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False Imprisonment - Mitigation of Damages - Admissibility of Reputation Evidence

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public intoxication, an area which is critical.¹⁷ Another obstacle appears to be the cost of adequate facilities for treatment. This can be countervailed by eliminating the expenses of repetitive arrest, trial, and incarceration of these sick people, with only a pre-trial hearing essential to ascertain defendant's status.¹⁸ More importantly, by dispensing psychiatric and medical ministrations to the alcoholic, we would be applying all our sophistication to the cause of the disease, rather than its symptom, in an unbenighted manner

RICHARD GLENN PETERSON

FALSE IMPRISONMENT—MITIGATION OF DAMAGES—ADMISSIBILITY OF REPUTATION EVIDENCE—This action was instituted to recover damages arising from the plaintiff's arrest without a warrant and the resulting assault and battery. The complaint also alleged damage to reputation. The Superior Court of New Jersey, Appellate Division, held that the trial court erred in refusing to permit cross-examination of plaintiff regarding the effect, if any, of the arrest on his reputation and in refusing to permit a neighbor to testify relative to the plaintiff's reputation in the neighborhood, such testimony being relevant to the damages allegedly suffered. *Price v Phillips*, 90 N.J. Super 480, 218 A.2d 167 (1966)

There are numerous definitions of reputation, but it is generally agreed that the term connotes the common report which others make about a man;¹ the talk about him which shows the opinion in which he is held in his community.² Reputation evidence offered to prove character is hearsay for it represents a statement of community opinion made out of court and not under cross-examination. To admit such evidence at all, it must be as an exception to the hearsay rule.³ When reputation evidence is offered in mitigation

17. A bill to provide a defense for all crimes perpetrated by a chronic alcoholic where it can be established that the offense was committed while he was intoxicated was proposed and defeated by committee in the present 1967 North Dakota Legislature. This was apparently too much for the legislative body to accept at one time.

18. Obviously, one determination as to defendant's alcoholic status will preclude any further bothersome entanglement by him in the law enforcement machinery with respect to the public intoxication offense. For example, in the *Driver* case, defendant was arrested and convicted over 200 times. An early diagnosis of his alcoholism could have saved the courts a considerable amount of time and expense.

1. 1 JONES, EVIDENCE, CRIMINAL AND CIVIL § 165 (5th ed. 1958).

2. BLACK, LAW DICTIONARY (4th ed. 1951). Character and reputation are often used interchangeably by many courts. *E.g.*, *Garrison v. State*, 217 Ala. 322, 116 So. 705 (1928). Although there is a distinction, both are subjective. Reputation represents what others think a man is while character represents what he actually is.

3. 5 WIGMORE, EVIDENCE § 1609 (3rd ed. 1940).

of damages where damage to reputation is alleged, however, the evidence is not offered evidentially, and the hearsay exclusion would not apply.⁴ This is so because whenever reputation itself is the issue, as in the determination of compensatory damages, reputation is the fact to be proved regardless of actual character.⁵

The courts, including those of New Jersey, have been reluctant to allow testimony dealing with a person's reputation in civil cases.⁶ This is readily understood when the possible consequences of such testimony are examined: most obvious is the probability that trials would have the appearance of popularity contests rather than legal proceedings;⁷ besides lacking relevancy, it has also been stated that such evidence unnecessarily delays trials on collateral issues and tends to improperly prejudice the jury.⁸ Notwithstanding, the law does recognize that such testimony is relevant to specific civil actions where a person's reputation is directly in issue.⁹ Examples of such related actions are those for libel, slander, malicious prosecution, seduction, and assault and battery.¹⁰ In cases of false imprisonment, the issue of good character is not relevant to the right of recovery itself, but when the complaint alleges good character and such allegation is denied by the answer, evidence in support of good character is relevant insofar as determining the amount of damages.¹¹

It is well settled that in a civil action a person's reputation is presumed good until shown otherwise.¹² Where damages are sought for injury to reputation, however, the plaintiff must prove such damages as a matter of course.¹³ Any evidence regarding the plaintiff's reputation tending to show that his damages were less than alleged is admissible.¹⁴

In the instant case, the New Jersey court was troubled, as are many other courts, with the question of compensation for non-pecuniary damages such as loss of community reputation. There is no mathematical formula for determining a just pecuniary compensation for damage to feelings and a person's reputation.¹⁵ Also,

4. *Id.* § 1609 at 479.

5. 1 WIGMORE, EVIDENCE § 75 (3rd ed. 1940).

6. *E.g.*, *Millers Mut. Fire Ins. Co. v. King*, 232 Miss. 260, 98 So.2d 662 (1957), *Troast v. Lascari*, 59 N.J. Super. 110, 157 A.2d 346 (1960).

7. 1 JONES, EVIDENCE, CRIMINAL AND CIVIL § 165 (5th ed. 1958).

8. Comment, *The Relevancy of the Character of a Party to a Civil Action*, 7 ST. LOUIS U.L.J. 347 (1963).

9. *Koonts v. Farmers Mut. Ins. Ass'n.*, 235 Iowa 87, 16 N.W.2d 20 (1944).

10. *Lakes v. Buckeye State Mut. Ins. Ass'n.*, 110 Ohio App. 115, 168 N.E.2d 895 (1959).

11. *Savannah Elec. Co. v. Lowe*, 27 Ga. 350, 108 S.E. 313 (Ct. App. 1921).

12. *Smith v. Smith*, 31 Cal. App.2d 272, 87 P.2d 863 (Ct. App. 1939), *Burns v. Burns*, 193 S.W.2d 951 (Mo. App. 1946), *Fort Worth Hotel v. Waggoman*, 126 S.W.2d 578 (Tex. Ct. App. 1939).

13. *Paget v. Cordes*, 129 Ore. 224, 277 Pac. 101 (1929).

14. *Harris v. Sims*, 155 Miss. 207, 124 So. 325 (1929).

15. *Burns v. Burns*, *supra* note 12.

the law does not prescribe a definite rule for the determination of the exact amount recoverable for false imprisonment.¹⁶ The only solution is the considered judgment and opinion of the reasonable man.¹⁷ Where the issue of reputation is paramount and the jury is denied access to relevant evidence of reputation, the appellate courts must remand for a new trial,¹⁸ as in the instant case. There is no requirement that the testimony of witnesses be uniformly favorable or unfavorable regarding the litigant's reputation, only that it be allowed for consideration.¹⁹

North Dakota apparently has not considered the issue of alleged damage to general reputation in false imprisonment or any other civil action. The cases in other jurisdictions are generally quite old and relatively infrequent. Their value as precedent is not diminished, however, as their results are consistent and represent the correct application of the rules of evidence.

The admissibility of reputation evidence in those civil actions where reputation is placed directly in issue may well be settled. The instant case is representative of the authorities cited herein, and North Dakota could well use that court's reasoning as a guideline when the issue arises. Compensatory damages should, insofar as possible, compensate the plaintiff in the amount of the damages suffered. To arrive at a just amount, however, the defendant must be allowed to show any mitigating facts or circumstances which would properly influence the determination of those damages. Perhaps no precise formula will ever be developed to determine the amount of compensation for non-pecuniary loss of reputation, nor is one needed if the jury is allowed to consider all of the relevant evidence. It is only just that a man of good repute should recover more than the man with a doubtful reputation.

BRUCE E. BOHLMAN

NEGLIGENCE—EVIDENCE—REBUTTAL OF RES IPSA LOQUITUR—The defendant, while using a rented truck to haul hay, had backed the vehicle up to a barn to discharge the third load for the day when a fire started in the barn, resulting in a complete loss of both the hay and the barn. The Supreme Court of California, in a 4-3 decision

16. *Herbrick v. Samardick & Co.*, 169 Neb. 333, 101 N.W.2d 488 (1960).

17. *Burns v. Burns*, *supra* note 12.

18. *Price v. Phillips*, 90 N.J. Super. 480, 218 A.2d 167 (1966).

19. *In re Greenfields Estate*, 245 S.C. 595, 141 S.E.2d 916 (1965).