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*Dec. 13, 14, 15
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*Mar. 2

THOMAS ROSS (*Plaintiff*) .....APPELLANT;

AND

ALLAN LAMPORT (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Libel and Slander—Defamation—Statements to reporters published in newspapers—Whether all innuendos should have been placed before jury—Whether words in relation to calling of plaintiff—No actual damage shown—Inflammatory address to jury—Excessive damages awarded.*

The appellant, a taxi cab driver and owner, brought this action for damages for libel and slander against the respondent who, at the time, was the Mayor of the City of Toronto and Chairman of its Board of Police Commissioners, a body responsible for the issuance or refusal of licences to taxi cab drivers and owners. The appellant had appealed successfully from a refusal by the Board to grant him a

licence and had moved to commit the respondent for failing to comply with the decision of Lebel J. that a licence should be issued. Oral reasons given by the Chief Justice of the High Court in disposing of this motion were published in the press and contained statements which the respondent regarded as reflecting on himself and the Board. The respondent, in interviews with reporters from two newspapers commented on these statements and charged the appellant with, inter alia, "trafficking in licences". The interviews were reported in these newspapers. The trial judge ruled that the statements made by the respondent were published on an occasion of qualified privilege. The jury found that the words spoken referred to the appellant in his occupation, that in their natural and ordinary meaning they were defamatory of the appellant, that they were also defamatory of him in the sense ascribed to them in some of the innuendos pleaded, that they were published with express malice, and assessed the damages at sums totalling $40,000.

In this Court the respondent contended, as was held by the Court of Appeal, (1) that all the innuendos should not have been placed before the jury as the words published were not capable of bearing the meaning assigned to some of them, (2) that the words spoken were not in relation to the appellant in his calling and that no actual damage was shown, (3) that the address of counsel for the appellant had been inflammatory and (4) that the damages were excessive.

*Held:* The appeal should be allowed and the new trial directed should be limited to the amount of damages. If the appellant does not elect to have his damages assessed only on the basis that the words were defamatory of him in their natural and ordinary meaning, the judge presiding at the new trial will decide on each innuendo as to whether the words are reasonably capable of the meaning ascribed and will instruct the jury accordingly.

*Per* Kerwin C.J. and Rand J.: In view of the position taken at the trial by counsel for the respondent where he sought to use all the innuendos in order to strengthen his argument that the respondent had brought himself within his claim of privilege and was therefore entitled to comment fairly on a matter of public interest, counsel cannot now change his ground and complain that one or more innuendos were not capable of the meaning ascribed.

*Per* Locke, Cartwright and Abbott JJ.: The course of the trial in regard to the submission of the innuendos to the jury was not satisfactory, and it has not been established that it was such as to preclude counsel for the respondent from relying on that ground of appeal.

*Per Curiam:* Since the words "trafficking in licences" clearly referred to the appellant in relation to his calling as a taxi cab driver and owner, they were actionable without proof of special damage.

Considering the circumstances, the address of counsel for the appellant to the jury was not inflammatory.

It cannot be said that the Court of Appeal was wrong in holding that the jury acting reasonably could not have awarded so large a sum.

1956

ROSS
v.
LAMPORT

APPEAL from the judgment of the Court of Appeal for Ontario (1), ordering a new trial in an action tried by a jury for damages for libel and slander.

*R. N. Starr, Q.C.* for the appellant.

*J. J. Robinette, Q.C.* for the respondent.

THE CHIEF JUSTICE:—In an action for libel and slander the plaintiff secured a judgment for $40,000 damages against the respondent upon the answers of the jury made to these questions:—

1. Were the words complained of spoken to:
   (*a*) Hamilton Yes
   (*b*) Belland Yes
2. Did the defendant authorize or intend the publication of the words complained of
   (*a*) in Exhibit 2—*Globe and Mail* Yes
   (*b*) in Exhibit 4—Toronto *Star* Yes
3. With respect to slander do the words refer to the Plaintiff in the way of his trade or calling? Yes.
4. Are the words defamatory to the plaintiff
   (*a*) in their natural and ordinary meaning Yes
   (*b*) in any of the meanings attributed to them in the innuendo Yes
5. Are the words in their natural and ordinary meaning true in substance and in fact? No
6. In so far as the words are comment, are they fair comment on facts truly stated? No
7. Was there express malice on the part of the defendant? Yes
8. Damages:

| | |
|---|---|
| for slander to Hamilton and/or | 2,500.00 |
| for slander to Belland and/or | 2,500.00 |
| for libel in *Globe and Mail* and/or | 25,000.00 |
| for libel in Toronto *Star* | 10,000.00 |

We find for the Plaintiff.

The Court of Appeal for Ontario (1) set aside the judgment and ordered a new trial generally, because, in the opinion of the Members of that Court:—(1) The trial judge erred in allowing all the innuendos to be placed before the jury; (2) The address to the jury of Counsel for the appellant at the trial was inflammatory; (3) The damages awarded by the jury were so excessive as to amount to a wholly incorrect estimation. The plaintiff now appeals.

(1) [1955] O.R. 542; 4 D.L.R. 826.

The appellant's calling was that of a taxi driver and owner and the respondent was Mayor of Toronto and Chairman of the Board of Police Commissioners for the city. The appellant and one Smith had been partners in various taxi cab businesses and in 1950 these businesses were sold for a substantial sum. The necessary approval of the Board was given to the transfer of the licenses from the appellant and Smith. In the spring of the following year Smith obtained the Board's approval of the purchase by him of a business known as Imperial Taxi and in this new business the appellant was a partner.

Smith was drowned in the autumn of 1951 and the appellant, in addition to doing what he could for Smith's widow, applied to the Board for a taxi cab license in his own name. This was refused, but, on appeal, Mr. Justice Lebel ordered the Board to issue the license. It becoming apparent that the Board did not intend to obey this order, a motion was launched to commit the Members of the Board who thereupon moved to rescind, or vary, the order of Lebel J. Both motions were heard before the Chief Justice of the High Court on the 29th and 30th of October, 1953. On the morning of the latter day Counsel on behalf of the Board Members undertook that the appellant would be granted the license if the appellant would withdraw the committal proceedings. An order was subsequently issued incorporating these terms and disposing of the question of costs which had been left by the parties to Chief Justice McRuer, but, in the meantime, on October 30, the respondent was interviewed by Hamilton, of the *Globe and Mail* newspaper, and by Belland, of the Toronto *Star* newspaper. The words spoken by the respondent to these men and the reports in the two newspapers contain the slanders and libels in issue.

As to the first point upon which the Court of Appeal set aside the judgment at the trial, I am of opinion that, in view of the position taken at the trial by Counsel for the respondent, the latter cannot change his ground and complain that one or more innuendos were not capable of the meaning ascribed. What occurred at the trial is set out at pages 340, 341 and 342 of the record at a point in the trial where Counsel for the respondent was seeking to use all the innuendos in order to strengthen his argument that the

1956

Ross
v.
LAMPORT

Kerwin C.J.

respondent had brought himself within his claim of privilege and was therefore entitled to comment fairly on a matter of public interest.

At this stage a point raised by Mr. Robinette may be dealt with. He argued that no actual damages having been proved, the spoken words were not said in relation to the appellant in his calling. The calling of the appellant was that of a taxi cab driver and owner and, in view of the authority conferred upon the Board in relation to licensing, the charge, as it appears in the defamations of "trafficking in licenses" refers clearly, in my opinion, to the appellant in relation to his calling. The Board, including the respondent, had taken a decided stand with reference to people who, in their opinion, were obtaining licenses and then attempting to build up a good will, for both of which they might be able to obtain a substantial sum upon the transfer of the license, the approval of which transfer came under the jurisdiction of the Board. A license was necessary for the plaintiff to carry on a taxi business and the charge that he was trafficking in licenses, in my opinion, clearly brings the case within the well settled rule as set forth in the 3rd edition of Gatley on Libel and Slander, at pp. 61 et seq. Upon this point the 4th edition of this textbook must be read with care in view of *The Defamation Act, 1952,* which was enacted in Great Britain subsequent to the appearance of the 3rd edition. The decision of the House of Lords in *Jones* v. *Jones* (1), is distinguishable as is apparent from a reading of this part of the headnote:—

> An action of slander will not lie for words imputing adultery to a schoolmaster, in the absence of proof of special damage, unless the words are spoken of him touching or in the way of his calling.

Here the defamations claimed show that there was nothing personal like that which occurred in the case of the schoolmaster but it affected the very means of livelihood of the appellant.

The Court of Appeal considered that the address of the appellant's Counsel had been inflammatory. It is impossible to lay down any hard and fast rule, but it should be emphasized that in such an action as this the damages may be punitive and furthermore it must be remembered that by reason of the holding of the trial judge that the occasions

(1) [1916] 2 A.C. 481.

were privileged, it was necessary to secure from the jury an affirmative finding that there was malice. The reference by Counsel for the appellant to the larger question of autocratic behaviour on the part of some Boards was made only to bring in the particular application of the words in issue in this litigation. Upon consideration of what was said by Counsel, I am, with respect, unable to agree that, considering the setting and all the circumstances, his address was inflammatory.

Finally, the Court of Appeal considered that the amount awarded amounted to a wholly incorrect estimation. In *Deutch* v. *Martin* (1), this Court decided that:—

> When an appellate court is considering whether a verdict should be set aside on the ground that the damages are excessive (there being no error in law), it is not sufficient for setting it aside, that the appellate court would not have arrived at the same amount; its rule of conduct is as nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence; this is the rule in contract cases (*Mechanical and General Inventions Co. Ltd.* v. *Austin* (1935) A.C., 346, at 378), and the same rule applies in cases of tort.

In the *Mechanical* case (2), Lord Wright referred to *Praed* v. *Graham* (3), where the Court of Appeal had refused to set aside a judgment in an action for damages for libel because they thought that, having regard to all the circumstances of the case, the damages were not so large that no jury could reasonably have given them. I would certainly not have awarded the substantial sums fixed by the jury in the present case, but that by itself is not sufficient and the question to be determined is whether the jury appreciating the evidence could reasonably have awarded the appellant the various amounts. My conclusion is that they could not.

The appeal should therefore be allowed and a new trial directed but only as to the amount of damages. The appellant has the finding of the jury in his favour that the words were defamatory of him in their natural and ordinary meaning and he may decide to have his damages assessed on that basis only. However, as a practical matter, if he elects to ask the jury for damages in the light of any of the innuendos set forth in the statement of claim, the presiding judge

(1) [1943] S.C.R. 366. (2) [1935] A.C. 346.
(3) (1889) 24 Q.B.D. 53.

1956

Ross
v.
LAMPORT

Kerwin C.J.

will decide in each case as to whether the words are reasonably capable of the meaning ascribed. Where he decides in the negative, that will be the end of the matter; but, where he decides in the affirmative, it will be left to the jury to assess the damages. The appellant should have his costs of the action down to and including the trial and the costs of the appeal to this Court, but the respondent should have his costs in the Court of Appeal. The costs of the new assessment of damages should be in the discretion of the presiding judge.

RAND J.:—This is an action for slander and libel. The respondent Lamport was mayor of Toronto when, in 1953, the Police Commission of which he was chairman was directed by an order of a judge of the High Court to issue a taxi-cab owner's license to the appellant Ross. The Commission did not comply with the order and a motion was made before the Chief Justice of the High Court to attach the respondent and one other member in contempt. At the same time a cross-motion was launched to set the order aside. By consent and on the undertaking of the Commission to issue the license both motions were dismissed except as to costs which were to be settled by the court. A direction that they should be paid by the Commission was accompanied by reasons which reviewed the facts of the controversy in detail. Upon these being called to his attention, the mayor in an interview gave out for publication, first, to a reporter of the Toronto *Star* newspaper and a few hours later to two representatives of the *Globe and Mail,* a violent criticism of the original order and of the reasons given by the Chief Justice. Included in the remarks were words to the effect that Ross had been guilty of "trafficking" to his profit in taxi licenses and that the Commission had been acting in the best interests of the public in its refusal to issue one. This action was thereupon brought.

The jury found that the words had been spoken maliciously of Ross in the way of or relating to his occupation and were defamatory, and fixed the damages as follows: for the words spoken to the first reporter, $2,500 and for the publication in the *Star* $10,000; for the second communication, $2,500 and on the publication in the *Globe and Mail* $25,000.

On appeal a new trial was directed. Mr. Robinette, for the respondent, supported that direction on four grounds: that of four innuendoes alleged, two were beyond any reasonable interpretation of the language used; that the words spoken were not in relation to Ross in his calling and that no actual damage was shown; that the address of counsel had been inflammatory; and that the damages were excessive.

The first of these objections is disposed of by what took place at the trial. The role of the court in dealing with innuendoes was expressly raised by counsel for Lamport at the trial, and the following exchange is sufficient to conclude the point taken:

HIS LORDSHIP: Of course, if the jury comes to the conclusion—if it is left to them, for instance, the innuendo in paragraph 5 that Ross had obtained in some way the good offices of the Chief Justice of the High Court, in my view I have grave doubts whether they believe that was a fact that would be germane to the business of his living.

HON. MR. HAYDEN: My friend has set up that innuendo and there is no way in which—that I know in law in which we can get the benefit of the opinion of the jury—

HIS LORDSHIP: Any defence—

HON. MR. HAYDEN: No, or even on the question of whether it is capable—whether that innuendo has been established or not, because the verdict of the jury is a general verdict on the libel but I think your lordship has the right to determine whether or not the words in their natural and ordinary meaning are capable of a defamatory—are capable of being said to be of a defamatory nature, and also I think your lordship is entitled to rule so far as the innuendo is concerned they are capable of such an innuendo, I think that is all part of the duty which your lordship has, but what I am arguing in connection with the qualified privilege is something more basic, your lordship's function as to determine whether or not qualified privilege exists on this occasion.

These remarks were made in the course of an argument which sought to bring all the innuendoes within the privilege of fair comment on a matter of public interest. For the purposes of the trial the respondent thus committed himself to allowing them to go to the jury as fair interpretations of the language used; and having done so, he cannot be heard to complain on appeal that they should have been withdrawn.

The second point presents a question of some nicety in the examination of which a distinction must be made between the several statements made. The main charge was that of "trafficking in licenses": could this be found to be a slander actionable without proof of actual damage?

1956

Ross
v.
LAMPORT

Rand J.

The law on this question was thoroughly reviewed by the House of Lords in *Jones* v. *Jones* (1), from which the scope and character of this genre of slander can be summarized as follows: words spoken of a person following a calling, imputing lack of fitness for or misconduct in the calling, are per se actionable. The statement here was expressly made of Ross and in its plain meaning it is directed to him in his calling. "Trafficking in licenses" implied both a lack of good faith toward the Commission and a direct object in obtaining licenses which the appellant knew to be in the face of its administrative policy, an object which would justify the Commission in refusing a license or a transfer. The business was the carrying of passengers and with that as the sole end in view; to enter upon it for the purpose of building up a quasi-franchise that could be sold at a profit is, I should say, carrying on that business illegitimately and is misconduct in the course of it.

The cases in which difficulties have been encountered in this category have generally been concerned with moral or other delinquency not necessarily incompatible with the continuance of the calling but an imputation of which might have repercussions upon it. In them the courts have required that the imputation either by express reference or necessary implication touched the calling prejudicially, and it is argued that a license in no aspect can in the proper sense be said to do that to a taxi business. In considering this we must take the law of slander to be more than a mere series of specific and disparate rulings; as Lord Sumner in *Jones* v. *Jones, supra,* at p. 500, says:

> The Court of Appeal in the present case says (1) "the law of slander is an artificial law. . . . It is not like a law founded on settled principles, where the Court applies established principles to new cases, as they arise." I think this does the common law on the subject less than justice. . . . (4) when words are spoken of a person following a calling, and spoken of him in that calling, which impute to him unfitness for or misconduct in that calling. The classification is one of words, not of persons, but it is a classification only. There is no reason why all four classes of words should be held to import legal damage for the same or for some analogous reason. I think these rules are as well established, as worthy of being called principles, and as capable of being applied to new cases when they arise, as are most rules or principles of law or equity. Perhaps they are neither ideally just nor ideally logical, but principles are like that.

(1) [1916] 2 A.C. 481.

Apart from special cases, the consideration underlying oral defamation is that the language in the reasonable judgment of men could not but have a damaging effect on the person in the occupation he pursues; anything short of that would open the door to a flood of actions over mere "words" which experience shows, for the most part, to be evanescent in effect. But the language before us describes not only misconduct but also a want of capacity: a license is as essential as the skill to drive, which also must be satisfactorily shown; and in this there is a clear analogy in the cases. A charge of insolvency spoken of a trader "touches a man in his trade because it is an attack upon a necessary part of his trading equipment": Lord Wrenbury in *Jones* v. *Jones, supra,* at p. 507: in like manner the license is a necessary part of the equipment of a taxi business; and both in this aspect and as misconduct, the imputation of trafficking takes us directly within the structure of the operations.

On the other hand the innuendoes imputing dishonesty toward the Chief Justice of the High Court in the application for attachment and that in some way Ross had succeeded in winning his good offices do not touch Ross, the taxi operator; their stigma affects him as a litigant and an individual. But, as Pickup C.J. says, the failure to make this distinction clear to the jury could have affected only the quantum of damages which will now be dealt with.

The third ground was argued as interlocked with the fourth. The inflammatory address was said to have produced damages beyond the limits of any reasonable relation to the offence and the authorities cited in support of the objection were, without exception, cases where the damages were found to be in that sense excessive. But the grounds are distinct and severable. An inflammatory address, in the proper understanding of that expression, is sufficient in itself to call for a re-assessment unless, among other things, it can be said that the amount awarded demonstrates that the jury could not have been influenced by it. But an excessive award as an individual objection must be examined from the standpoint of other considerations.

On the former ground I am constrained to observe that, as it was once, in effect, put in the Court of Appeal for Ontario by Riddell J.A., a lawsuit is not a tea party, and except where there has been a clear and objectionable

1956

Ross
v.
LAMPORT

Rand J.

excess, we should hesitate to put shackles on the traditional scope allowed counsel in his plea to the tribunal of his client's countrymen. The attempt to divest a trial of any feeling would not only be futile but might defeat its object which is to ascertain the reality of past events. In libel damages can be punitive or exemplary, and malice can be an ingredient, and from these it is impossible to dissociate all feeling. The objectionable elements in inflammatory remarks are primarily irrelevant ideas which are highly provocative of hostility; but I should have found difficulty in finding anything in Mr. Starr's address of this character. The reference to the tendency of present day administrative bodies to become arbitrary and to resent interference with their action is surely legitimate: the illustration of the particular by the general has been a useful and effective device since the institution of the jury. In many cases it is almost necessary to convey a real appreciation of the full nature and significance of the action assailed. But that the verdict here represents a castigation of the respondent for the sins of all of his brother administrators does not, I fear, do justice to those who found it. The best test for such a question is experience, and I doubt that the previous generations of advocates would have been moved to raise an eyebrow, much less be shocked, by anything uttered in this case.

But I put that question aside. I am unable to say that the Court of Appeal was wrong in finding the damages awarded were excessive in the second sense. Although in such a matter damages are substantially what a jury thinks fit to find, whether as speculatively estimated actual damages, as so-called general damages, or as exemplary or punitive damages—the words simply define an area almost at large—yet the judgment upon these considerations must be proportionate to the situation in which they were uttered. Here Lamport was acting as a public official. Towards Ross as an inconspicuous individual he can be taken to have had no resentment but toward him as an applicant for a license who had been guilty of causing a violent irruption upon the otherwise placid proceedings of the Commission, amounting almost to a subversion, the attitude was quite different. The view of the jury was probably that the mayor had struck out against him as

against a marauder, recklessly and regardless of the facts intending to administer a chastisement that would demonstrate both his culpability and the outrageous treatment accorded the Commission. That was not the object or purpose of the privileged occasion, the protection of which he sought to invoke: *Royal Aquarium* v. *Parkinson* (1). What resulted was a substantial wrong to Ross. On the other hand, the mayor was attempting, though in a somewhat crude manner, to vindicate the action of a public body; and however objectionable the insolence of office may be, it is certainly not desirable that zeal, however misguided, in protesting what can be taken to be believed to be an injury to the public interest, should draw upon itself such an exorbitant condemnation.

But I see no reason to have all of the issues in this case threshed out anew. As Laidlaw J.A. in *Arland* v. *Taylor* (2), in his valuable review of the law dealing with new trials, said, it is against the interest of the administration of justice that they should be directed if it is clear that substantial justice has been done in determining the real issues; and although it was intimated by Pickup C.J. that in some other but unstated respects the trial seemed to be unsatisfactory, that there was substantial justice done here on the main questions is, I think, beyond controversy. I should add that before the Court of Appeal the circumstances of the two innuendoes objected to do not appear to have been made as clear as they were in the argument before us. I would therefore limit the rehearing to a re-assessment of damages.

On that rehearing, however, the answer of the jury to question 4(*b*),

> Are the words defamatory to the plaintiff . . .
> (*b*) in any of the meanings attributable to them in the innuendo?
> Answer, yes.

requires consideration. The innuendoes set forth in para. 5 of the statement of claim can be treated as being five in number, and the jury were asked to find whether "any" of them were defamatory. In that situation it cannot be said which specifically is or are intended by the answer "yes", and the answer, concluding an undisclosed fact, cannot form a factual basis of damages for a new jury. If, then,

(1) (1892) 1 Q.B. 431.
(2) [1955] O.R. 131 at 138.

1956

ROSS
v.
LAMPORT

Rand J.

the appellant desires to rely upon the innuendoes, the verdict as to them must be opened and it will be necessary for the new jury to deal with them *ab initio*. I should remark, however, that whether the innuendoes are relied upon or abandoned, the item included in para. 4 by the words "that he was concerned only in trafficking in licenses as a profit to himself and in preference to serving the public in his trade" is not to be taken as restricting the plain and ordinary meaning of the libel to be drawn from the words used.

I would allow the appeal and modify the judgment of the court below by limiting the new trial accordingly. The appellant will be entitled to his costs of the trial and of the appeal to this Court and the respondent to the costs in the Court of Appeal. The costs on the re-assessment will be as directed by the judge before whom it is made.

The judgment of Locke, Cartwright and Abbott JJ. was delivered by:—

CARTWRIGHT J.:—The facts out of which this action arises and the questions raised before us are set out in the reasons of my Lord the Chief Justice and of my brother Rand. I agree with the conclusion at which they have arrived and propose to state my reasons briefly.

Before charging the jury the learned trial judge submitted to counsel the questions which are set out in the reasons of my Lord the Chief Justice. Counsel for the appellant indicated that he found these satisfactory. Counsel for the respondent, while not expressly objecting to questions being put, made it clear that he did not consent to this course being followed and submitted that if questions were to go before the jury they should be amended. Having heard the submissions of counsel the learned judge decided to put the questions before the jury without amendment. At the beginning and again at the end of his charge the learned judge made it clear to the jury that they were free to answer the questions or to leave them unanswered and to bring in a general verdict. This was, in my opinion,

a permissible course authorized by the terms of s. 4 of the *Libel and Slander Act*, R.S.O. 1950, c. 204, reading as follows:—

> On a trial of an action for libel the jury may give a general verdict upon the whole matter in issue in the action, and shall not be required or directed to find for the plaintiff, merely on proof of publication by the defendant of the alleged libel, and of the sense ascribed to it in the action; but the court shall according to its discretion, give its opinion and directions to the jury on the matter in issue as in other cases, and the jury may on such issue find a special verdict, if they think fit so to do, and the proceedings after verdict, whether general or special, shall be the same as in other cases.

By answering the questions the jury have in effect returned a special verdict, as they were free to do. In adding at the end of their answers the words—"We find for the Plaintiff"—they may be said to have also found a general verdict but such general verdict is consistent with the facts found in the special verdict and in my view the case should be treated as one in which a special verdict has been found.

I am of opinion that the findings of the jury in the answers to questions 1(*a*), 1(*b*), 2(*a*), 2(*b*), 3, 4(*a*), 5, 6 and 7 are all supported by the evidence, that the charge of the learned trial judge in respect of the matters dealt with in such answers was adequate and that such findings established the appellant's right to recover damages. I do, however, share the view of the learned Chief Justice of Ontario that the course of the trial in regard to the submission of the innuendoes to the jury was not satisfactory, and I am not altogether satisfied that the course of the trial was such as to preclude counsel for the respondent from relying on that ground of appeal. It is true that counsel who appeared for the respondent at the trial used the words —"I think your Lordship is entitled to rule so far as the innuendo is concerned they (i.e. the words complained of) are capable of such an innuendo"—but after reading the whole of the discussion in the course of which this statement was made I am doubtful whether it was intended or understood as an invitation to the learned judge to so rule; and I am unable to see that such a ruling if made would have assisted the argument as to qualified privilege with which counsel was then dealing. The basis of that argument was that the respondent and the commission of which he was the chairman had been attacked as arbitrarily

1956

Ross
v.
LAMPORT

Cartwright J.

depriving the appellant of his living, that such attack had been published in the press, that is to the world, that the respondent was entitled and under a duty to address a reply and defence to the same audience and that, so long as in so doing he did not go beyond what was reasonably germane to answering such attack, what he caused to be published was published on an occasion of qualified privilege. The duty of the learned judge in dealing with such a submission is stated as follows in *Douglas* v. *Tucker* (1):

> . . . The appellant was entitled to reply to such a charge and his reply would be protected by qualified privilege, but I think it clear that this protection would be lost if in making his reply the appellant went beyond matters which were reasonably germane to the charge which had been brought against him. It is for the judge alone to rule as a matter of law not only whether the occasion is privileged but also whether the defendant has published something beyond what was germane and reasonably appropriate to the occasion so that the privilege does not extend thereto.

A ruling that the words complained of were capable of bearing all the meanings ascribed to them in the innuendoes would appear to have increased the likelihood of the learned trial judge ruling that the respondent's answer had gone beyond what was germane to the occasion. However, as the jury have found that the words complained of were defamatory of the appellant in their natural and ordinary meaning, any error that occurred in regard to the innuendoes could affect only the quantum of damages; and, as I have concluded that there must be a new assessment of damages, I do not pursue this point farther.

With the greatest respect for the contrary view entertained by the Court of Appeal I am unable to find anything in the address of counsel for the plaintiff to the jury which would warrant any interference with the verdict found.

I have already indicated my view that the finding that the spoken words complained of referred to the appellant in the way of his trade or calling cannot be successfully attacked.

There remains the question of the amounts at which the damages were assessed. These amounts are much larger than I would have fixed had it been my duty to assess them but that, of course, would not of itself be a sufficient reason for interference. However, the Court of Appeal have unanimously reached the conclusion, as a distinct ground of

(1) [1952] S.C.R. 275 at 286.

decision, that the jury acting reasonably could not have awarded so large a sum and I am unable to say that they were wrong in so deciding.

For the reasons given by my brother Rand I agree with his conclusion that the new trial should be limited to the assessment of damages and I wish only to add that a similar course has been followed in actions for libel by the Judicial Committee in *Abraham* v. *Advocate Company* (1), and, as has been called to my attention by my brother Locke, by the House of Lords in *Tolley* v. *J. S. Fry and Sons, Limited* (2).

In regard to the innuendoes, it is my opinion that, even if it should be held that counsel for the respondent is precluded from complaining of the manner in which they were left to the jury at the first trial, the position of the parties at the new trial will not be affected by the findings of the jury in answer to question 4 (*b*), as that answer is inconclusive. Paragraph 5 of the Statement of Claim ascribes five innuendoes to the words published, viz, that the plaintiff, both in his personal capacity and in his capacity as a taxi-driver and owner, (i) had been dishonest with the Honourable the Chief Justice of the High Court; (ii) had been dishonest with the Board of Police Commissioners for the City of Toronto; (iii) had been dishonest in his relations with the public; (iv) was concerned only in "trafficking" in licenses at a profit to himself in preference to serving the public in his trade, and (v) had obtained in some way the good offices of the Chief Justice of the High Court. It is impossible to tell from the answer of the jury whether they found that the words were understood to have the meaning alleged in one only or in some or in all of the innuendoes.

As it has now been established in the plaintiff's favour that the words in their natural and ordinary meaning are defamatory of him and that he is entitled to have his damages assessed, it may be that at the new trial he will not insist on the questions raised by the innuendoes being submitted to the jury. If he does, it will be for the presiding judge, after having heard the evidence, to decide as to each innuendo whether the words published are reasonably capable of bearing the meaning thereby attributed to them

(1) [1946] 2 W.W.R. 181. (2) [1931] A.C. 333.

1956

ROSS
v.
LAMPORT

Cartwright J.

and in the case of those innuendoes in regard to which he decides this question in the affirmative to leave it to the jury to say whether the words were understood to have the meaning so ascribed to them. I do not mean by anything I have said above to suggest that the jury at the new trial should be asked to answer any questions other than a question as to the amounts at which they assess the damages on the four heads set out in question 8 put at the first trial. The whole conduct of the new trial will, of course, be in the hands of the presiding judge subject only to this that the findings of the jury at the first trial in their answers to questions 1(*a*), 1(*b*), 2(*a*), 2(*b*), 3, 4(*a*), 5, 6 and 7 must all be taken as established.

I would dispose of the appeal as proposed by my Lord the Chief Justice.

*Appeal allowed and new trial directed limited to the amount of damages.*

Solicitors for the appellant: *Sinclair, Goodenough, Higginbottom & McDonnell.*

Solicitors for the respondent: *McCarthy & McCarthy.*