

EXAMINERS' ANALYSIS OF QUESTION NO. II

The Members would have a complete defense to the tort action because their speech is constitutionally protected by the First Amendment to the United States Constitution. The Free Speech Clause of the Amendment states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech. . . ." The right to free speech protects one against constitutionally infirm legislation but the right to free speech can serve as a defense in state tort suits, including suits for the intentional infliction of emotional distress. *Hustler Magazine, Inc v Falwell*, 485 US 46, 50-51 (1988). Stated differently, if the Members' speech is protected under the First Amendment, that protection eliminates liability for the exercise of the Members' First Amendment right. That the Members could assert their right to free speech as a defense nevertheless requires further analysis to determine if the Members' words are entitled to constitutional protection.

It is clear from the facts, speech is at issue here and it is speech that is at the base of Mr. Jones's cause of action. Words on a picket sign are speech. The Members' demonstration did not physically disrupt the funeral nor trespass on it. Therefore, on this threshold question, speech is at the core.

Whether the First Amendment prohibits holding the Members liable for its speech turns largely on whether that speech is of public or private concern. Speech on matters of public concern is accorded the greatest protection under the Free Speech Clause because public speech on matters of public concern goes to the very core of open discourse and debate and goes to the essence of self-government. *Snyder v Phelps*, 562 US 443 (2011) citing *New York Times Co v Sullivan*, 376 US 254, 270 (1964) and *Garrison v Louisiana*, 379 US 64, 74-75 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of first amendment values and is entitled to special protection." *Connick v Myers*, 461 US 138, 145 (1983) (internal quotations omitted).

However, not all forms of speech are accorded such high protection. Where matters of purely private significance are at issue, First Amendment protections are often less rigorous.

Hustler, at 56, citing *Dun and Bradstreet, Inc v Greenmoss Builders, Inc*, 472 US 749, 758-759 (1985).

The issue presented is whether the Members' speech is public or private in nature, with the former deserving of high--if not the highest--First Amendment protection and the latter receiving far less. "Speech deals with matters of public concern when 'it can fairly be considered as relating to any matter of political, social or other concern to the community,'" *Snyder*. at 453 citing *Connick*, "or when it is 'a subject of legitimate news interest; that is a subject of general interest and of value and concern to the public.'" *Snyder, supra*.

Deciding whether speech is of public or private concern requires examination of the content, form and context of that speech.

Applying these principles to the facts at hand yields the conclusion that the content on the placard related to broad issues of interest to society at large, rather than matters of purely private concern. Although harshly, even venomously expressed, the words chosen related to America's war effort, the political and moral conduct of the nation, the fate of the nation, homosexuality in the military, and scandals involving the Catholic clergy. All are matters of public, not private, concern in their content.

As far as context is concerned, the Members' demonstration took place on public property, next to a public street, highly traditional places for demonstrations of this nature and the central locale in the public marketplace for the debate, discourse and exchange of public concerns. These precepts are not lessened because Jones's son's funeral was taking place nearby, nor because of the caustic nature of the Members' expressions.

Finally, even protected speech may be subject to reasonable, time, place and manner restrictions. Here, however, the Members followed the guidance of local authorities as to where the picketing could take place. The picketing was 1000 feet away from the church and did not include shouting, violence, profanity or interference with the funeral.

In sum, the Members were expressing public concern from a public place in a manner consistent with police directives in a peaceful and non-violent manner.

The Members have a legitimate defense under the Free Speech Clause of the First Amendment and cannot be held liable to Jones for his claim of intentional infliction of emotional distress.