KEN LEFOLII, BORDEN SPEARS, BLAIR FRASER and MACLEAN-HUNTER PUBLISHING COMPANY LIMITED (*Defendants*) ..... APPELLANTS;

1968

*Mar. 19, 20
Oct. 1

AND

IGOR GOUZENKO (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Defamation—Libel action—Motion for nonsuit—Judge reserving decision on whether words capable of defamatory meaning until after jury's verdict—Charge to jury—Propriety of judge referring to motion and difficulties in deciding same.

The plaintiff brought an action for libel based upon an article in a national magazine. He alleged that a number of quotations from the article in their plain and ordinary meaning were defamatory of him and said that the words used were meant and were understood to have certain meanings. The defendants admitted publication of the said words but denied that they were defamatory. At the trial the defendants moved for a nonsuit. Instead of disposing of the motion for nonsuit, the trial judge reserved his decision and let the case go to the jury. Later, after the jury had brought in its verdict, he dismissed the motion. However, in his charge to the jury, he made several references to the difficulty he was having in deciding the motion.

The jury in a general verdict found that the plaintiff had been libelled and assessed the damages at $1. The plaintiff appealed to the Court of Appeal, basing his appeal against the award of $1 damages. The Court of Appeal ordered a new trial both as to liability and quantum. The defendants then appealed to this Court.

Held (Judson J. dissenting): The appeal should be dismissed; judgment of the Court of Appeal varied.

Per Martland, Ritchie and Hall JJ.: There should be a new trial on the issue of damages. The trial judge was in error when in his charge to the jury he referred to the fact that he was reserving his decision on the motion for nonsuit and that he was having difficulty in deciding whether or not the words were capable of a defamatory meaning. Agreement was expressed with the Court below that, reading the charge as a whole, the judge, time and again, must have confused and misled the jury on the matter of compensation. There was no reason for retrying the issue of libel or no libel. A jury had already made a valid finding on this aspect of the case.

Per Spence J.: The trial judge, despite what might be described as a classic charge on libel so far as libel was concerned, did not sufficiently stress the jury's function to come to their conclusion not only on the question of libel but on the question of damages without feeling in

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

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any way bound by his personal views as to the facts and, therefore, there should be a new trial which, however, should be limited to the assessment of damages only.

Per Judson J., *dissenting*: The appeal should be allowed and the judgment at trial restored.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Stark J. and ordering a new trial in a libel action. Appeal dismissed but judgment of the Court of Appeal varied, Judson J. dissenting.

J. Sedgwick, Q.C., and *J. A. Campbell*, for the defendants, appellants.

R. A. Harris and *H. W. Lebo*, for the plaintiff, respondent.

The judgment of Martland, Ritchie and Hall JJ. was delivered by

HALL J.:—The respondent's action is for libel based upon an article in the issue of MacLean's Magazine dated September 5, 1964. The article in question carried the title "These Were The Years That Made Our World". The respondent alleged that 17 quotations from the article as set out in para. 10 of the statement of claim, preceded by the following words:

> 10. In the said issue the Defendants printed or caused to be printed and falsely and maliciously published or caused to be published of the Plaintiff and of him in the way of his profession as an author, and in relation to his conduct, photographs and words as follows:

were libellous. He alleged that the quotations in their plain and ordinary meaning were defamatory of the respondent and in a subsequent paragraph said that the words used were meant and are understood to mean that the respondent:

(a) is a spend-thrift;
(b) a person whose contribution to the security of Canada was incidental and was of no great value;
(c) a trouble maker;
(d) a ward of the R.C.M.P.;
(e) a dishonest man seeking to have the government do his family chores;
(f) a lazy man and a work-shirker;

[1] [1967] 2 O.R. 262, 63 D.L.R. (2d) 217.

(g) a man deluded by delusions of great wealth;
(h) a washed out author;
(i) an ungrateful person;
(j) a person not worthy of the goodwill of his fellow Canadian citizens.

The appellants admitted publication of the words complained of but denied that they were defamatory, and further alleged by para. 8 of the defence that:

> 8. In so far as the words set out in paragraph 10 of the statement of claim consist of statements of fact they are true in substance and in fact and in so far as the said words consist of expressions of opinion they are fair and bona fide comment made without malice upon the said facts which are a matter of public interest.

The trial was a short one. Certain questions and answers from the examinations for discovery of appellants were put in evidence by the respondent. The appellants called no witnesses. They moved for a nonsuit. Instead of disposing of the motion for nonsuit, the learned trial judge reserved his decision and let the case go to the jury. Later, after the jury had brought in its verdict, he dismissed the motion. However, in his charge to the jury, he made several references to the difficulty he was having in deciding the motion, and I will be dealing with this aspect of the matter later in these reasons.

No defence evidence having been tendered in support of their pleas by the appellants, the learned trial judge correctly charged the jury that they were not concerned with the truth or falsity of the article, he put it this way:

> Now remember, we are not concerned, as I say, with the truth or falsity of that statement. We presume it is false, and there is no evidence about that, but the question is: did that photograph and do those words detract from his, Gouzenko's reputation? These are the questions that you are going to provide the answers for.

He further charged them that certain of the passages complained of were not capable of being defamatory. Then he told the jury of the motion made by counsel for the appellants "that I should stop the case right then and there, and he argued that the words were not capable of having a defamatory meaning". He went on to say:

> Now when the plaintiff finished his case yesterday you gentlemen were asked to leave the room for a while, you will recall, and counsel for the defence rose to his feet and urged upon me this very matter, that I should stop the case right then and there, and he argued that the words were not capable of having a defamatory meaning. In other words that the plaintiff hadn't even crossed that first bridge. I reserved my deci-

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sion and I have been giving this question a lot of thought and last night in the rather late hours I was reading these words over and over again to try and decide that preliminary question, and I hope I have made it clear what that preliminary question is, whether the words are capable of being construed by reasonable men as defamatory, and that is not a simple question like the obvious examples that I mentioned a few moments ago: the thief, the liar, the rogue, that type of example. The result of all this is that I am still reserving my decision on this question and I am going to give this matter further thought and all I am going to say at this time is I am not going to rule that these words or some of them are completely incapable of a defamatory meaning. In other words I may not be too impressed by the seriousness of these allegations but I must be scrupulously fair to the plaintiff and what I am saying is this: that I am not satisfied that there is not some evidence to go before you and I am not going to take it away from you. I am simply saying I am not going to rule that these words are completely incapable of a defamatory meaning. I am quite sure a lot of them are completely incapable. There may be some that are not and I am not going to take it away from the jury at this time. Regardless of what your verdict is I may still change my mind, or rather, I may still make up my mind one way or the other and for that reason I am reserving that portion of the decision. So all I am saying to you now is that I am puzzled, I am not sure whether these words are capable in the minds of reasonable men of being construed in a defamatory sense. I am not sure that they are incapable and so I am going to ask you as reasonable men to decide whether in fact they did libel the plaintiff.

In so doing, he was, in my view, in error. Comments such as these are not for the ears of the jury.

Instead of putting specific questions to the jury, the learned trial judge, with the consent of counsel, asked the jury for a general verdict. This procedure was criticized in the judgment of the Court of Appeal. I am of opinion that this was a case in which asking for a general verdict was eminently the right course to follow.

The jury brought in a general verdict as follows:

"Verdict libel. Damages $1. Foreman Lester Bolton."

The respondent appealed to the Court of Appeal for Ontario, basing his appeal against the award of $1 damages. The Court of Appeal[2] ordered a new trial both as to liability and quantum.

I am unable to agree with the Court of Appeal in so far as a new trial being required on the question of liability. The jury was properly charged on the question of libel or no libel. The verdict of "libel" justified the respondent's action. The Court of Appeal appears to have considered a

[2] [1967] 2 O.R. 262, 63 D.L.R. (2d) 217.

new trial necessary on the question of liability because in its view specific questions should have been put to the jury. Kelly J.A. said in this regard:

> Had the jury in this case been asked to answer specific questions, in all probability a new trial, limited to the assessment of damages, could have been appropriately ordered.

What the respondent Gouzenko was complaining of in the Court of Appeal was misdirection as to damages, and in this regard his argument in the Court of Appeal and here was that the learned trial judge had, at various times in his charge to the jury and particularly in discussing his own doubts in relation to the nonsuit motion, so denigrated the respondent's case for substantial damages and made light of the whole matter that what he did amounted to misdirection and resulted in the jury awarding nominal damages only.

In his reasons for judgment, Kelly J.A. said:

> In this action the duty of the jury was to determine liability and, having done so, to assess damages. These were separate functions and should not have been intermixed. The jury's finding as to liability should have been made with respect to words which the Judge had already ruled capable of being defamatory or instructed the jury to assume to be so. The assessment of damages should have been made uninfluenced by the charge with respect to liability. The effect of this charge was to invite the jury to belittle the damages by the doubt that was thrown on liability.

I agree with Kelly J.A. that, reading the judge's charge as a whole as one should do, the judge, time and again, must have confused and misled the jury on the matter of compensation. I am of opinion that there must be a new trial on the issue of damages. I see no reason for retrying the issue of libel or no libel. A jury has already made a valid finding on this aspect of the case.

I would, accordingly, dismiss the appeal but vary the judgment of the Court of Appeal by restricting the new trial to the issue of damages only. The respondent should have his costs of this appeal.

JUDSON J. (*dissenting*):—I would allow this appeal and restore the judgment at trial which allowed the plaintiff damages in the amount of $1 and the costs of the trial.

The plaintiff complained of libel in the issue of MacLean's Magazine dated September 5, 1964. The greater part of this issue contained an historical survey of the 1940's. As part of this survey there were approximately

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two columns devoted to the plaintiff. In his statement of claim the plaintiff referred to seventeen passages from these two columns as being libelous in their plain and ordinary meaning. This is all that we are concerned with in this appeal. There were no innuendoes, either pleaded or proved.

My opinion is that only two of these passages could possibly have been found to be capable of any defamatory meaning, including the one assigned by the plaintiff in his statement of claim, and there would have been no error if the trial judge had so instructed the jury. Instead of following this course he went through the passages one by one and expressed his opinion on them. He withdrew all but three passages from the jury's consideration and in leaving those three to the jury, he expressed a doubt whether they were capable of being defamatory. It was within his power to do this and that this power should not be restricted in the way proposed by the Court of Appeal. The jury brought in a general verdict of libel and assessed the damages at $1.

I do not agree that the course followed by the judge had the effect of belittling the damages. His instruction on damages was emphatic and correct and there were no objections taken to his charge by either side. This was a highly exaggerated claim and the jury must have appreciated that fact. The plaintiff did not give evidence.

I do not think that the new trial should be restricted to an assessment of damages. A jury assessing damages should not be restricted to a mere reading of the article in its context and to a hearing of whatever oral evidence is given on damages. If there is to be a new trial, the better course would be to direct that it be both on liability and damages.

SPENCE J.:—I have had the privilege of reading the reasons of my brother Hall and have come to the conclusion that I shall concur therein. I need not repeat the recital of the circumstances and the course of litigation outlined in those reasons. As did my brother Hall, I agree with the statement of Kelly J.A. in the Court of Appeal when he said:

> This statement of his difficulties in deciding whether the words were capable of a defamatory meaning was repeated three times in different

but equally compelling language. In the light of the statement of Lord Porter in *Turner v. M.G.M. Pictures Ltd.*, [1950] 1 All E.R. 449 at p. 454, I doubt if this is a case where the trial judge should have reserved his ruling on the issue of whether the words were capable of a defamatory meaning, but, assuming it was an appropriate case to reserve his ruling, he should simply have told the jury to assume that the words were capable of a defamatory meaning and that it was their duty to decide whether they were so in fact. He should not have told them of the motion made in their absence or have said anything about his difficulty in arriving at a conclusion as to whether the words were capable of a defamatory meaning. What happened in the jury's absence was wholly irrelevant to the function of the jury.

Had the jury returned an answer that there was no libel, the plaintiff (here the respondent) would have had a very grave cause to complain as to the learned trial judge's charge. The jury, however, answered that there was a libel and, surely, that answer completely disposes of the objection to the learned trial judge's charge except as to the question of damages, with which I shall deal hereafter.

Kelly J.A. in the Court of Appeal found that there were other reasons which would justify a new trial as to both libel and damages. The learned trial judge had excluded evidence which was urged by the plaintiff as being admissible to prove express malice and the judgment of the Court of Appeal approved that ruling so that issue need not be further considered. The plaintiff in addition to pleading the libel in the ordinary and natural meaning of the word had assigned in para. 12 of the statement of claim some ten different innuendoes. The learned trial judge withdrew from the consideration of the jury seven of the ten meanings ascribed in the said innuendoes. Kelly J.A. in his reasons for judgment said:

> . . . I do not think it desirable to say more than the words complained of taken in their entirety are capable of supporting some of the other innuendoes set out in the statement of claim in addition to those which the learned trial Judge left with the jury.

At the trial, the plaintiff did not appear and the only evidence adduced was on behalf of the plaintiff and consisted of the reading of the actual article complained of and certain limited portions of the examination for discovery of the three defendants Lefolii, Spears and Fraser. I cannot understand how under those circumstances any innuendoes, in the primary meaning of that word, could be supported. There was no one who appeared to say that because of some extraordinary circumstance the words

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meant something other than their natural and ordinary meaning: *Grubb v. Bristol United Press Ltd.*[3], *per* Upjohn L.J. at p. 392. This distinction was pointed out by the learned trial judge when he said when dealing with the submission of counsel for the defence that the consideration of the innuendoes should be taken from the jury as they had not been supported by the evidence:

> Then there is also a form of innuendo we commonly use whereby we do not much more than define the words or in fact the various meanings that the words may have.

In short, they were the mere extended definitions of the ordinary and natural meaning of the words. Therefore, a new trial as to liability is not required to deal with these alleged innuendoes. It must be remembered the jury, by its answer, did find a libel. The judge presiding at the new trial for the assessment of damages only could simply charge the jury that the words having already been found to be libel it was their function to determine the damages which accrued to the plaintiff as a result of the publication of such libel.

I turn now to the problem of whether the plaintiff should have a new trial limited to the assessment of damages only or whether the judgment at trial should be restored.

Kelly J.A. in his reasons for judgment in the Court of Appeal for Ontario followed the statement which I have quoted above with these words:

> The emphasis placed upon his difficulties in making up his mind could have one effect and one effect only on the jury to cause them to believe that, if the words were defamatory at all, the effect on the reputation of the appellant was trivial and that the damages suffered by the appellant were likewise trivial. It may be that what was said of the appellant was not serious: in a proper context a trial judge may properly express to the jury his own views in regard to the words used. But he should not permit his uncertainty as to the capability of the words to be defamatory, to influence the jury's assessment of the gravity of the injury to the appellant caused by those words.

I am in agreement with the view of Kelly J.A. that the effect of the emphasis to the jury by the learned trial judge of his difficulty in making up his mind as to the possible defamatory nature of the words could cause the members of the jury to believe that the damages suffered by the

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[3] [1962] 2 All E.R. 380 (C.A.).

plaintiff were trivial. As Kelly J.A. notes, the trial judge may properly express to the jury his own view of the facts. That is so whether the said facts are relevant to either liability or damages. The rather unique feature of an action for libel is that the libel, *i.e.*, the thing which creates the liability, is also to a large degree the measure of the damages and, therefore, it is most important that in a libel action the warning, which it is the duty of the trial judge to give to the jury, that any expression of his personal view of the facts must be understood to be without any authority whatsoever and to be only an honest attempt to assist them in the performance of their duty should be stressed. He should be careful, in fact, to encourage the jury to disregard his personal views, which as I have said he had every right to express, at any time those views of the facts should fail to accord with his own.

I have come to the conclusion that the learned trial judge in the present case, despite what might be described as a classic charge on libel so far as libel is concerned, did not sufficiently stress the jury's function to come to their conclusion not only on the question of libel but on the question of damages without feeling in any way bound by his personal views as to the facts and that, therefore, there should be a new trial which, however, as my brother Hall has pointed out, should be limited to the assessment of damages only. It is this unique feature of a trial of an action for libel which makes a new trial limited only to the assessment of damages a procedure of doubtful efficiency. I am only moved to resort to such a procedure in the present case because of the unusual fashion in which the plaintiff put forward his case. The plaintiff not only gave no testimony on his own behalf but did not even appear at the trial. The defendant MacLean-Hunter Publishing Company Limited, admitted publication. The plaintiff, as I have said, read in portions of the examinations for discovery of the defendants Lefolii, Spears and Fraser. These defendants adduced no evidence. Therefore, no witness gave evidence under oath at the trial. Under these unusual circumstances, there would seem to be no good reason why an assessment of damages could not proceed by a mere reading to the jury of the whole article in the magazine followed by the address of counsel and the judge's charge. I do not wish to be understood as so directing but merely

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mention these factors as moving me to concur with my brother Hall to limiting the new trial to an assessment of damages only. I also agree with my brother Hall's disposition of costs.

Appeal dismissed but judgment varied, with costs, JUDSON J. *dissenting.*

Solicitors for the defendants, appellants: Smith, Rae, Greer, Toronto.

Solicitors for the plaintiff, respondent: Luck and Harris, Rexdale.