

New York Civil Practice Act § 347--Testimony in Action Based on Accident Involving Negligence or Contributory Negligence

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cable."¹¹ If one reads the present statutes literally, it appears that a substantial change has been effectuated. They provide that alimony may be granted to a wife whether she is the plaintiff¹² or the defendant in the annulment action. This provision is also extended in order to include within its purview actions brought by a third party during the lifetime of both parties to the marriage. Consequently, guilt or innocence is not a material factor. It is to be noted that the enactments in question are more liberal than those granting relief in divorce and separation actions. In the latter cases, permanent alimony is awarded in actions brought by the wife.¹³ The present statute contains no such limitation.

Whether future analysis will deem these provisions mandatory or merely advisory presents a difficulty. The legislature has provided what may be a modifying clause by inserting the phrase "as justice requires". If this clause is used as a basis for granting or denying relief, it may be contended that there will be little or no change in the trend as it existed prior to the enactment of the statutory change. However, if this "loophole" phrase is not construed as a discretionary guide for ascertaining in what instances alimony should be granted, but instead it is held to apply only to the amount to be given,¹⁴ then the statute indeed works a substantial change.

MARY E. BROPHY.

NEW YORK CIVIL PRACTICE ACT § 347—TESTIMONY IN ACTION BASED ON ACCIDENT INVOLVING NEGLIGENCE OR CONTRIBUTORY NEGLIGENCE.—At early common law persons having no religious belief, insane persons, those convicted of crimes, deaf and dumb persons and parties to the action or interested in its outcome were disqualified as witnesses.¹ Today by various enabling statutes and decisions the tendency is to rest in the triers of the facts the ultimate value to be given to testimony, the source being a fact to be weighed in such determination. Thus a person is not rendered incompetent because of his religious belief or disbelief.² Persons are not excluded merely

¹¹ 1 VERNIER, AMERICAN FAMILY (1931) 266.

¹² *Anonymous v. Anonymous*, 174 Misc. 496, 21 N. Y. S. (2d) 71 (1940) (where plaintiff had married a man who had another wife living. Plaintiff brought an action for support. The court held that she could institute an action for annulment and get a direction for support under Section 1140-a of the Civil Practice Act).

¹³ N. Y. CIV. PRAC. ACT §§ 1155, 1164, 1170.

¹⁴ LAW REVISION COMMISSION, LEGIS. DOC. (1940) No. 65 (H) 59.

¹ RICHARDSON, EVIDENCE (5th ed. 1936) § 454.

² N. Y. CONST. ART. I, § 3 ("no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief").

because they are lunatics,³ or idiots,⁴ Persons convicted of crimes are competent even if the crime committed was perjury;⁵ and parties to the suit or persons interested in the event are competent witnesses.⁶ An important exception to the rule that a party who has an interest in the action is not thereby disqualified from testifying has been created by statute. Section 347 of the Civil Practice Act provides that "Upon the trial of an action * * *, a party or a person interested in the event * * *, shall not be examined as a witness in his own behalf or interest, * * * concerning a personal transaction or communication between the witness and the deceased person."⁷ The purpose of the statute is to prevent a person who might be a partisan witness from giving his version of a transaction with another who is deceased and therefore unable to speak.⁸ No undue hardship is created when nonpartisan witnesses are available. Of what worth is this same vested legal right or defense when there are no disinterested witnesses if the essential corresponding right to prove it before a tribunal is taken away by the disqualification of the only witnesses able to prove the fact?

Many writers advocate the admission of interested witnesses to testify to all matters whether with a deceased person or others, leaving the credibility to be determined by the court or jury. It is submitted that this trend of thought is in line with the enabling statutes and

³ *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865, 18 Am. Rep. 711 (1874).

⁴ *Barker v. Washburn*, 200 N. Y. 280, 93 N. E. 958 (1911).

⁵ N. Y. CIV. PRAC. ACT § 350; N. Y. PENAL LAW § 2444.

⁶ N. Y. CIV. PRAC. ACT § 346.

⁷ N. Y. CIV. PRAC. ACT § 347. "Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof. No party or person interested in the event, who is otherwise competent to testify, shall be disqualified from testifying by the possible imposition of costs against him or the award of costs to him. A party or person interested in the event or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be qualified for the purposes of this section, to testify in his own behalf or interest, or in behalf of the party succeeding to his title or interest, to personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate."

⁸ *Abbot v. Doughan*, 204 N. Y. 223, 97 N. E. 102 (1912).

decisions above referred to although expressly repudiated by Section 347. "When a law works well and satisfies the judgment of the bar and the public, there is no occasion for change; but when something has been overlooked and the defect is discovered by the practical test of litigation, the legislature is apt to respond."⁹ Section 347 has not worked well in certain situations and the legislature has responded.

Let us assume that *A* and *B* are riding along a public highway in a motor vehicle under the control of *A*. Suddenly *B* grabs the wheel thereby throwing the car into a ditch. *B* is killed. In an action by *B*'s representatives against *A* for negligently causing the death of *B*, *A* could not testify as to what took place, by virtue of Section 347. Clearly defendant *A* should not be obliged to suffer liability, yet as the statute stood he would find it almost impossible to prove the negligence of *B*. With this evil presented by Section 347, the New York Legislature enacted the following amendment:

"Nothing contained in this section, however, shall render a person incompetent to testify as to the facts of an accident or the results therefrom where the proceeding, hearing, defense or cause of action involves a claim of negligence or contributory negligence in an action wherein one or more parties is the representative of a deceased or incompetent person based upon, or by reason of the operation or ownership of a motor vehicle being operated upon the highways of the state, but this provision shall not be construed as permitting testimony as to conversations with the deceased."¹⁰ The enactment applies to the above case,¹¹ and defendant *A* will be permitted to testify as to the facts of the accident. It is specifically limited and will open the door to previously barred testimony if certain conditions precedent, specified in the statute, are first complied with by the party seeking to introduce such testimony.

The statute is expressly limited to actions wherein the tort of negligence is the cause of action or defense. Thus this fact must be established before the statute will apply; the proof of any other tort will not satisfy the statute. Having thus established negligence it will be further necessary to establish that the negligence involved the ownership or operation of a motor vehicle being operated upon the highways of the state. The use of the broad term "motor vehicle"¹² does not limit the amendment to automobiles but includes any means of convey-

⁹ *Clifford v. Denver & Rio Grande R. R.*, 188 N. Y. 349, 354, 80 N. E. 1094, 1095 (1907).

¹⁰ N. Y. Laws 1940, c. 620.

¹¹ In *Trombly v. Deso*, 235 App. Div. 15, 256 N. Y. Supp. 225 (3d Dept. 1932), the defendant was driving his car with the plaintiff's intestate as a guest passenger when an accident occurred resulting in the death of the guest. On the trial the defendant sought to prove the contributory negligence of the decedent by his own evidence that he and decedent had been drinking and were intoxicated at the time of the accident. The court excluded the evidence as being a personal transaction with the deceased. Accord: *Lakin v. Wright*, 230 App. Div. 330, 243 N. Y. Supp. 597 (4th Dept. 1930).

¹² See 10 *FORDHAM L. REV.* 123, where the term "motor vehicle" seems to be limited to automobiles.

ance used as a means of transportation on land propelled by a motor.¹³ A horse-drawn vehicle is excluded; although a trolley car or railroad train may be classified as motor vehicles the requirement that the vehicle must have been operated upon the highways of the state, excludes their being considered as such.¹⁴ Except for the fact that this last condition was intended to exclude trolley cars and railroad trains, it seems to serve no valid purpose in alleviating the evil sought to be corrected. Suppose the accident takes place on a private street as distinguished from a public highway, the evil which existed where a public highway is concerned exists here, yet by express provision the amendment is inapplicable.

After all the conditions above set forth have been complied with testimony as to the facts of the accident are admitted but testimony as to a conversation with the deceased is still incompetent.¹⁵ The statute somewhat alleviates the situation but its limitations are unduly narrowed by the wording of the Act. If the courts interpret the statute in the light of the evil sought to be prevented and give a liberal construction to its limitations the Act is a definite step forward. If, on the other hand, the Act is to be strictly construed, many evils sought to be prevented will not be eliminated.

BENJAMIN LIEBOV.

ATTORNEYS EXEMPT FROM FILING CERTIFICATE OF PARTNERSHIP.—The state, by virtue of its police power, may regulate its internal affairs for the protection and promotion of the general welfare.¹ Exercising this regulatory power the New York Legislature enacted in 1939 a mandatory direction requiring all persons conducting business as partners to file with the county clerk a certificate containing the name of the partnership and the names and addresses of all the partners.² The purpose of this statute was for the general conve-

¹³ BLACK, LAW DICTIONARY (3d ed. 1933) 1801 ("VEHICLE. Any carriage, conveyance, or other artificial contrivance used, or capable of being used, as a means of transportation on land;—not ordinarily including locomotives, cars, and street cars which run and are operated only over and upon permanent track or fixed way, unless the context of the ordinance or statute in question clearly indicates an intention to the contrary").

¹⁴ *Ibid.*

¹⁵ The statute expressly provides that "this provision shall not be construed as permitting testimony as to conversations with the deceased".

¹ *Halter v. State of Nebraska*, 205 U. S. 34, 27 Sup. Ct. 419 (1907).

² N. Y. PENAL LAW § 440-b: "1. No person shall hereafter carry on or conduct or transact business in this state as partners under a partnership agreement unless such persons shall file in the office of the clerk of the county or counties in which the partnership business shall be conducted or transacted, a certificate setting forth the name under which such business is, or is to be, conducted or transacted, the true or real full names of all the persons conducting