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THE EVIDENCE OF INTERESTED WITNESSES IN NEGLIGENCE CASES.

"Given, the parties and their financial condition, without regard to the weight or significance of the evidence, in a very large number of cases the verdict can be assumed with proximate certainty. An individual against a corporation, municipal or private, a poor man against a rich one, the undoubted tendency in later years, is, on conflicting evidence, to find the disputed fact for plaintiff, without giving proper weight to countervailing evidence in favor of defendant.

"This statement is made after an experience of forty years at the bar and on the bench; it is not made as an attack upon the institution of the jury, for if there be one part of our judicial system to which I am unalterably attached, it is 'trial by jury as heretofore;' but to effectually defend it, the truth must be told. If public confidence is becoming impaired in the stability, of what to me, seems the most important pillar of our grand edifice, we must know why, and proceed at once to restore and repair."[1]

As is shown by the other parts of Judge Dean's address, the cases which he had mainly in mind were negligence cases. There is no doubt of the accuracy of his statement of the situation.

[1] Hon. John Dean, Justice of the Supreme Court of Pennsylvania, in his address before the Law Academy of Philadelphia, May 20, 1897.

It is generally recognized that there is no sufficient remedy now available to meet the abuse of the jury system in such cases. The remedy which Judge Dean suggests will be later referred to, and does not lie within the power of the bar; but the object of this article is merely to direct the attention of those members of the profession, who are interested in the subject, to forms of cautionary instructions to a jury, which, it is believed, offer some measure of protection and would aid in safeguarding the interests of the defendant in such cases. The hope of the writer is to make a practical suggestion which may prove of value in negligence cases generally, and particularly in the most iniquitous class of such cases, viz: the too frequently occurring cases in which the plaintiff, or those interested in the result, manufacture a case for the jury upon their own testimony.

In recent years the tendency of juries, in actions for personal injuries, to find issues of negligence in favor of the plaintiff, without regard to the weight of the evidence or credibility of the witnesses, has been widely remarked and severely commented upon.

It is certainly true that a conflict in such a case between the testimony of the witnesses for the plaintiff and those for the defendant will, almost inevitably, be resolved against the defendant by a jury, if the plaintiff's circumstances are such as to excite the jury's sympathies, or if there is a disparity, financial or of any other sort, between the parties plaintiff and defendant, such as would lead the jury to sympathize with the plaintiff.

Frequently it happens, in the trial of such cases, that the evidence of the plaintiff alone is relied upon, or the evidence of some witness interested in the result by relationship or otherwise, and is held sufficient to take the issue of negligence by the defendant to the jury, and to warrant and uphold a verdict for the plaintiff, even though such evidence is contradicted both by the circumstances surrounding the accident and by the evidence of the other witnesses. Doubless every lawyer who has been connected with the defence of any considerable number of negligence cases has felt the irritation

and rebellion against the jury system necessarily following an unjust verdict against his client. Familiar instances are the crossing cases. Very often the unaided and contradicted testimony of the plaintiff has been held to establish, as a fact, that the engine bell was not rung or the whistle blown for the crossing, although the trainmen and the disinterested neighborhood witnesses contradicted the plaintiff. Many a case of this class has resulted in a judgment against the defendant, although there was no moral doubt that the signals were duly given and that there was no negligence by the railroad company.

Mr. Justice Dean, in his address already referred to, discussing the causes for the iniquitous results so often reached by jury trial in such cases, suggested the following as a remedy:

"The professional man, the boss mechanic, the city councilman, the thriving farmer, all wanted to be excused from jury service, because of the pressing nature of their business affairs.

"I would take the banker from his desk, the editor and professor from their chairs, the preacher from his pulpit, and put them in the jury box—there, under oath, to well and truly try, or a true deliverance make according to the evidence. I would make shirking jury duty as odious as skulking in time of war. Instead of leaving to them the sole part of criticizing and denouncing courts and juries, I would inflexibly compel them, as the law intended they should, to perform their part in the administration of justice, wherever they were sober, intelligent and judicious. I would make jury duty as imperative and as certain as payment of taxes on a house and lot. The presence of such men would raise the average of conscience and intelligence as indicated by the verdict, and have it represent the intelligence and conscience of the general public."

Probably the suggestion of Judge Dean would do much to correct the now prevalent abuses in jury trials, if any practical way could be found by legislation or otherwise to accomplish the result he desires. But until the juries are constituted in the ideal way he suggests, or until the injustice done by the jury system in the class of cases under discussion has been corrected by some other means, lawyers engaged for the defendant in practice of this class naturally seek to adopt every precaution within their reach to protect their client and prevent injustice.

Admittedly, the credibility of a witness, whether or not he be a party or be otherwise interested in the suit, is for the jury to determine. This proposition is axiomatic. But, nevertheless, every cautionary instruction which may properly be asked by a defendant in a case so situated may be helpful, either in the trial court or on writ of error, and is an additional safeguard.

Instances are numerous in the reports of criminal cases where the defendant has taken the stand on his own behalf, and where it has been held proper for the trial court to direct the jury to take into consideration the fact that the prisoner is interested in the result of the case, and, frequently, in such cases, the courts, in charging, have cautioned the jury to bear in mind the interest of the witnesses, in determining or as affecting their credibility.[1]

There is no apparent reason why similar instructions should not be quite as appropriate and necessary in ordinary civil cases as in criminal cases, and, accordingly, the courts have not hesitated to approve such cautionary instructions to the jury in civil cases.

Thus, in *Hill* v. *Sprinkle*,[2] an action for $300, balance due on a bond given for purchase money of a tract of land, counsel asked the court to charge as follows:

"That when there is a conflict of testimony between witnesses of equal respectability, one of whom is a party in interest, and the other not, the jury have the right to consider the question of interest in deciding upon the credibility of the witnesses."

This the court refused, but charged as follows:

"That they had a right to consider all the circumstances attending the examination of the witnesses on the trial and to weigh their testimony accordingly."

[1] State *v.* Sterrett, 71 Iowa, 386 (1887); Rider *v.* People, 110 Ill. 11 (1884); People *v.* Knapp, 71 Cal. 1 (1886); Norris *v.* State, 87 Ala. 85 (1888); Felker *v.* State, 54 Ark. 489 (1891); Faulkner *v.* Territory, 6 New Mexico, 464 (1892); Siebert *v.* People, 143 Ill. 571 (1892); Miller *v.* State, 107 Ala. 40 (1894); State *v.* McCann, 16 Wash. 249 (1896), are, perhaps, among the best recent illustrations of the form which such an instruction should take in a criminal case.

[2] 76 N. C. 353 (1877).

Held, the refusal and modification of the instructions as tendered were error, and Bynum, J., said:

"It is questionable whether they or others understood that the interest of the defendant in the suit as affecting his credibility, was a circumstance attending the examination of a witness as distinguished from deportment, intelligence, means of knowledge and the like, which are more frequently understood as circumstances attending the examination of witnesses, At all events, the charge was not such a clear and distinct enunciation of an important principle of evidence as could leave no reasonable doubt of its meaning in the minds of the jury. The prayer was distinct and the response should have been equally so. For generations past and up to within the last few years, interest in the event of the action, however small, excluded a party altogether as a witness and that upon the ground, not that he may not sometimes state the truth, but because it would not ordinarily be safe to rely on his testimony. This rule is still applauded by great judges as a rule founded in good sense and sound policy: 1 Greenl. § 330.

"Parties to the action are now competent witnesses, but the reasons which once excluded them still exist but go only to their credibility.

"Interest like infamy does go to the credibility; and therefore especially in the inauguration of the new rules of evidence, the relation of interest to credibility should be impressed upon the jury in all cases of conflict of testimony, not as necessarily turning the scale in matters of doubt, but as an important fact to be considered by the jury in weighing one man's testimony against another's. The plaintiff having asked for was entitled to the specific instructions. For this error there must be another trial."

In *Ney* v. *City of Troy*,[1] an action for injuries to plaintiff received by falling upon ice on a side-walk, a charge was held correct which stated to the jury "that, in considering plaintiff's testimony, the jury are to take into account the fact that he is interested."

In *Young* v. *Gentis*,[2] an action of trespass upon land, it was held proper to charge the jury that they were the exclusive judges of the credibility of the witnesses; and that in weighing the evidence they were authorized to consider the relationship of the witnesses to the parties, their interest in the result of the suit, their apparent candor and intelligence and other matters of like character.

[1] 3 N. Y. Suppl. 679 (1888).
[2] 7 Ind. App. 199 (1893).

In *Barmby* v. *Wolfe*,[1] the action was upon a promissory note. The defendants had testified on their own behalf. At the instance of plaintiff the trial court instructed the jury as follows:

"The court instructs the jury that while the law makes the defendants competent witnesses in this case, yet the jury have a right to take into consideration their interest in the result of your verdict and all the circumstances which surround them, and give to their testimony only such weight as in your judgment it is entitled to."

This portion of the charge was assigned as error, but was held correct.

And in *City of Harvard* v. *Crouch*,[2] the action was to assess the damage to the real estate of Crouch by a change of grade of one of the city streets. The witnesses for the defendant (Crouch) were all, or nearly all, residents and taxpayers in the city, and had to that extent a pecuniary interest in the result of the trial.

Upon these facts and at the instance of the city the trial court instructed the jury as follows:

"In passing upon the testimony of the witnesses for the defendant, you have a right to take into consideration any interest which such witnesses may feel in the result of the suit, if any is proved or appears, growing out of their relationship or interest in the defendant or otherwise, and give to the testimony of such witnesses only such weight as you think it entitled to under all the circumstances proved on the trial."

Upon exception and appeal this instruction was held free from error.

There can be little doubt that such an instruction actually does substantial justice between the parties in ordinary civil cases, where there is no inequality in the situation of the parties and no other circumstance likely to lead the jury to disregard the weight and credibility of the evidence, and find as their sympathies or prejudices may dictate. But in negligence cases, where the evidence justifies, it would seem particularly important to request such an instruction in the charge.

[1] 44 Neb. 77 (1895).
[2] 47 Neb. 133 (1896).

As giving a well constructed and approved form of instruction to present the point, reference is made to the following three recent Illinois cases:

In *Railway Company* v. *Estep*,[1] a personal injuries case, the railway company asked the following instruction:

"The jury are instructed that while the law permits a plaintiff in a case to testify on his own behalf, nevertheless the jury have a right, in weighing his evidence and determining how much credence is to be given to it, to take into consideration that he is the plaintiff, and his interest in the result of the suit."

The court held this instruction a correct statement of the law, although the failure to give the instruction in this particular case was not held error, because, in another instruction, the substance of it had been embodied.

Mr. Justice Baker said (p. 132):

"The first of these instructions states a correct proposition of law, and should not have been refused on the ground it is abstract. The person suing was necessarily the plaintiff and necessarily had an interest in the result of the suit, and the instruction, therefore, does in terms refer to the pending case."

In *Railway Company* v. *Nash*,[2] Nash was a passenger injured by the negligence of the railway company. At the railway company's request the lower court directed the jury, in determining how much credence should be given plaintiff's evidence, that they may "take into consideration the fact that he is the plaintiff and his interest in the outcome of the suit." Held, no error.

And in *West Chicago Street Railway Company* v. *Dougherty*,[3] the action was for personal injuries and the trial court had refused to charge, at the request of the railway company, as follows:

"The jury are instructed that, while the law permits the plaintiff in the case to testify in his own behalf, nevertheless the jury have the right, in weighing his evidence, to determine how much

[1] 162 Ill. 130 (1896).
[2] 166 Ill. 528 (1897).
[3] 48 N. E. (Ill.) 1000 (1897).

credence is to be given to it, and to take into consideration that he is the plaintiff, and interested in the result of the suit."[1]

On appeal it was held, reversing a judgment against the railway company, that the refusal to give the instruction asked was error, and Phillips, C. J., said:

"No instruction was given on this question, and no objection exists to the instruction. There was a sharp conflict in the evidence as to who was guilty of negligence,—the plaintiff and the

[1] It is worthy of remark at this point, that cases have arisen wherein a similar instruction as to the interest and credibility of defendant's witnesses has been asked by the plaintiff, and held proper. Instances are: McDonnell *v.* Boom Co., 71 Mich. 61 (1888); Central Railroad & Banking Co. *v.* Maltsby, 90 Ga. 630 (1892), s. c. 16 S. E. 953, and Central Railroad & Banking Co. *v.* Attaway, 90 Ga. 656 (1893), s. c. 16 S. E. 956, where the interest consisted in the fact that the witnesses were in the employ of the defendants. To a proper instruction of this sort the defendant could offer no successful objection, but while this is true, yet the court must be careful in giving such an instruction not to overstep its limitations by suggesting that any suspicion attaches to the testimony of employes merely by reason of their employment. Thus, in Marquette, Etc., R. Co. *v.* Kirkwood, 45 Mich. 51 (1880), an action against the railroad company for breakage and loss of two soda water fountains in transit, the trial court instructed the jury that: "If they found it necessary to consider the testimony given by the agents and employes of the railroad, they should bear in mind the interest they have in protecting their company and shielding themselves from blame."

This was held reversible error, and Campbell, J., said: "While there may appear on the trial on direct or cross-examination such bias or behavior as would authorize comment by counsel to the jury, we think it is not within the province of a court to instruct a jury, or suggest to them, that any suspicion attaches to the testimony of agents or servants of a corporation or individual by reason of their employment, or that they have any such interest as requires them to be dealt with differently from other witnesses."

And this case was referred to with approval and distinguished in McDonnell *v.* Boom Co., *supra*, wherein Morse, J., said: "It was properly held in such case (Marquette, Etc., R. Co. *v.* Kirkwood) by this court that the judge erred in thus suggesting to the jury that suspicion attached to the testimony of these persons. But that is not this case. Nothing of this character was suggested by the court below, but the jury were properly advised of their right to take notice of the interest or employment of a witness, if such interest or employment had in anywise affected the credibility of their testimony."

Unless confined carefully within the proper limitations such an instruction might readily be destructive in the Appellate Court of a judgment for the plaintiff not otherwise erroneous.

driver of the wagon or the servants of the defendant. The evidence for the plaintiff as to the negligence of defendant was shown by his testimony and that of O'Brien. The testimony of the gripman and four or five passengers on the car which struck the wagon was in conflict with testimony for plaintiff. We have held, where there is such conflict, it is important that the jury should be correctly instructed. The refusal of this instruction was error."

In the last case the question was squarely presented, and the court held that the refusal of the trial court to give such an instruction was error requiring reversal. The judgment against the railway company was reversed solely upon this ground.

Such an instruction, if given by the trial court, might, in many negligence cases of the class particularly under discussion, recall the jury to their duty in weighing the evidence and determining the credibility of witnesses. At all events, the defendant in such a case is clearly entitled to the instruction under the authorities and should ask the trial court to give it, in order to have whatever benefit could be derived from the instruction if given, and, if refused, then to save an exception and thus reserve an important point of error in the event of an adverse result of the trial.

The instruction may need to be amplified in particular cases. Thus, where the interested witness shows, by his evidence or by his manner on the stand, that he is biased, it would seem proper for the court to direct the attention of the jury to this fact. And similarly the instruction would need to be amplified to cover the case of a witness whose testimony, in material points, is self contradictory, or is contradicted by other witnesses. Particular cases might also present other peculiarities upon the trial which would require additions to, or modifications of, the form of the instruction.

In conclusion, we draw attention to the remarks of Mr. Justice Williams in the recent case of *Fineburg* v. *Second and Third Streets Passenger Railway Company*.[1] The case is not directly upon the point discussed, because the particular witness was not interested; but the case is, nevertheless, important upon the general duty of trial courts to instruct the jury upon the credibility of witnesses, and is interesting for that reason.

[1] 182 Pa. 97 (1897).

The evidence of the only witness (one Rosenberg), who testified to acts of defendant's negligence, was contradicted to some extent, by his own statements, by the other witnesses, and by the circumstances surrounding the accident. The court held that the trial court committed reversible error in neglecting to call the attention of the jury in the charge to the pertinent facts affecting the credibility of the witness and the contradictions of his testimony, and Mr. Justice Williams said:

"With the exception of the testimony of Rosenberg, there was no evidence in this case to justify its submission to the jury. If his testimony, so contradictory in itself and so thoroughly contradicted by all the other evidence and by all the circumstances before the jury, was to be submitted as sufficient to justify a verdict, its credibility should have been called to their attention. The pertinent facts affecting its credit and the contradictions of its statements by other witnesses should have been adverted to. The learned judge alluded to him as an example of a class of witnesses whose testimony sustained the plaintiff's case, but he was not an example of a class. He stood absolutely alone. So far as the facts testified to by him affecting the charge of negligence against the company are concerned, every other witness called on both sides, some five or six in number, testified in a manner that tended with more or less directness to contradict him. In no particular relating to the failure of the driver to do his full duty is he corroborated by a single witness or a single circumstance. The attention of the jury should have been drawn to the situation and credibility of this witness."

In this case the defendant had not asked any instruction upon the credibility of Rosenberg, but the Supreme Court, nevertheless, found a way to overturn the judgment, because it was manifestly unjust and unsupported by the weight of the evidence. The court declared it to be the duty of the trial court, *suo motu*, to instruct the jury upon the point, and to call attention to the credibility of such a witness.

In every case where the evidence will justify, it is believed that some such instruction, modified to meet the particular facts, should be requested. In some cases the request, if refused, would result in overturning iniquitous judgments, which could not be destroyed or reversed on any other ground; and, if granted, the instruction should be helpful with the jury. *Theodore W. Reath.*

Philadelphia, June 22, 1898.