CHRISTOPHER WALTER HALLS (PLAINTIFF) ..... } APPELLANT;

AND

J. P. MITCHELL (DEFENDANT) ..... RESPONDENT.

1927
*Nov. 2.
1928
*Feb. 7.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Libel—Privilege—Letters written by medical officer of railway company, while investigating claim by company's employee to Workmen's Compensation Board—Disclosure of alleged communications by claimant when consulting medical officer as his personal physician—Principles underlying right to protection of privilege.

The underlying principle on which is founded protection for a communication otherwise actionable as defamatory, is "the common convenience and welfare of society." The communication is only protected when it is fairly warranted by some reasonable occasion or exigency, and when made in discharge of some public or private duty such as would be recognized by people of ordinary intelligence and moral principles, or is fairly made in the legitimate defence of a person's own interests. It is not sufficient that the person making the statement believes, honestly and not without some ground, that the duty or interest exists. There must, in fact, be such a duty or interest as, under all the circumstances, warrants the communication.

Professional secrets acquired from a patient by a physician in the course of his practice, are the patient's secrets, and, normally, are under his control and not under that of the physician. *Prima facie* it is the patient's right that the secrets be not divulged; and that right is absolute unless there is some paramount reason overriding it.

The fact that the disclosure of a patient's secret is made by one physician to another is not a decisive factor to justify it, although in some cases that fact may have significance.

Even where the circumstances may justify a physician in disclosing his patient's secret, the justification does not extend to a wanton disclosure; and the fact that a statement is made unnecessarily (though without malice) may, having regard to its nature, make it a wanton disclosure, and bar the claim of privilege with respect to it. Also, even where a disclosure of a patient's secret may be justified, the physician should take every practicable precaution to avoid inaccuracy and unfairness, and his failure to do so (though without malice) may be fatal to a claim of privilege.

A medical officer of an industrial concern, charged with investigating an employee's claim made to the Workmen's Compensation Board (Ont.), and in preparing the evidence, (and even where any sum awarded will be paid, not by the employer, but by the Dominion Government, by reason of the claimant being a returned soldier), is not so situated that he is under a duty, for the purpose of securing information in preparing his case, to divulge, without the claimant's assent, facts which he has confidentially ascertained from the claimant as his personal medical adviser.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Lamont and Smith JJ.

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The absolute privilege protecting the testimony of witnesses in court is applicable to protect statements by an intending witness, as to the nature of the evidence he can give, made to persons engaged professionally in preparing the evidence to be presented in court (*Watson* v. *McEwan*, [1905] A.C. 480); but does not extend to such statements made to persons not concerned in preparing the evidence.

Certain statements made by defendant, assistant chief medical officer of a railway company, and charged with investigating a claim made by plaintiff, an employee of the company, to the Workmen's Compensation Board (Ont.), which statements were contained in two letters, written, respectively, to an officer of the Department of Soldiers Civil Re-establishment, for information, and to an eye specialist whose opinion was required, and disclosed communications alleged by defendant to have been made to him by plaintiff when consulting defendant as a physician some years before to the effect that plaintiff had had a certain disorder, were held, in the circumstances in question, not to come within the protection of privilege.

Macintosh v. *Dun*, [1908] A.C. 480, at pp. 390, 398, 399; *London Assn. for Protection of Trade* v. *Greenlands Ltd.*, [1916] A.C. 15, at pp. 22-23, 28, 29; *Stuart* v. *Bell*, [1891] 2 Q.B. 341, at p. 350, and other cases, cited.

Judgment of the Appellate Division of the Supreme Court of Ontario (59 Ont. L.R. 590, reversing judgment of Wright J., 59 Ont. L.R. 385) reversed in part.

Smith J. dissented in part, holding that the second letter was privileged, being written in the performance of defendant's duty of investigating the claim, and submitting facts, as he had gathered them, on which an expert opinion was to be based; that defendant could not properly, under the circumstances, have suppressed the facts (as he understood them) which he believed would show the claim to be unfounded; as to the first letter, however, the defence of qualified privilege could not prevail; it was a letter seeking information, and there was no necessity of making therein the libellous statement complained of; and in respect thereof the plaintiff was entitled to at least nominal damages.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment of Wright J. (2).

The action was for damages for alleged libel and slander. Wright J. held the plaintiff entitled to recover $500 for libel and $200 for slander. His judgment was reversed by the Appellate Division, which held that the plaintiff's action should be dismissed. This Court, in its judgment now reported, held that the plaintiff should succeed as to the libels, and allowed the appeal with costs in this Court and in the Appellate Division, and directed judgment to be entered for the plaintiff for $500 damages for libel, and costs

(1) (1926) 59 Ont. L.R. 590. (2) (1926) 59 Ont. L.R. 355.

of the action. Smith J. dissented in part, as indicated in the above headnote. The material facts of the case are sufficiently stated in the judgments now reported.

R. T. Harding K.C. for the appellant.

D. L. McCarthy K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault and Lamont JJ.) was delivered by

DUFF J.—The appellant was a member of the Canadian Expeditionary Forces, in which he enlisted on the 8th of October, 1915, and was discharged as no longer fit for service, on the 10th of April, 1918, by reason of valvular disease of the heart, which had been contracted in the army. In May, 1924, while in the service of the Canadian National Railways at Toronto, as a draftsman, he suffered an attack of iritis, which permanently affected his vision; and in the following September he applied to the Ontario Workmen's Compensation Board for compensation, ascribing the affection from which he suffered to a blow received from a swinging door in the office where he was employed, and supporting his application by a certificate from Dr. Angus Campbell, the physician who had treated him. Shortly afterwards, he was requested by the Claims Department of the Canadian National Railways to submit himself for examination to the respondent, who was Assistant Chief Medical Officer of the railway company, at Toronto, and was in due course examined by the respondent, and later by Dr. James McCallum, an eye specialist.

On the 22nd of December, 1924, the Board notified him that his application had been rejected. His request for permission to inspect the evidence upon which the Board had proceeded was refused, but he was granted a re-hearing, which took place on the 8th of January, 1925. On the re-hearing, he was asked by the Secretary of the Board if, while in the army, he had contracted a disease referred to in the evidence as "g. c. infection"; and this he denied. On this re-hearing, the respondent also gave evidence, that the appellant had been a patient of his in 1920, and had then admitted to him that, two years before, he had suffered from that malady. This the appellant denied, and the hearing was adjourned for further evidence. The ap-

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pellant then, having been given an opportunity of inspecting the material before the Board, discovered that, in addition to a communication from the respondent, similar in tenor to that of the testimony just mentioned, there had been placed before the Board a communication from Dr. Hewitt, the Chief Officer of the Department of Soldiers' Civil Re-establishment in Toronto, stating that the military records contained an entry indicating that the appellant had been affected by this disorder, while in the army. After considerable delay, the appellant's exertions were successful in having the original records, giving his army medical history, transferred from Ottawa to Toronto for inspection; from which it appeared that they contained no such entry. Thereupon the appellant requested the respondent to withdraw the statements he had made as to the facts ascertained by him as the appellant's physician in 1920, which, through some channel, had been reported to the appellant's family. The appellant, in his evidence, stated that at this interview the respondent declared he would never have made the communication he did make to the Board, but for the information he had received from Dr. Hewitt, as to the entries in the military record; and the learned trial judge finds as a fact that the respondent promised then to write a letter which the appellant had demanded, withdrawing the statement that the appellant had admitted having contracted g. c. infection. A day or two after this interview, the appellant received from the respondent a letter, written, it is stated, after consultation with the Railway Company's Claims Agent, declining to make any "further report" upon the subject to the appellant. The appellant then brought the action out of which this appeal arises, claiming damages for defamation. Justification was not pleaded, but the respondent alleged that the communications complained of were severally published on privileged occasions, and without malice.

In substance, the learned trial judge held that in fact the appellant had not informed the respondent that he had suffered from the malady mentioned; that the publications complained of were not privileged; and, moreover, that in disclosing to the detriment of the appellant information supposed to have been received by him under the seal of professional confidence, the respondent was not

actuated by a sense of duty, but by a determination to defeat the appellant's claim for compensation. This judgment was reversed, and the action dismissed, by the Second Appellate Division.

The publications complained of in the statement of claim are four, all in October or November, 1924. First, to the Workmen's Compensation Board, in writing; second, to Dr. Angus Campbell, orally; third, to Dr. Hewitt, in writing; fourth, to Dr. McCallum, in writing.

As to the first of these publications, the learned trial judge held that the respondent was protected by an absolute privilege, on the principle of *Watson* v. *McEwan* (1), and no question now arises as to this communication. As to the second, the Appellate Division held, and we think rightly, that there was nothing in the conversation upon which the charge was based which, in terms or in effect, upon the evidence adduced, can properly be held to have imputed to the appellant a presently existing infection. We need only concern ourselves, therefore, with the communications on the third and fourth occasions. Before proceeding to the discussion of the evidence, it should be mentioned that, after declining, on the advice of the Claims Agent, to write the letter he had previously promised to write, the respondent says that he appeared before the Workmen's Compensation Board on behalf of the Railway Company, and insisted upon the correctness of his previous statement. The appellant's claim was dismissed upon grounds which the Board stated in their reasons for judgment, included the fact that there was before them evidence of a g. c. infection. Later, the appellant having taken the only means left to vindicate himself, by bringing this action, he was, because he had taken that step, dismissed from his employment with the Canadian National Railways.

In all this, if the learned trial judge was not mistaken in his finding, the appellant has evidently been the victim of a cruel error; and it behooves us to examine with some attention the reasons given by the Appellate Division for their reversal of Wright J's judgment.

(1) [1905] A.C. 480.

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Let us, then, consider these communications, in respect of their origin, purport and object. In each case, the subject matter of the communication was a fact which the respondent supposed the appellant had stated to him as his medical attendant, in circumstances which clothed the communication with a confidential character. The respondent, looking up his notes of his treatment of the appellant, found an entry on one of his cards to the effect that, two years before the date of the entry, the appellant had suffered from g. c. infection; and a further entry, that, in treating the appellant, he had administered anti-g. c. vaccine. He had no actual recollection of any statement by the appellant on the subject; and at the trial he was unable to say with certainty when the memorandum had been made. The learned trial judge found— a finding which must, I think, be accepted in this Court—that the note was not made at the time of, or immediately after, the interview to which it relates, but some weeks, at least, later. Before the publication of any of these libels, the respondent had interviewed Dr. Angus Campbell, who had treated Halls quite recently, and had been informed by Dr. Campbell that, when first consulted by Halls, he had, with a view to ascertaining the cause of the iritis from which he was suffering and the proper treatment for it, asked Halls if he had ever suffered from g. c. infection, and had received an answer in the negative; and his treatment had proceeded on that basis. The respondent, in these communications, therefore, was professing to give the substance of information confidentially imparted to him by the appellant as the appellant's medical adviser, but without any actual recollection of what the appellant had told him, and with a knowledge of the fact that, for the purposes of diagnosis, the appellant had recently informed the physician who was treating him that he had never suffered from the complaint imputed to him in the entry on the respondent's card.

As to the occasion, the respondent, acting in his capacity as Assistant Chief Medical Officer of the Canadian National Railways, was engaged in investigating, at the request of the Claims Department, the appellant's claim for compensation, and in collecting the evidence to be presented to the Board upon the subject of that claim, for the purpose of assisting the Board in determining the

questions raised, in their medical aspects. The respondent, in applying to Dr. Hewitt, wished to obtain, to assist him in his investigations, the medical history of the appellant as disclosed in the records of the Department, of which Dr. Hewitt was an official—the chief official in Toronto. Iritis, it seems, is commonly the result of a systemic affection, and as, according to the respondent, his entries suggested the existence of rheumatism, although there is there no express entry to that effect, he was particularly anxious to ascertain, he says, whether the military records threw any light upon that subject; and primarily, the application to Dr. Hewitt was made with that object in view. He first made a personal visit to Dr. Hewitt, taking with him his cards, and gave to Dr. Hewitt the history of his interviews with, and treatment of, the appellant as disclosed by his notes; and received from Dr. Hewitt, orally, a statement of the contents of his record, including the entry "v.d.g.", indicating "g. c. infection." On his examination for discovery, he affirmed quite unreservedly that he had read the document, and that the interview had lasted about half an hour. At the trial, he agreed with the suggestion of cross-examining counsel that any competent physician, reading the history as given by the document, intelligently, must have realized that the entry of the letters "v. d. g." was a mistake, and that the letters should have been " v. d. h."; but he there stated that he did "not think" he had inspected the document, and that his attention had been attracted almost exclusively by the entry " v.d.g.", read to him by Dr. Hewitt. On the 30th of October, he wrote the letter containing the statements complained of. Before the letter of the 30th of October was written, Dr. Hewitt had already, on the 27th of October, communicated with Ottawa, and by letter dated the 3rd of November, he received authority to give the information desired, and this was done by letter dated the 6th of November.

The other occasion with which we are concerned is the occasion of the respondent's letter of the 17th of November to Dr. McCallum, who was an eye specialist; and the ostensible purpose of the letter to Dr. McCallum was to put him in possession of the relevant facts, so far as they were known to Dr. Mitchell, in order to enable Dr. Mc-

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Callum to conduct an examination of the appellant, and report upon the probable cause, in his opinion, of the appellant's malady.

The first question for consideration is whether the statements made in the letters of the 30th of October and the 17th of November, disclosing confidential communications alleged by the respondent to have been made by the appellant to him as his medical attendant, and imputing to the appellant the disorder mentioned, were made in such circumstances as, *prima facie*, to bring them under the protection of privilege.

The circumstances of the alleged libel are very exceptional, and cases similar, in the nature and origin of the defamatory matter, must have been rare; and it is therefore desirable to be quite sure that we are on the solid ground of fundamental principles. Fortunately, we have for our guidance a statement of the law proceeding from the very highest authority, and I at once quote from the judgment of the Judicial Committee, delivered by Lord Macnaghten in *Macintosh* v. *Dun* (1). The members of the Board for whom Lord Macnaghten spoke were, Lord Loreburn, Lord Ashburne, Lord Robertson, Lord Atkinson and Lord Collins. The passage is as follows:—

> The law with regard to the publication of information injurious to the character of another is well settled. The difficulty lies in applying the law to the circumstances of the particular case under consideration. In *Toogood* v. *Spyring* (2), Parke B., delivering the judgment of the Court of Exchequer, says: "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."
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> That passage, which, as Lindley L.J. observes, is frequently cited, and "always with approval," not only defines the occasion that protects a communication otherwise actionable, but enunciates the principle on which the protection is founded. The underlying principle is "the common convenience and welfare of society"—not the convenience of individuals or the convenience of a class, but, to use the words of Erle C.J., in *Whiteley* v. *Adams* (3), "the general interest of society."
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> Communications injurious to the character of another may be made in answer to inquiry or may be volunteered. If the communication be made

(1) [1908] A.C. 390, at pp. 398 and 399.

(2) (1834) 1 C.M. & R. 181, at p. 193.

(3) (1863) 15 C.B. (N.S.) 392 at p. 418.

in the legitimate defence of a person's own interest, or plainly under a sense of duty such as would be "recognized by English people of ordinary intelligence and moral principle," to borrow again the language of Lindley L.J., it cannot matter whether it is volunteered or brought out in answer to an inquiry. But in cases which are near the line, and in cases which may give rise to a difference of opinion, the circumstance that the information is volunteered is an element for consideration certainly not without some importance.

The defamatory statement, therefore, is only protected when it is fairly warranted by some reasonable occasion or exigency, and when it is fairly made in discharge of some public or private duty, or in the conduct of the defendant's own affairs in matters in which his interests are concerned. The privilege rests not upon the interests of the persons entitled to invoke it, but upon the general interests of society, and protects only communications "*fairly* made" (the italics are those of Parke B. himself) in the legitimate defence of a person's own interests, or plainly made under a sense of duty, such as would be recognized by "people of ordinary intelligence and moral principles."

Referring to the enunciation of the principle by Parke B., in the passage quoted above, in *London Assn. for Protection of Trade* v. *Greenlands Ltd.* (1), Lord Buckmaster said:—

I do not think that any of the subsequent explanations, or definitions, have made any variation in the principle thus enunciated, nor added anything by way of explanation to this clear exposition of the law. The long list of subsequent authorities to which your Lordships were referred do nothing but afford illustrations of the different circumstances to which this principle may be applied * * * Indeed, the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact * * * It is, I think, essential to consider every circumstance associated with the origin and publication of the defamatory matter in order to ascertain whether the necessary conditions are satisfied by which alone protection can be obtained.

Again, in *James* v. *Baird* (2), Lord Loreburn said:—

In considering the question whether the occasion was an occasion of privilege, the Court will regard the alleged libel and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives rise to a social or moral right or duty, and the consideration of these things may involve the consideration of questions of public policy, as had to be done in a comparatively recent case in the Privy Council—(See *Macintosh* v. *Dun* (3), considered in *Barr* v. *Musselburgh Merchants Association* (4)).

(1) [1916] 2 A.C. 15, at pp. 22-23.
(2) [1916] S.C., (H.L.) 158, at pp. 163-4.
(3) [1908] A.C. 390, at p. 400.
(4) [1912] S.C. 174, at p. 180.

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It is not sufficient—it is, perhaps, unnecessary to say—that the defendant may, quite honestly and not without some ground, have believed that the interest or the duty existed. There must, in fact, be such an interest or such a duty as, when all the circumstances are considered, warranted the communication. *Stuart* v. *Bell* (1). Was there any duty, then, resting upon the respondent, was there any interest which he was bound or entitled to protect, which, upon these principles, could justify the disclosure of the facts stated, which he believed, but which he believed had come to his knowledge under the seal of professional confidence?

It is pointed out in the judgment of the Appellate Division that the Canadian National Railways had, strictly, no substantial pecuniary interest in any question raised by the appellant's claim for compensation. In order to obviate some of the difficulties encountered by returned soldiers in securing employment, the Dominion Government had agreed to assume the payment of awards for compensation made in their favour under the Workmen's Compensation Acts. A fund had been set apart for this purpose, and the administration of this was committed to the Department of Soldiers' Civil Re-establishment. The Canadian National Railways was technically interested in the appellant's claim, as a claim, if valid, payable by the company in point of law, but in fact its chief concern was that, having assumed the investigation of such claims, it was under a duty (whether legal or moral is of no importance) to take the usual steps to assist the Board in ascertaining the facts. The parties, in point of substantial interest, were the appellant and the Crown. Primarily, and at the outset of the proceedings, the appellant's interest was exclusively a pecuniary one, although, as we have seen, his interest assumed a much graver character in the later stages. The Crown also, as the ultimate payer in the event of the claim being established, had a pecuniary interest, and an interest not, perhaps, easily distinguishable from that of any high-minded employer

(1) [1891] 2 Q.B. 341, at p. 350.

concerned to do his full duty by his employees. No official could be under a duty to secure the defeat of such a claim by unfair or improper methods. As to Dr. Hewitt, and the officials of the Department of Soldiers' Civil Re-establishment, and the officers of the Department of National Defence, they had no special concern with the investigation of these claims: their duty, as regards the medical records in their hands, would be to observe the practice of the department, which, we may assume, included measures to prevent any improper use of such records; and it is difficult, if not impossible, to suppose, although there is no evidence on the point, that the practice could authorize giving out such information without the knowledge of the soldier to whom it related, to be used by the person receiving that information, equally without his knowledge, to his intended prejudice; or, in any case, in the absence of the strictest care to prevent the publication, to his detriment, of misleading statements.

As to Dr. Mitchell, no doubt, when engaged in investigating a claim for compensation made by a returned soldier, he would be quite within the limits of his duty in consulting, subject to the conditions prescribed by the practice, the military records of such a soldier, and making such fair and proper use of information obtained therefrom as the practice might permit; but it would be a mistake to suppose,—in considering the assertions made by him to the D.S.C.R., in connection with an application for permission to inspect such a record (whether merely casual or with the deliberate object of inducing the Department to permit inspection)—it would be a mistake to suppose (as we have seen) that we can properly disregard the fact that the matter of them was derived through confidential communications received from the appellant.

The Judicial Committee, in *Macintosh* v. *Dun* (1), in summarizing their reasons for holding that the communications, in question there, were not within the protection of the law, said:

> Information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation * * * It

(1) [1908] A.C. 390, at p. 400.

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may be picked up from discharged servants. It may be betrayed by disloyal employees;

and in *Greenlands' Case* (1), the Law Lords agreed that every circumstance connected with the origin and publication of the defamatory matter must be considered, in determining whether or not the necessary conditions of protection exist.

We are not required, for the purposes of this appeal, to attempt to state with any sort of precision the limits of the obligation of secrecy which rests upon the medical practitioner in relation to professional secrets acquired by him in the course of his practice. Nobody would dispute that a secret so acquired is the secret of the patient, and, normally, is under his control, and not under that of the doctor. *Prima facie,* the patient has the right to require that the secret shall not be divulged; and that right is absolute, unless there is some paramount reason which overrides it. Such reasons may arise, no doubt, from the existence of facts which bring into play overpowering considerations connected with public justice; and there may be cases in which reasons connected with the safety of individuals or of the public, physical or moral, would be sufficiently cogent to supersede or qualify the obligations *prima facie* imposed by the confidential relation.

In Comyn's Digest, Action on the Case for Deceit, (A. 5) "For Deceit in his Trust", the action is said to lie

> if a man, being entrusted in his profession, deceive him who entrusted him; as, if a man retained of counsel, become afterward of counsel with the other party in the same cause, or, discover the evidence, or secrets of the cause.

Communications made in confidence to, or knowledge acquired in confidence by members of the medical profession, are not at common law privileged from disclosure in courts of justice, as are communications to legal advisers; but Lord Brougham many years ago declared himself unable to appreciate the grounds of this distinction; and other eminent judges have expressed their regret that such a distinction should be recognized. Lord Mansfield, in a famous case, used strong language concerning the voluntary disclosure of confidences by medical practition-

(1) [1916] 2 A.C. 15.

ers. The right of the client to insist upon the nondisclosure of information acquired by his solicitor when acting for him is not limited in its application to those matters which are privileged from disclosure in courts of justice. The right is founded upon the necessities of the business of life, which require that people shall be able fearlessly to entrust their affairs to legal advisers, and applies to all confidential communications received professionally. Consequently, a solicitor is not permitted to make use, for his own benefit, or for the benefit of another client, of admissions or communications made to him by a person for whom he is acting as solicitor (*Moore* v. *Terrell* (1); *Taylor* v. *Blacklow* (2); *Cleave* v. *Jones* (3); and a solicitor will be restrained from acting for a new client in matters so closely connected with the business of a client for whom he is already acting as to justify an apprehension that some prejudicial disclosure may take place.

A similar duty is broadly incidental, not only to the relationship of principal and agent, or that of master and servant, but, speaking generally, to all cases in which confidence is given and accepted, subject, of course, to the implied qualification springing from the maxim *de minimis*. In Scotland, the clerk of a firm of accountants engaged in winding up the affairs of a firm of writers, who disclosed to the Board of Inland Revenue information derived from books and documents to which he had access for that purpose, and which seemed to indicate that the returns to the Board had not correctly stated the profit and loss account of the defunct firm, was held liable to pay damages for this breach of confidence, although no special damages were proved. Lord McLaren, in delivering judgment, in which the Lord President (Lord Robertson), Lord Adam and Lord Kinnear, concurred, observed,

> The act was defended as being done in discharge of a public duty, but I have never heard nor read that the duty of assisting the Treasury in the collection of the public revenue was of such a paramount nature that it must be carried out by private individuals at the cost of the betrayal of confidence and the invasion of the proprietary rights of other people.

There is apparently no reported judgment of any English court in which the principle stated in the passage

(1) (1833) 4 B. and Ad. 870. (2) 1836) 3 Bing N.C. 235.
(3) 1852) 21 L.J. Ex. 105.

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quoted above, from Comyn, has been applied to a medical practitioner. In Scotland, the liability is sanctioned by decision as well as by principle. *A.B.* v. *C.D.* (1).

The general duty of medical men to observe secrecy, in relation to information acquired by them confidentially from their patients is subject, no doubt, to some exceptions, which have no operation in the case of solicitors; but the grounds of the legal, social or moral imperatives affecting physicians and surgeons, touching the inviolability of professional confidences, are not, any more than those affecting legal advisers, based exclusively upon the relations between the parties as individuals.

It is, perhaps, not easy to exaggerate the value attached by the community as a whole to the existence of a competently trained and honourable medical profession; and it is just as important that patients, in consulting a physician, shall feel that they may impart the facts touching their bodily health, without fear that their confidence may be abused to their disadvantage. Was there, as to the communication to Dr. Hewitt, any reason for the disclosure of such weight (when these considerations are kept in view) as to attract to the respondent's statement the protection which the law, for the welfare of society as a whole, affords to privileged communications? The direct interest of the Crown was a pecuniary interest—an interest in the proper application of the fund. The duty of the respondent had relation only to the protection of that interest. It was not, as already observed, a duty of stricter obligation than that of any employee or agent called upon to investigate such a claim, and instructed by his employer to take all proper measures to assist the Board in arriving at the facts. Having regard to the character of the disclosures, I confess my inability to treat very seriously the notion that the existence of such a duty or such an interest could afford a ground for holding that the welfare of society requires the protection of them. The Appellate Division seems to have treated the communication as a confidential communication between doctors. I do not perceive the force of the fact that the official to whom the communication was made was

(1) (1851) S.C. 14 D., 2nd series, 177.

a doctor. The occasion was not a consultation between physicians; still less a consultation in the interests of the appellant. The communication was made to an official for the purpose of securing official information, to be used adversely to a claim which the appellant was asserting. No special precautions were taken to secure secrecy. The respondent's letter would pass through the usual clerical and official channels. Moreover, the official was the local head of the Department to which, as a pensioner, the appellant periodically reported. A communication made by a medical adviser, with regard to the state of his patient's health, for the purposes of consultation, for the benefit and with the authority, express or inferential, of his patient, is a thing bearing no resemblance to that with which we are concerned in this case.

From beginning to end, the respondent was actuated by the intention of placing the medical secrets which he had acquired from the appelllant before the Workmen's Compensation Board, and before others, for the purpose of securing reports or evidence (for the information of the Board) that were expected and intended to have some effect in influencing the Board to take a view adverse to the appellant's claim.

No doubt there may be cases in which the fact that the communication is made to a physician is not without significance; but to regard it as a necessarily decisive factor is not an admissible view. As Lord Loreburn said, in *Greenlands' Case* (1):

> The Court has to hold the balance, and, looking at who published the libel, and why, and to whom, and in what circumstances, to say whether it is for the welfare of society that such a communication, honestly made, should be protected by clothing the occasion of the publication with privilege;

and in a passage in which it appears to me the law is accurately stated, in Pollock, Torts, 12th Ed., p. 270, it is said:

> The nature of the interest for the sake of which the communication is made (as whether it be public or private, whether it is one touching the preservation of life, honour or morals, or only matters of ordinary business), the apparent importance and urgency of the occasion, * * * will all have their weight.

(1) [1916] 2 A.C. 15, at p. 29.

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Considering the present case from all these points of view, I am unable to agree that the duty of a chief medical officer of an industrial concern, for example charged with investigating a claim made by an employee for compensation under the *Workmen's Compensation Act,* and in preparing the evidence, is so "situated" that "it," to use the language of Blackburn, J. in *Davies* v. *Snead* (1), " becomes right in the interests of society that he should tell ", for the purpose of securing information in preparing his case, the facts he has confidentially ascertained from the claimant as his personal medical adviser; or that he is under a duty recognized by people of " ordinary intelligence and moral principle," to divulge such facts without the assent of the patient.

The judgment of the Appellate Division refers to a remark of the trial judge, that the interest with which the respondent was concerned was a pecuniary interest.

The question, in the last resort, with which everyone was concerned, was this, was the appellant to be awarded a certain sum of money, to be paid by the Crown? Neither the Canadian National Railway Company nor the respondent, as already observed, had any immediate pecuniary interest in this question. But to repeat what has been said above, I do not agree that, because of that, the duty under which he rested, was of a quality more potent for justifying his disclosures than the interest or the duty coming into play in the case of a practitioner acting for a private employer in investigating a claim for compensation by any employee.

The duty devolving upon the company, and upon the respondent as a servant of the company, was to take measures to see that the Board was properly informed; as the Appellate Division observes, to ascertain the facts and report them. But did this duty involve this professional man in any obligation to betray the professional confidences of his personal patient? If he chose to do so, was there any occasion or exigency which fairly warranted it? Does the welfare of society require that his communications should receive the protection which the law affords to privileged communications? Or is it not right that, having done so, to quote again from Lord Macnaghten's

(1) (1870) L.R. 5 Q.B. 608, at p. 611.

judgment, he "should take the consequences," if he did "overstep the law?" That question is, I think, best answered by citing another passage from the judgment of the Judicial Committee, in *Macintosh* v. *Dun* (1):

> It may not be out of place to recall the striking language of Knight Bruce, V.C., in reference to a somewhat similar subject * * * "The discovery and vindication and establishment of truth," His Honour says, "are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, * * * cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them * * * Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much." And then he points out that the meanness and the mischief of prying into things which are regarded as confidential, with all the attending consequences, are "too great a price to pay for truth itself."

"Following up this train of thought," as their Lordships did in *Macintosh* v. *Dun* (2)—however convenient or even advantageous it may be to employers to have access to the secrets entrusted by their employees to their own medical advisers, such information "may be bought too dearly —at least for the good of society in general."

The Appellate Division have agreed with the trial judge that the statement in the letter to Dr. Hewitt was not necessary. The substance of the statement being such as it was, that alone seems to be a conclusive bar to the claim of privilege. Even in a case in which circumstances might, in the last resort, require a doctor to give up his patient's secret, or justify him in doing so, justification could not extend to a wanton disclosure. A statement, such as that we are discussing, made unnecessarily, is, in my opinion, a wanton disclosure. Plainly, it is not a disclosure, to quote the language of Parke B., "fairly warranted by any reasonable occasion or exigency." Plainly, also, persons of ordinary intelligence and moral principle, situated as the respondent was, would not feel themselves under a duty unnecessarily to make such a disclosure.

And here an observation becomes necessary which, in principle, applies to the communication to Dr. McCallum as well as to the letter to Dr. Hewitt. In *Greenlands' Case* (3), Lord Loreburn said (at pp. 28 and 29):

(1) [1908] A.C. 390, at p. 400. (2) [1908] A.C. 390.
(3) [1916] 2 A.C. 15.

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> We should look at who and what are the persons to whom and by whom the libellous communication is made, and to the manner in which they conducted themselves, before admitting the privilege claimed * * *
>
> But we must remember that private reputation and credit are at stake, and I cannot think that privilege should be allowed unless there is not merely good faith but also real care to make inquiry only in reliable quarters, and to verify it where practicable. The absence of such care may, no doubt, be evidence of malice, but it is also relevant on the point whether there is privilege or not, and may, in my judgment, be fatal to the privilege even if malice is disproved.

First, as to the letter to Dr. Hewitt. The sentences which are important are as follows:—

> Halls tells me that he was discharged from the army on account of valvular disease of the heart, resulting from rheumatism earlier in life. He also stated that he had had g. c. infection about 1918. I would be glad if you would advise me as to the heart condition which necessitated his discharge, also whether his records show a history of rheumatism and g. c. infection.

As to the first sentence, the appellant denies that he ever told the defendant he had suffered from rheumatism. The respondent does not dispute this; his evidence is to the effect that he had inferred rheumatism from the entries on his card, as to the disease of the heart, and as to the initial treatment. The learned trial judge might have regarded this sentence not only as inaccurate but even as misleading. As to the second sentence, the respondent admits, that he had no recollection of any statement to that effect by the appellant. He was here also drawing an inference from his notes. He had been told that the appellant had informed his own physician in answer to questions put for purposes of diagnosis that he had never suffered from the infection mentioned. The respondent, if he had given the matter the slightest thought, must have realized that his letter was calculated to give the impression that there was no dispute about the facts he was stating, if indeed the letter was not also calculated to create the impression that his application was being made with the assent of the appellant; that, in truth, he was speaking for the appellant, although he knew he was, in effect, stating what the appellant had recently denied to his own physician.

From this point of view, Dr. Hewitt's reply is rather important. Dr. Hewitt evidently was under the impression that the information he was giving from the army records added nothing material to what the respondent already knew from the lips of the appellant himself.

The judgment of the Appellate Division, as I have said, treats this letter as innocuous. There is only too much reason to think that, next to the respondent's fatal mistake in proceeding with the investigation after discovering the former relation between himself and the appellant, this communication and the form in which it was couched had much to do with the mistakes that followed. I repeat that Dr. Hewitt's reply indicates, if it does not conclusively establish, that he believed he was giving to the respondent from the records, information which he had already received from his patient, and as to the correctness of which there was no sort of dispute between the respondent and the patient; a view which the respondent's letter was naturally calculated to produce, as we have seen. This seems to me the most natural explanation of the failure on the part of Dr. Hewitt to observe that the letters v. d. g. had been entered in his *précis* by mistake; a mistake which the respondent admits must at least have been suspected by any competent person reading the *précis* with care. It is not easy to understand why Dr. Hewitt was not sufficiently struck by the incongruity between the letters v. d. g. and their context, and the practice, to have realized at least the desirability of some inquiry as to the accuracy of his *précis*. His mistake most naturally is to be ascribed, I think, to the fact that he had before him this letter from the respondent, a physician, professing to give his patient's own account of his medical history, with which the entry (the letters v. d. g.) was wholly in accord. The learned trial judge might very well have taken the view, and this may go far to account for the severity of some of his strictures, that if the respondent had informed Dr. Hewitt that the application was not made with the assent of the appellant; that the appellant denied having had the infection indicated; that he himself had no recollection of any admission by the appellant; that he was proceeding solely upon the entries in his cards; that the attention of the appellant had not been called to these entries; that he purposed using Dr. Hewitt's reply in opposition to the appellant's claim, without notifying the appellant, and without giving him an opportunity of meeting it—if all these facts had been fairly placed before Dr. Hewitt, the learned trial

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judge might have found it difficult (if not impossible) to think that Dr. Hewitt's reply would have been sent without further inquiry.

The letter to Dr. McCallum (17th Nov.) consisted largely of a repetition of communications said to have been received by the respondent from the appellant. Assuming that a duty did rest upon the respondent in the last resort to disclose the facts touching the appellant's confidential statements to him in 1920, and touching his treatment of the appellant, he was under no obligation in doing so to conceal from the appellant the fact of his disclosures; and he was under a duty at least to take every practicable precaution to avoid inaccuracy.

He wrote in part as follows:

> Mr. Halls had been a patient of my own in 1920, when he consulted me for a painful condition of the right side of the sacrum about its middle, which had been bothering him for some five weeks prior to that. He gave a history of having been discharged from the Army on account of valvular disease of the heart, and when I saw him in 1920, he had a mitral systolic lesion. I at first, gave anti-rheumatism treatment, but this did not affect the painful sacral condition, and in view of this, and the fact that Halls admitted having had a g. c. infection two years before I saw him and still had shreds in the urine, I administered anti-gonococcus vaccine. After a short course of treatment, my records show that he felt some improvement. He now tells me that very shortly after the last injection the painful condition in the sacrum cleared up.

This last sentence distinctly conveys the impression that Halls had, in a very recent discussion of his g. c. infection with the respondent and of the doctor's treatment of it, admitted that he had benefited by that treatment. There had, in fact, been no such discussion. Neither the subject of g. c. infection nor that of the treatment had been mentioned between them. The statement seems to have been founded upon some inference drawn by Dr. Mitchell from an explanation given to him by Halls of the discontinuance of his visits to the doctor in 1920. The appellant denied that the treatment had been of any value, and the learned trial judge seems to have accepted his evidence. The letter contains more than one assertion conveying the idea that facts are either admitted or indisputable, which would have been disproved or vigorously disputed by the appellant.

It is difficult to understand why he did not take the course of frankly informing the appellant of what he was

doing; in the interests of accuracy, since the facts placed before Dr. McCallum so largely rested upon "admissions" ascribed to the appellant, that would appear to have been an obvious precaution.

In justice to the respondent, it should be said that he was no doubt convinced by his notes, and the entry in Dr. Hewitt's *précis,* that the appellant's claim was groundless, and his conviction as to this, no doubt, explains the tone of his letter to Dr. McCallum. It cannot, however, justify his conduct in disclosing the contents of his notes without giving the appellant an opportunity of explaining, or presenting his side of the matter, or taking any measures to protect his reputation. I cannot think that public policy requires that such communications, made in such circumstances should receive the protection accorded to privileged communications.

It was rather suggested that the letter to Dr. McCallum should be protected as within the principle of *Watson* v. *McEwan* (1). The basis of the judgment in *Watson* v. *McEwan* (1) is that statements made by a witness as such, in court, are absolutely privileged, and that this privilege would become illusory, were it not applicable for the protection of a statement by an intending witness, as to the nature of the evidence the witness can give, made to professional persons preparing the evidence to be presented in court. As the protection by privilege of the testimony of witnesses in court is regarded by the law as essential to the administration of justice, and as the extension of that protection to such preliminary statements is regarded as essential to the effectiveness of the substantive privilege, such preliminary statements are held to fall within the rule; but, as Lord Halsbury points out, this strict necessity is the basis of the privilege. In *Watson* v. *McEwan* (1) there was no question, as Lord Halsbury observes, of communications to persons other than those engaged professionally in preparing the evidence to be presented in court, and obviously the principle does not extend to such collateral statements. It protects the respondent, whatever his motives may have been, in respect of statements made before the

(1) [1905] A.C. 480.

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Workmen's Compensation Board and in respect of statements made to the Claims Agent, voluntary though they were, as to the evidence which he was prepared to give; but this privilege has no relation to the statements made to Dr. Campbell, to Dr. Hewitt, or to Dr. McCallum.

There was also a suggestion that the respondent may plead in excuse the fact that he was acting under the instructions of the Claims Department of the Canadian National Railway Company. In disclosing to the officials of that Department the nature of the evidence he could give, the respondent was within the principle of *Watson* v. *McEwan* (1), and is protected accordingly. But as regards other defamatory communications, the railway company, in requiring, or knowingly taking advantage of, breaches of confidence on his part, would share his responsibility. In respect of communications in breach of confidence, the courts afford protection as against the person in whom confidence was originally reposed; and the law is not so futile as to withhold such protection as against third persons, who, in acquiring knowledge of confidential matters, have also become acquainted with their character and origin. As the judgment in *Macintosh* v. *Dun* (2) shews, the fact that defamatory matter has originated in breach of confidence, to the knowledge of the defamer, or indeed, the fact that it was produced under a system which contemplated the violation of confidence as a source of information, may constitute a conclusive reason for rejecting the claim of privilege.

It is, perhaps, desirable to mention a passage in a textbook by a well known author: Bower, on Actionable Defamation (2nd Ed.), p. 111, which seems, superficially at least, not to be entirely in consonance with the view here expressed. The passage is as follows:

> Where the party defaming is entitled to such defeasible immunity as aforesaid, he is not deprived of the benefit thereof, as a defence to any action of defamation, by reason only of the circumstance that the communication was, as between himself and the party defamed, a breach of duty or a wrongful act not being in the nature of defamation.

If this passage is to be read as enunciating the proposition that in determining the existence or non-existence of privilege, it is, in point of law, immaterial that the defamatory

(1) [1905] A.C. 480. (2) [1908] A.C. 390.

matter originated or was published in breach of confidence, then the passage is plainly inconsistent with the decisions in *Macintosh* v. *Dun* (1), and *Greenlands' Case* (2). The authorities cited in support of the passage are, indeed, of doubtful purport. In *Robshaw* v. *Smith* (3), it does not appear that the court was really concerned with anything amounting to a breach of confidence on the part of the defendant. No such point was discussed or considered, and generally, as regards that case, the observations of Hamilton L.J. in the *Greenlands' Case* (4) must not be overlooked. That eminent judge suggests that the case is incompletely reported; and he declines to accept the expressions of opinion imputed to Lindley and Grove JJ. as authoritative. In *Thurston* v. *Charles* (5), no question of breach of confidence arose.

To summarize my reasons for thinking that the conditions have not in this case been satisfied in which the law protects privileged communications that otherwise would be actionable as defamatory. "The underlying principle" upon which that protection is founded is "the common convenience and welfare of society"—not the interests of individuals or of a class, but "the general interest of society." The court must consider whether the communication was made plainly under a duty—and a sense of that duty—which in all the circumstances would be "recognized by people of ordinary intelligence and moral principle"; and in considering that, the court will take into account the origin of the matter of the communication and "every circumstance connected with the publication" of it; and must "hold the balance and looking at who published the libel, and why, and to whom, and in what circumstances" must say "whether it is for the welfare of society that such a communication honestly made should be protected by clothing the occasion of the publication with privilege." There was no duty resting upon the respondent, and no interest committed to his charge, of sufficient weight and importance to require that the libels in question, involving the disclosure of profes-

(1) [1908] A.C. 390.
(2) [1916] 2 A.C. 15.
(3) (1878) 38 L.T. 423.
(4) [1916] 2 A.C. 15.
(5) (1905) 21 T.L.R. 659.

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sional confidences, should be protected in the "general interests of society." Moreover, assuming such a duty or interest existed as might warrant such disclosures if necessary in the last resort, the protection ought not, (considering the gravity of the matter of the libels), to be extended beyond the strict necessities of the occasion, or to disclosures made secretly without communicating with the appellant giving him an opportunity of explanation, and endeavouring to attain the object sought by other means, entailing no injury to the appellant's reputation. In all the circumstances, such disclosures made in the absence of such precautions, can not be said to be "fairly warranted by any reasonable occasion or exigency."

In this view it is unnecessary to consider the finding of the trial judge, that assuming the occasion of the publications in question to have been privileged, the respondent was actuated by some ulterior motive, and that in each case the occasion was abused. No opinion is expressed upon that finding beyond this: there is no adequate ground for disagreeing with the finding of the trial judge that the appellant's account of the interviews between himself and the respondent in 1920 should be accepted; and that the entry in the respondent's notes on the subject of the g. c. infection was the result of an error.

The appeal therefore succeeds as to the libels. The appellant is entitled to judgment for $500 and Wright J.'s judgment should be varied accordingly. He is also entitled to his costs of both appeals.

SMITH J. (dissenting in part).—The grounds of appeal that require serious consideration are those in reference to the libels alleged to be contained in the letter of respondent to Dr. Hewitt of 30th October, 1924, Ex. I, and in his letter to Dr. McCallum of 17th November, 1924, Ex. 20. In the judgment appealed from it was held that there was qualified privilege in connection with these communications.

The contention here is that there rests on a medical practitioner at least a strong moral obligation to keep secret information received by him from patients for the purpose of enabling him to properly and intelligently minister to their ailments. It is, however, I think, conceded

that there may be circumstances which may make it proper to disclose, even voluntarily, such information; and the question here is as to whether the circumstances in this case were such as to warrant the respondent in making such disclosure.

It is to be noted in the first place that a medical practitioner, unlike a solicitor, can be compelled to disclose, as a witness, relevant confidential information received in connection with professional services rendered, so that the statements complained of, when made in the witness box, were absolutely privileged, and the evidence could not have been excluded at the instance of appellant on the ground that the communication was confidential. It does not seem to me that the legal result would be different if a medical practitioner were to offer voluntarily to become a witness, though it might amount to a serious breach of professional etiquette.

The respondent was the Assistant Chief Medical Officer of the Canadian National Railway Company. In addition, he practised his profession of physician; and the appellant, while in the employ of the railway, consulted him, in May, 1920, and received treatment from him. Four years afterwards—on May 3rd, 1924—the appellant, while still in the employment of the Railway Company, was struck on the right eye by a swinging door that had been pushed open by a fellow employee; and on 10th June following, consulted Dr. Angus Campbell, who found him then suffering from acute iritis of that eye. In the following September he filed a claim with the Ontario Compensation Board against the Railway Company, alleging that the iritis arose from the stroke received from the swinging door. While any award against the Railway Company would be paid by the Dominion Government, it was none the less the duty of the Railway Company to see that no unfounded claim was allowed, and to make all proper investigations and present all proper evidence to the Board tending to show the claim to be unfounded. It was part of the regular duty of the respondent towards the Railway Company to investigate the medical aspect of the appellant's claim. This was a duty that he was under contract to faithfully and honestly perform for the Company.

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In the ordinary course, the respondent was called upon to investigate the plaintiff's claim. Dr. Campbell had certified that the iritis was the result of the blow from the swinging door. The respondent, as a medical man, was unable to connect the one with the other, particularly in view of the time that elapsed between the blow and the development of iritis; and it seems that such a lapse of time is quite unusual, and would ordinarily suggest the probability of some other cause. The respondent remembered having treated the appellant previously, and consulted his history card of that treatment, which he had on file, and which recorded that the appellant had had g. c. infection two years previous to the time of making out this card on May 1st, 1920, with some shreds still. The card continues, showing three treatments for this g. c. infection of two years previous. The respondent was of opinion that lingering constitutional effects of this former disorder of 1918 was a possible cause of the iritis. The appellant had been in the army, and the respondent pursued his enquiries by interviewing Dr. Hewitt, Medical Director for the Department of Soldiers' Civil Re-establishment at Toronto, as to appellant's medical history in the army, and was informed by Dr. Hewitt that the records showed that the appellant had suffered from rheumatism, and that there was one item of v.d.g. The respondent asked for this information in writing, but was informed that it would be necessary to make a written application for it. The respondent made this written application, which is Ex. I, complained of, and received the reply of November 6th, 1924—Ex. 5—which states that the appellant's medical history shows a single record of him having v.d.g.

With the information thus gathered from his own card of his treatment of appellant in 1920 for this disease of 1918, and from the army medical history, which went to confirm the statement in the card, the respondent was confirmed in his view that the iritis could not be connected with the blow from the door, and advised his Company to take the opinion of Dr. McCallum, an expert, and received directions to obtain Dr. McCallum's opinion. In the letter to Dr. McCallum of 17th November, 1924, Ex. 20, complained of, he submitted the facts as he had

gathered them, on which the expert opinion was to be based.

I think it is clear that the company had a right, in resisting what it believed to be an unfounded claim, to take expert advice as to whether or not the iritis could be regarded as flowing from the blow, and for the purposes of such advice to submit all material facts that it expected to establish by the evidence. The fact of v.d.g. infection was one that the company had strongest grounds for supposing would be established beyond question, in view of the respondent's card and the army record. It is not denied that this infection, if a fact, was most material. It would have been a manifest absurdity to ask Dr. McCallum for expert advice and to have suppressed a fact upon which his whole opinion might hinge. The respondent was the only party who had knowledge of this piece of material evidence. He was the proper medium for the company to use in laying the facts before Dr. McCallum. It is argued that, because of the confidential relationship between the appellant and respondent in connection with the treatments of 1920, the respondent should have suppressed this most important bit of evidence, which he had every reason at the time to suppose would establish that there was no valid claim against his company. It is suggested that, because of the moral obligation not to disclose what he had received in confidence from the consultations in 1920, he should have refused to have anything to do with investigating the claim, and should have suppressed the knowledge he had of facts he believed would show the claim to be unfounded. It was part of his duty to his company that he had contracted to perform and that he was being paid for, to investigate such claims where medical opinion was a factor, and, in my opinion, he could not honestly stand by under the circumstances and allow a claim to be established against his company by suppressing evidence that would go to show that the claim was unfounded. The higher duty, I think, was to have the evidence that he alone knew of placed fairly before the tribunal trying the rights between his company and the appellant.

It was finally established that the information furnished by Dr. Hewitt to the respondent as to the appellant's army

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medical history was in fact erroneous, and that the history did not contain any record of appellant having been afflicted with v.d.g. A most unfortunate mistake had been made in the copy of the record from which Dr. Hewitt gave his information in writing, the letters v.d.g. having been used, instead of the letters v.d.h., which have an entirely different signification. The correction of this mistake greatly weakened the evidence of the fact of the appellant having had g.c. infection, but the respondent had no knowledge of such mistake at the time he was submitting facts for the opinion of Dr. McCallum. In the final determination of the claim, the fact of the alleged infection rested solely on the correctness of the respondent's card record, made, as the respondent says, from the appellant's own statement to him. The appellant denies having made such statement and having had such infection, and gives as his explanation a misunderstanding between himself and respondent of questions and answers, and says he did not know he was receiving treatment for g.c. infection. The learned trial judge has accepted this testimony, finding as a fact that the respondent was not told by the appellant that he had had g.c. infection. This finding is not questioned in the Appellate Division nor here, and the appellant has the full benefit of it, regardless of the result of the litigation on the question of damages.

The letter of the respondent to Dr. Hewitt of 30th October, 1924, Ex. I, stands on a different footing from that to Dr. McCallum, which I have just discussed, and the difference is clearly recognized in the judgment appealed from. The respondent was simply seeking information from Dr. Hewitt, and in asking for information the protection of privilege is not required at all, as there can be no libel in a mere request for information. There is no necessity for allegations of facts or alleged facts in connection with such requests. At all events, there was no necessity in this instance for the allegation by respondent to Dr. Hewitt in Ex. I, "He also stated that he had had a g.c. infection about 1918," and the Appellate Division so holds, but excuses it on the ground that there was qualified privilege in connection with the letter itself. In my view this excuse cannot prevail. A litigant is, of course, within his right

in seeking any information that would be of service to him in connection with the action, but this, as I have stated, would not, in my opinion, warrant him in making libellous statements to those from whom he might be seeking the information. If, for instance, a servant were suing for wages or false dismissal, and the defence were dishonesty, the defendant would be within his right in inquiring as to the servant's conduct in other employment, but could not justify specific allegations of dishonesty on the part of the servant, if they were in fact untrue, on the ground of privilege.

Here we have a specific allegation of fact in a letter that was simply a request for information and could not be libellous if confined to such request. The allegation was entirely unnecessary, as held by the Appellate Division, and was, in fact, untrue, according to the undisturbed finding of the trial judge. The untrue allegation was undoubtedly libellous in its character, and gives, I think, technically a right of action with nominal damages. It could not have affected Dr. Hewitt's mind, because he had before him his own record that contained the same allegations, which he had just communicated to the respondent. It may be argued that when this record was corrected, an erroneous opinion of the appellant might still remain in Dr. Hewitt's mind as a result of the respondent's allegation, and that the allegation would remain permanently on the file.

It may be noted that the appellant would not necessarily have succeeded in establishing his claim before the Board if the respondent's evidence as to infection had not been offered, because it might still have been held that the connection between the blow and the iritis had not been established.

I agree with the trial judge that there was no malice on the respondent's part in the nature of ill-will towards the appellant, and with the Appellate Division that there was no malice in the legal sense of indirect or improper motive.

I therefore agree with the Appellate Division that the claim for libel in the letter of the 17th November, 1924, to Dr. McCallum should be dismissed, but am of opinion that

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the appellant is entitled to at least nominal damages for the untrue and unnecessary allegation in the letter to Dr. Hewitt of the 30th of October, 1924.

Appeal allowed with costs.

Solicitors for the appellant: *Harding & Clark.*

Solicitors for the respondent: *D. L. McCarthy.*