GEORGE A. LESLIE (*Plaintiff*) .....APPELLANT;

AND

THE CANADIAN PRESS (*Defendant*) ...RESPONDENT.

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*June 18
*Oct. 2

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeals—Ordering new trial on grounds of misdirection, etc.—Whether substantial wrong or miscarriage occasioned—Burden in this connection —The Judicature Act, R.S.O. 1950, c. 190, s. 28(1).

Where a new trial of a civil action is sought on the ground of misdirection of the jury it is sufficient, under s. 28(1) of the Ontario *Judicature Act,* for the appellant to show that the misdirection may have affected the verdict; he is not required to show that it actually did so. If thereafter the appellate Court is in doubt as to whether it did or not, it is then for the respondent to show that the misdirection did not in fact affect the verdict. *Storry v. C.N.R.,* [1941] 4 D.L.R. 169 at 174, disapproved.

Defamation—Defences—Justification—Fair and accurate report of judicial proceeding—Charge to jury and jury's findings—Whether substantial wrong or miscarriage occasioned—The Judicature Act, R.S.O. 1950, c. 190, s. 28(1).

An action for libel was based upon the publication by the defendant of a newspaper account of the proceedings at a trial. The defendant pleaded both justification and that the words complained of constituted a fair and accurate report of proceedings in court. The jury found that the words were a report of judicial proceedings, that they were substantially true, but that they were not a fair and accurate report, and that they were "harmful without intent". On these findings the trial judge dismissed the action.

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Held, the judgment should be affirmed.

Per Kerwin C.J. and Fauteux, Abbott and Nolan JJ.: The trial judge's directions to the jury did not make clear the distinction between the question whether the statements contained in the article were true and the question whether the article was a fair and accurate report of a judicial proceeding. But the jury by their answers had in fact distinguished between these questions, and the defendant had clearly shown that no substantial wrong or miscarriage had resulted from the misdirection; the appeal should therefore be dismissed under s. 28(1) of the Ontario *Judicature Act*.

Per Rand J.: Although the record of the previous trial, to which the report related, did not of itself prove the truth of the matters stated, and could not be resorted to for the purposes of the plea of justification, the plaintiff's own evidence supplied any inadequacy there might otherwise have been in this respect. There was therefore evidence to support the jury's finding on this plea, and that finding was conclusive.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario, affirming the judgment of LeBel J., after a trial with a jury, dismissing the action.

G. A. Leslie, plaintiff, appellant, in person.

P. B. C. Pepper, for the defendant, respondent.

The judgment of Kerwin C.J. and Fauteux, Abbott and Nolan JJ. was delivered by

THE CHIEF JUSTICE:—This is an action for damages for an alleged libel contained in a dispatch sent out by the defendant, The Canadian Press, and appearing in a newspaper. On the first trial the case was withdrawn from the jury, but the Court of Appeal for Ontario directed a new trial whereat the presiding judge, after having received answers to questions put to the jury, dismissed the action. The Court of Appeal affirmed that decision and the plaintiff now appeals to this Court.

The Canadian Press accepts responsibility for the article in question which was printed in a newspaper published by one of its subscribing members. That article reads:—

Toronto, June 12th,—(C.P.) George A. Leslie, former house officer at the Royal York Hotel, used to take lengthy trips in a certain elevator, "sometimes for 15 minutes, sometimes for a whole hour."

Catherine Ross, the elevator operator, today told a court hearing a slander suit in which Leslie is plaintiff that Leslie said he loved her and wanted her to go out with him.

Leslie is suing L. C. Parkinson, hotel personnel manager, and the Canadian Pacific Railway, owner of the hotel, for alleged slander by Parkinson. Parkinson denied the charge.

Miss Ross said the manager told Leslie to stay away from her and not talk to her, but Leslie persisted.

Miss Ross, who said that Leslie was on duty during the times he rode in her elevator, used to ask her during the elevator trips to go out with him.

"He didn't like me snubbing him", she said.

The questions put to the jury on the second trial and their answers are as follows:—

1. Do you find the words complained of (including those in the first paragraph) a report on judicial proceedings? Answer "yes" or "no". Answer: Yes.
2. Do you find the words complained of substantially true or false? Answer either "true" or "false". Answer: True.
3. If your answer to Question No. 2 is "false", do you find the words complained of defamatory of the plaintiff? Answer "yes" or "no". Answer:
4. If your answer to Question No. 3 is "yes", do you find the words complained of are substantially a fair and accurate report of the court proceedings in question? Answer "yes" or "no". Answer: No.
5. Do you find the defendant, in writing this report, was actuated by malice? Answer "yes" or "no". Answer: Harmful without intent.

The directions of the trial judge to the jury were not clear as to distinguishing between the questions whether the statements contained in the article were true and whether the latter was a fair and accurate report of the proceedings of one day at the trial of the earlier action for slander, but the provisions of subs. (1) of s. 28 of *The Judicature Act*, R.S.O. 1950, c. 190, require consideration. That subsection enacts:—

28. (1) A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to the jury, or by reason of any omission or irregularity in the course of the trial, unless some substantial wrong or miscarriage has been thereby occasioned.

The terms of a similar provision in England were before the House of Lords in *Bray v. Ford* (1), and in several cases in Ontario, including the most recent one to which we were referred, *Arland and Arland v. Taylor* (2). It was there

(1) [1896] A.C. 44.

(2) [1955] O.R. 131, [1955] 3 D.L.R. 358.

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Kerwin C.J.

pointed out by Laidlaw J.A., speaking on behalf of the Court, that in *Storry v. C.N.R.* (1), Chief Justice Robertson had said at p. 174:—

> In a criminal case . . . the appeal . . . is to be allowed unless the Court is "of opinion that no substantial wrong or miscarriage of justice has actually occurred" (s. 1014 (2) of the *Criminal Code*). In a civil case the provision is that a new trial shall not be granted on the ground of misdirection "unless some substantial wrong or miscarriage has been thereby occasioned" . . . The burden is on the respondent in the one case of showing that there was no substantial wrong or miscarriage of justice, while in the other case the burden is on the appellant of showing that there was some substantial wrong or miscarriage of justice.

As Laidlaw J.A. points out, this opinion is in direct conflict with that expressed by Meredith C.J.C.P. in *Gage v. Reid* (2), which was apparently not referred to in the *Storry* case, and it is also in conflict with the opinions in *Anthony v. Halstead* (3), and *White v. Barnes* (4). Laidlaw J.A. had also in *Temple v. Ottawa Drug Company Limited et al.* (5), expressed the view that "an appellant who seeks a new trial on the ground of misdirection must at least establish a doubt in the mind of the Court as to whether the misdirection occasioned a substantial wrong or miscarriage". There, and in the *Arland* case, he found it unnecessary to determine whether the onus rested on the appellant to show that such a result actually occurred. In *Bray v. Ford* (6) the House of Lords had not set forth any general rule. Bearing in mind the right of the plaintiff in such an action as this to have the issues passed upon by the jury, I am of opinion that the preferable rule and the one that should be adopted is that it is sufficient for the complaining party to show that a misdirection may have affected a verdict and not that it actually did so; and that, if an appellate Court is in doubt as to whether it did or not, it is then for the opposite party to show that the misdirection did not in fact affect the verdict.

(1) [1941] 4 D.L.R. 169, 53 C.R.T.C. 71.
(2) (1917), 38 O.L.R. 514, 34 D.L.R. 46.
(3) (1877), 37 L.T. 433.
(4) [1914] W.N. 74.
(5) [1946] O.W.N. 295.
(6) [1896] A.C. 44.

In the present case the defences set up by the respondent were: (1) That the statements were true; (2) that they were not defamatory; (3) that they constituted a fair and accurate report of judicial proceedings and were therefore privileged. Counsel for the defendant addressed the jury on all these defences and by their answers to questions 1 and 4 the jury were in fact distinguishing between the report of the slander action in the article complained of and the issue of the truth or falsity of the statements contained in it. I have not overlooked the fact that the efforts of counsel for the defendant had not succeeded in having the trial judge clarify the position, or the circumstance that the plaintiff, although having considerable experience in litigation, is not a lawyer and has acted for himself throughout these proceedings. Upon consideration of the entire record I am clearly of the opinion that the defendant has shown that no substantial wrong or miscarriage has been occasioned.

The appeal should be dismissed with costs.

RAND J.:—This is an action for libel. It is brought on what purports to be a news report of evidence given at a trial in which the present plaintiff, the appellant, was suing one Parkinson and the Canadian Pacific Railway Company for slander.

Three defences are pleaded: justification, a fair and accurate report of a judicial proceeding, and that the words are not defamatory. The finding of the jury on the first ground was against the plaintiff; no answer was given to the third; and the second was found against the respondent. The determining question is whether the first finding was vitiated by the language of the charge or by a failure in proof.

That there was some confusion in the charge in relation to the first two grounds is conceded. The attention of the trial judge was drawn to it by Mr. Pepper but the correction exhibited the same confounding of a fair and accurate account of what had taken place with the truth of the facts

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to which the language related. In view of the action of the jury on the second question, the precaution to rely on the first plea appears to have been well advised.

The report, in the light of the jury's action, was a selection of items disclosed in the course of the trial and considered newsworthy through what, apparently, was thought to be their "spiciness", and for the purposes of the second plea the record of the previous trial was put in evidence.

At the same time the main witness in the former case was called. She agreed that she had then been asked various questions and had given the answers which had previously been read in court, but she was not asked formally if the answers were true. In addition, she testified to certain of the primary facts. The ground was taken before us that the previous record of its own force could not be resorted to for the purposes of the plea of justification and that the respondent must rely on the testimony given by the witness alone.

On this view, which in the circumstances I consider to be sound, was there a sufficient foundation for the finding on that plea? On the testimony of the witness mentioned which was limited to what was thought to be the main item I should have held it insufficient.

But any inadequacy in this respect was supplied by the appellant himself. He admitted having made a remark to the effect of the significant item reported. That remark which gives colour to the course of conduct charged against him—of wasting his time in one of the hotel elevators—can be interpreted in two ways: as evidence either of a generous interest in the young woman operator—an interest in which the appellant's wife was said to have participated—or as a personal regard which led him to seek her company.

Which interpretation was to be given it was a question for the jury, to be found on a total of impressions and effects that are denied to a Court in appeal. The jury, it is true, is not infallible: it may have come to the wrong conclusion. The truth was hidden within the mind of the appellant and it may be that only an imaginative discrimination could appreciate the motivation for which he so strongly contended. But to the possible frailty of judgment of the jurors all such controversies are subject.

The apparent inability of the appellant to realize the conclusive effect of the finding of justification is attributable to the fact that this selective report had in it nothing of significance or of serious interest to the reading public, and it was quite unnecessarily reported only because of the character of its matter. But that inability, however understandable, cannot affect the consequences of the verdict.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant, respondent: John J. Robinette, Toronto.

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Abbott JJ.

(1) [1955] O.W.N. 615, [1955] 3 D.L.R. 248.

(2) [1954] O.R. 360, [1954] 3 D.L.R. 760.