S. 401 (1945); People v. Esposito, 224 N.Y. 370, 121 N.E. 344 (1918); Bowen v. Mahoney Coal Corp., 256 App.Div. 485, 10 N.Y.S.2d 454 (1st Dep't 1939); Abbate v. Solan, 257 App.Div. 776, 15 N.Y.S.2d 332 (2d Dep't 1939); Saunders v. Champlain Bus Corp., 263 App.Div. 683, 34 N.Y.S.2d 447 (3d Dep't 1942).

59. 53 C.J.S. *Libel And Slander* §§190(c), 264 (1948). The problem is discussed and several cases are gathered in *Press Publishing Co. v. McDonald* 63 Fed. 239 (C.C.S.D.N.Y. 1894).

60. Morey v. Morning Journal Ass'n, 123 N.Y. 207, 25 N.E. 161 (1890).

61. Saunders v. Post-Standard Co., 107 App.Div. 84, 94 N.Y. Supp. 993 (4th Dep't 1905).

according to its own circumstances, and a decrease in the probative value of the testimony in question or a clearer showing that it was used to incite the prejudice of the jury, could easily result in reversal.

Violation Of Local Traffic Ordinance—Evidence Of Negligence

New York City traffic regulations[62] establish a right of way in favor of pedestrians over automobile drivers at crossings not protected by a police officer or a traffic light. In *Taggart v. Vogel*,[63] plaintiff was struck by defendant's automobile while crossing at such an intersection. The Court of Appeals held (6-1) that the refusal of the trial judge to charge these regulations and his instructions to apply the same standard of care to both parties amounted to reversable error. The Court stated that the above regulations increased the responsibility of drivers, and a violation amounted to some evidence of negligence.

The effect which the Court gives to local traffic regulations in this case tacitly reaffirms the established principle that although the violation of a local ordinance will not amount to negligance per se,[64] it is relevant as amounting to some evidence of negligence on the part of the violator.[65]

Negligence—Question Of Fact

In *Levine v. City of New York*,[66] the Court was faced with the problem of determining whether the referee or the Appellate Division[67] made the appropriate findings of fact.[68] It held in agreement with the referee that it was more probable than not that the defendant was negligent. Judgment was therefore entered in favor of the plaintiff on the reinstated referee's report. This conclusion, because it involves only a factual appraisal, leaves no room for comment.[69]

Negligence—Incidental Injuries

Zipprich v. Smith Trucking Company and *Creaser v. Smith Trucking Company*,[70] personal injury actions arising out of the same accident, were tried

62. NEW YORK CITY TRAFFIC REGULATIONS §77.
63. 3 N.Y.2d 58, 163 N.Y.S.2d 674 (1957).
64. Fluker v. Ziegele Brewing Co., 201 N.Y. 40, 93 N.E. 1112 (1911).
65. Carlock v. Westchester Lighting Co., 268 N.Y. 345, 197 N.E. 306 (1935).
66. 2 N.Y.2d 246, 159 N.Y.S.2d 193 (1957).
67. 1 A.D.2d 661, 147 N.Y.S.2d 684 (1st Dep't 1955).
68. Section 605 of the Civil Practice Act compels the Court of Appeals to review findings of fact when the Appellate Division finds new facts in modifying or reversing the trial court.
69. For an interesting discussion of this case on a prior appeal, 309 N.Y. 88, 127 N.E.2d 825 (1955), see 5 BUFFALO L. REV. 240 (1956), wherein the writer asserts that the Court strained to allow recovery under the guise of the invitee theory when really applying the attractive nuisance doctrine which is not acceptable in the New York courts.
70. 2 N.Y.2d 177, 157 N.Y.S.2d 966 (1956).