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Torts—Dismissal of Prima Facie Case Disallowed

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fense[62] to mitigate punitive[63] or reduce compensatory damages[64] may be interposed where the facts tend but fail to prove the truth of the defamation.[65] It is to be noted that in pleading mitigation the particular circumstances must be stated, including the sources of the defendant's information and the grounds for his belief to show the absence of actual malice.[66]

The majority in the instant case reasoned that the defenses were insufficient, since they tended to establish the truth of a statement different from that made in the publication. The Court stated that "indictment" ordinarily refers to legal process rather than to condemnation in a moral sense; the defense of truth, based on the assumption that the jury could accept the broader meaning, must fall, since it is not even related to the libellous matter.

Dismissal of Prima Facie Case Disallowed

In *Flander v. City of Yonkers*,[67] plaintiff brought three causes of action[68] based on the wrongful shooting of plaintiff's intestate, allegedly in an effort by two police officers to effect an arrest. The present appeal concerns itself only with the cause of action based on negligence, which upon defendant's motion was dismissed in the lower court; this was affirmed in the Appellate Division.[69] The Court of Appeals reversed, on the ground that plaintiff need only establish a prima facie case of negligence to take the case to the jury.

The weight of authority in this jurisdiction supports the proposition that where there is a conflict of evidence, as in the present case, it is within the province of the jury to decide on the issue of credibility and give appropriate weight to the proffered evidence.[70] It is equally well established that upon defendant's motion to dismiss, the trial court should for the purposes of the motion accept plaintiff's evidence as true, and regard it in the most favorable light to determine

62. N. Y. CIV. PRAC. ACT § 262 defines a partial defense as "matter tending only to mitigate or reduce damages," and the section requires that it be designated as such in the answer.

63. Punitive damages are held to be available as to a libel published with actual malice; the term includes also a carelessly published libel even if published by an agent. *Crave v. Bennett*, 177 N. Y. 106, 69 N. E. 274 (1904).

64. *Gressman v. Morning Journal Ass'n*, 197 N. Y. 474, 90 N. E. 1131 (1910); *Lanpher v. Clark*, 149 N. Y. 472, 44 N. E. 182 (1896).

65. *Ibid.*

66. *Flickenstein v. Friedman, supra*, note 57.

67. 309 N. Y. 114, 127 N. E. 2d 838 (1955).

68. (a) action against the city for having knowingly and negligently employed unreliable police officers. (b) action for assault and battery. (c) action for negligence against the police officers.

69. 283 App. Div. 970, 130 N. Y. S. 2d 895 (2d Dep't 1954).

70. *Kraus v. Birnbaum*, 200 N. Y. 130, 93 N. E. 474 (1910); *Meiselman v. Crown Heights Hosp.*, 285 N. Y. 389, 34 N. E. 2d 367 (1941); *Sadowski v. Long Island R.R. Co.*, 292 N. Y. 448, 55 N. E. 2d 497 (1944).

whether a prima facie case of negligence has been proved.[71] The issue of the plaintiff's intestate's contributory negligence, being clearly a question for the jury, was not elaborated upon by the Court.

Burden of Proof

The Court of Appeals was faced with a difficult problem of burden of proof in an unusual accident case in *Cole v. Swagler*.[72] Here the owner-driver and a passenger were killed when the car went off the highway. The vehicle traveled 177 feet, striking two trees, uprooting one, passing through bushes, and finally broke itself in half before coming to a stop. The pavement was dry, the weather clear, and there were no living eyewitnesses to the accident. The relative positions of the bodies, when found, indicated that Swagler, the defendant's intestate, was driving. The Court reversed the trial court and the Appellate Division, and held there was insufficient evidence to take to the jury the question of defendant's alleged negligence and whether it was the proximate cause of the accident.

In a death case the plaintiff is not held to as high a degree of proof of the cause of action as where the injured plaintiff can himself describe the occurrence.[73] In order to apply this rule, however, there must be a showing of facts from which negligence may be inferred.[74] In the instant case the Court held that in order to hold defendant liable for the death of Cole, the evidence must show (1) that Swagler was in control of the car at the time of the accident; (2) that Swagler was negligent in his operation of the car, and (3) that the negligent operation by Swagler was the proximate cause of the crash in which Cole died.

The first requirement was deemed satisfied, as the only reasonable inference from the relative positions of the bodies after the accident was that Swagler was driving his own car.[75] As to the second requirement, the Court found that the jury had a right to find that the car was travelling at a high rate of speed, due to the physical circumstances surrounding the crash. However, the mere fact that the car left the road did not give rise to a presumption of negligence, as the accident might have occurred due to other causes, such as a mechanical defect.[76] The third requirement of proximate cause was not met by the evidence, as proof of speed alone will not serve as a casual connection between the defendant's

71. *Cohen v. Consolidated Gas Co.*, 137 App. Div. 213, 121 N. Y. Supp. 956 (1st Dep't 1910); *aff'd*, 202 N. Y. 578, 96 N. E. 1113 (1911).
72. 308 N. Y. 325, 125 N. E. 2d 592 (1955).
73. *Noseworthy v. City of New York*, 298 N. Y. 76, 80 N. E. 2d 744 (1948).
74. *Wank v. Ambrosino*, 307 N. Y. 321, 121 N. E. 2d 246 (1954).
75. Where bodies are so scattered as to render impossible a determination of who was driving, the court will not presume that the owner drove. *Towne v. Bunce*, 307 N. Y. 969, 122 N. E. 2d 751 (1954).
76. A guest assumes the risk of mechanical defect in an automobile which is not known to the owner. *Higgins v. Mason*, 255 N. Y. 104, 174 N. E. 77 (1931).