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Touro Law Review

Volume 10 | Number 3

Article 41

1994

Freedom of Speech & Press: Polish American Immigration Relief Committee, Inc. v. Relax

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Recommended Citation
(1994) "Freedom of Speech & Press: Polish American Immigration Relief Committee, Inc. v. Relax," *Touro Law Review*: Vol. 10 : No. 3 , Article 41.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol10/iss3/41

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"spite," a different determination may be established during the new trial.[1126]

Both the State and Federal Constitutions provide the press with broad protection of free speech by requiring defamatory statements to be published with "actual malice." Under the Federal Constitution, only a showing of actual malice is necessary to sustain an award of punitive damages. However, New York law, seems to require an additional showing of common-law malice, finding "actual malice . . . insufficient by itself to justify an award of punitive damages . . . .[1127] Together, these requirements not only reduce the "chilling effect" that large libel judgments may have on the "full and unfettered expression of ideas," but more importantly,[1128] these standards guarantee that the "broad cloak of protection afforded the press under the State and Federal Constitutions, . . . does not extend to the reckless and irresponsible infliction of injury by defendant."[1129]

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Polish American Immigration Relief Committee, Inc. v. Relax[1130]
(decided April 13, 1993)

Plaintiff, Polish American Immigration Relief Committee, Inc. [hereinafter PAIRC], a Polish immigrant aid corporation, brought suit against the magazine publisher and editor of "Relax," a small-circulation Polish language magazine, to recover for libel based upon the contents of a letter to the editor, and an interview,

1126. *Prozeralik*, 82 N.Y.2d at 480, 626 N.E.2d at 42, 605 N.Y.S.2d at 226.
1127. *Id.* at 479, 626 N.E.2d at 42, 605 N.Y.S.2d at 226 (1993).
1128. *Prozeralik*, 188 A.D.2d at 186, 593 N.Y.S.2d at 668.
1129. *Id.*
1130. 189 A.D.2d 370, 596 N.Y.S.2d 756 (1st Dep't 1993).

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which were published in its February 4, 1989, issue.[1131] In its defense, defendants claimed that the statements complained of were constitutionally protected opinion under both the New York State[1132] and Federal[1133] Constitutions[1134]. The court held that the statements at issue were non-actionable expressions of opinion under both the federal and state constitutional standards.[1135]

The subject of this lawsuit was a letter written by Marian Jablonski, a recent Polish immigrant.[1136] Mr. Jablonski complained about his family's treatment by PAIRC and the Polish American Congress upon their arrival to the United States.[1137] In the letter, Mr. Jablonski referred to the plaintiffs as "thieves who should have been put in prison long ago."[1138] Subsequently, Mr. Jablonski and his wife were interviewed, and Mr. Jablonski had an opportunity to elaborate on the letter.[1139] During the course of that interview, Mr. Jablonski explained why he considered PAIRC a "madhouse."[1140]

1131. *Id.* at 371, 596 N.Y.S.2d at 756.

1132. N.Y. CONST. art. I, § 8. Section 8 provides in pertinent part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

1133. U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." *Id.*

1134. *Relax*, 189 A.D.2d at 372, 596 N.Y.S.2d at 757.

1135. *Id.* at 374, 596 N.Y.S.2d at 758.

1136. *Id.* at 371, 596 N.Y.S.2d at 756.

1137. *Id.* at 371, 596 N.Y.S.2d at 756-57.

1138. *Id.* at 371, 596 N.Y.S.2d at 757.

1139. *Id.*

1140. *Id.* The comments which form the basis of plaintiff's claim included the following: "'PAIRC is a madhouse. For instance, they won't pick up people at the airport. Last year there was nobody to meet four families.'" Furthermore, he also stated:

> As I said, I don't regret having left Poland. There's a lesson for me: forget the PAIRC, forget the Polish American Congress, forget others. Let them do their fund raisers that nobody understands the aim of, let them pretend they are just and democratic, let them have their pictures taken with whomever they choose, let them listen to national anthems. I

Mr. Jablonski's letter and the substance of his interview were published in "Relax."[1141] However, the magazine did not imply that the facts and opinions stated were accurate.[1142] In fact, the article was prefaced by a statement from the editor, Mr. Heyduk, which stated: "[t]he text really speaks for itself, yet if anything remains to be said, it is the institutions referred to that should say it."[1143] In addition, Mr. Heyduk notified the plaintiffs and offered to publish an article exhibiting plaintiff's version of the facts, but the plaintiffs failed to respond.[1144] Nevertheless, the plaintiffs claimed that the article published constituted libel and defamation. However, the defendants claimed that "the statements complained of were constitutionally protected opinion."[1145]

The court acknowledged the differing federal and state standards used to evaluate the contents of speech alleged to be constitutionally protected.[1146] With respect to the federal test, the court found that under such test, "the court must first define the words as they are commonly understood, then determine whether the words are subject to verification, and lastly, examine the type of speech at issue."[1147] As the court explained, "[o]nly if the expression fell within the category of loose, figurative, or hyperbolic speech could the impression that an apparently

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> myself have found a job in my own occupation, and so I now have a chance to move out of here and really start living on my own instead of just treading water. The farther away from false do-gooders, the better.

Id. at 371-72, 596 N.Y.S.2d at 757. In addition, with respect to Jablonski's claim that PAIRC pays rent for unoccupied apartments in a building that "is rumored to be owned by the director of the PAIRC," he stated "You know how it is. The PAIRC gets funds for immigrants from the Americans, from the federal government, so it is better to report that all the apartments are occupied, that rent must be paid and so on. This way business is booming." *Id.* at 372, 596 N.Y.S.2d at 757.

1141. *Id.*

1142. *Id.*

1143. *Id.*

1144. *Id.*

1145. *Id.*

1146. *Id.* at 373, 596 N.Y.S.2d at 758.

1147. *Id.*

verifiable assertion was intended, be negated."[1148] As for the New York standard, the court set forth the "content, tone and purpose" test mandated by the New York State Constitution.[1149] However, despite the fact that the federal and state standards differ, the court recognized that under either standard, the dispositive issue is the same: "whether a reasonable listener could conclude that the defendant is conveying facts."[1150]

In order to determine whether the publication at issue in this case could be understood to mean that the speaker was conveying "facts," the court set out to distinguish between a "pure opinion," which is not actionable under New York law, and a "mixed opinion," which is actionable.[1151] Relying on *Gross v. New York Times Co.*,[1152] the court defined a "pure opinion" as "a statement of opinion which discloses the facts relied on, or

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1148. *Id.* To illustrate the application of this standard, the court cited Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970), where the Supreme Court held that the term "blackmail," used during a heated public debate, was not actionable because "[n]o reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense." *Id.*

1149. *Relax*, 189 A.D.2d at 372, 596 N.Y.S.2d at 758. This test originated in Steinhilber v. Alphonse, 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986). The *Steinhilber* court stated that "[t]he essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion." *Id.* at 290, 501 N.E.2d at 553, 508 N.Y.S.2d at 904.

1150. *Relax*, 189 A.D.2d at 373, 596 N.Y.S.2d at 758.

1151. *Id.* at 374, 586 N.Y.S.2d at 758. In *Steinhilber*, the New York Court of Appeals set forth the reasoning behind this distinction. The court stated that "[a]n expression of pure opinion is not actionable. It receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable it may be." 68 N.Y.2d at 289, 501 N.E.2d at 552, 508 N.Y.S.2d at 903 (citations omitted). In contrast, "[t]he actionable element of a 'mixed opinion' is not the false opinion itself - it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking." *Id.* at 290, 501 N.E.2d at 553, 508 N.Y.S.2d at 904 (citations omitted).

1152. 180 A.D.2d 308, 587 N.Y.S.2d 293 (1st Dep't 1992), *aff'd in part, rev'd in part*, No. 178, 1993 WL 41949 (N.Y. Ct. App. Oct. 21, 1993).

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does not suggest that it is based on undisclosed facts,"[1153] and a "mixed opinion" as one which is "published with actual malice as to the facts underlying the opinion," and therefore actionable.[1154]

The court found the words at issue here to be "pure opinion," and therefore, constitutionally permissible under the State and Federal Constitutions.[1155] It characterized the statements as "rhetorical hyperbole and vigorous epithet,"[1156] and concluded that "a reasonable reader would not interpret the expressions as factual."[1157] In reaching its decision, the court focused on the fact that the publication in question was based upon a letter written to the editor of a magazine.[1158] In the court's opinion, this fact assures that "[n]o reasonable person would conclude that PAIRC was literally a 'madhouse,' or that actual criminality is

1153. *Relax*, 189 A.D.2d at 374, 596 N.Y.S.2d at 758. *See also* John Grace & Co. v. Todd Assocs., 188 A.D.2d 585, 585-86, 591 N.Y.S.2d 477, 478 (2d Dep't 1992) (holding engineering company's report which indicated that plaintiff was responsible for project delays to be pure opinion since the expressions in the report "were adequately supported by the statement of the underlying facts"(citations omitted)); Keller v. Miami Herald Publishing Co., 778 F.2d 711, 718 (11th Cir. 1985) (finding that a cartoon depicting a nursing home that was closed down by state order constituted a pure opinion because "[t]he statement was not capable of verification.").

1154. *Relax*, 189 A.D.2d at 374, 596 N.Y.S.2d at 758. *See also* Zeevi v. Union Bank of Switzerland, 1993 WL 148871 at *6 (S.D.N.Y. Apr. 30, 1993) (holding statements contained in a Criminal Referral Form concerning a former employee to be actionable as a "mixed opinion" because the statement suggests that it is based upon underlying facts which are not disclosed).

1155. *Relax*, 189 A.D.2d at 374, 596 N.Y.S.2d at 759.

1156. *Id.* at 374, 596 N.Y.S.2d at 758. *See also* Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 286 (1974) (finding the word "scab" used in a union publication to describe nonunion letter carriers to constitute "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join"); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (holding the word "blackmail" as used in an article about a public figure to be "no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable").

1157. *Id.* at 374, 596 N.Y.S.2d at 759.

1158. *Id.* at 374, 596 N.Y.S.2d at 758-59.

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charged by the epithets 'thieves' and 'false do-gooders.'"[1159] In addition, the court took into account the underlying free speech considerations involved in situations of this kind, and the importance of encouraging a public forum.[1160]

It has often been noted that the New York test is broader than the federal test.[1161] The federal test first requires a determination of "whether challenged expression . . . would reasonably appear to state or imply assertions of objective fact[,]" and second, the determination of "the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person."[1162] In contrast, the state test examines "the content of the whole communication, its tone and apparent purpose."[1163] In discussing the distinction between the two tests, the *Immuno AG.* court observed that by "[i]solating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered," as required under federal law, an application of the federal test "may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context."[1164]

Nevertheless, while the two tests diverge somewhat, the focus of the inquiry under both standards are the same: "whether a reasonable listener could conclude that the defendant is conveying

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1159. *Id.* at 374, 596 N.Y.S.2d at 759.

1160. *Id.* at 375-76, 596 N.Y.S.2d at 359 (citing Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 255, 567 N.E.2d 1270, 1281-82, 566 N.Y.S.2d 906, 917-18 (1991) (discussing the public function of letters to the editor)).

1161. *See Immuno AG.*, 77 N.Y.2d at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914 (stating that "'protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by' the Federal Constitution") (citing O'Neill v. Oakgrove Constr., 71 N.Y.2d 521, 529 n.3, 523 N.E.2d 277, 280 n.3, 528 N.Y.S.2d 1, 4 n.3 (1988)); 600 West 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 145, 603 N.E.2d 930, 938, 589 N.Y.S.2d 825, 833 (1992) (stating that the federal test is narrower).

1162. *Immuno AG.*, 77 N.Y.2d at 243, 567 N.E.2d at 1273-74, 566 N.Y.S.2d at 909-10.

1163. *Id.* at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

1164. *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

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facts."[1165] Moreover, as is demonstrated by the case law, both tests often yield the same result.[1166] Thus, as long as an offensive utterance appears to communicate facts, it will be actionable under both state and federal law.

1165. *Relax*, 189 A.D.2d at 373, 596 N.Y.S.2d at 758 (citations omitted).

1166. *See, e.g.*, 600 West 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 145, 603 N.E.2d 930, 938, 589 N.Y.S.2d 825, 833 (1992) (finding statements made at a public hearing were not actionable defamation under Federal or State Constitutions); McGill v. Parker, 179 A.D.2d 98, 107-09, 582 N.Y.S.2d 91, 97-98 (1st Dep't 1992) (finding statements published in pamphlets and leaflets regarding the treatment of New York City carriage horses considered protected opinion under federal and state law).