THE GLOBE AND MAIL LIMITED (*Defendant*) ..... APPELLANT; 1959 *Dec. 9, 10, 11

AND

JOHN BOLAND (*Plaintiff*) ..... RESPONDENT. 1960 Jan. 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Libel and Slander—Newspaper—Editorial during election campaign on fitness of candidate—Defence of qualified privilege not available—Fair comment—Rights and duties of newspapers.

The plaintiff, a candidate in a federal election, sued the defendant newspaper for libel in connection with an editorial published by the defendant. The defence of qualified privilege was pleaded. The trial

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judge dismissed the action on the ground that the publication was made on an occasion of qualified privilege and there was no evidence of malice. The Court of Appeal ordered a new trial on the ground that there was evidence of malice to go to the jury, but did not affirm or reject the view of the trial judge on the question of qualified privilege. The defendant appealed to this Court.

Held: The appeal should be dismissed.

The defence of qualified privilege, based on the plea that the newspaper had a duty to inform the public and the public had an interest in receiving information relevant to the question of the candidate's fitness for office, is not open to a newspaper which has published defamatory statements about the candidate. To hold otherwise would be not only contrary to the great weight of authority in England and in this country but harmful to that "common convenience and welfare of society" which is the underlying principle on which the rules as to qualified privilege are founded.

APPEAL from a judgment of the Court of Appeal for Ontario[1], ordering a new trial in an action for libel. Appeal dismissed.

C. F. H. Carson, Q.C., C. H. Walker, Q.C. and *J. B. S. Southey,* for the defendant, appellant.

J. Boland, Q.C., in person.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing the plaintiff's appeal from the judgment of Spence J. The action is for damages for libel. At the conclusion of the plaintiff's case counsel for the defendant stated that he did not intend to call evidence and moved for a dismissal of the action. The learned trial judge held that the words complained of were published on an occasion of qualified privilege and that there was no evidence of malice to go to the jury and accordingly dismissed the action.

The Court of Appeal, in a unanimous judgment delivered by Lebel J.A., allowed the appeal and directed a new trial on the ground that there was evidence upon which the jury might find express malice. As I read his reasons, the learned justice of Appeal neither affirms nor rejects the view of the learned trial judge that it was established that the words were published on an occasion of qualified privilege.

[1] (1959), 17 D.L.R. (2d) 313.

In my opinion the order made by the Court of Appeal was right but as there is to be a new trial I think it desirable to say something as to the appellant's plea of qualified privilege.

The respondent was a candidate for election in Parkdale riding in the general election held in Canada on June 10, 1957.

The words complained of appeared on May 27, 1957, as an editorial in all issues of the Globe and Mail, a daily newspaper published by the appellant. They read as follows:

SHABBY TACTICS

One of the less creditable episodes of the election campaign occurred on Thursday evening in Parkdale constituency, in Toronto, when Mr. John Boland, self-styled independent Conservative candidate, introduced an issue which does not exist in this election. McCarthy-style, he put forward an ex-Communist in an attempt to show the Liberals are "Soft on Communism". The results were far from edifying.

The reason for this disgusting performance was undoubtedly to mislead the so-called New Canadian vote in that riding, in the hope that their anti-Communist fears might be translated into an anti-Liberal anti-Conservative prejudice. An election won by such tactics would be a degradation to the whole democratic system of Government in Canada. Let us have no more of that sort of thing, this time or ever.

In the statement of claim it is alleged that the defendant falsely and maliciously published this editorial of and concerning the plaintiff and that in its plain and ordinary meaning it is defamatory of him. In paras. 6 to 15 inclusive a number of innuendoes are alleged.

In the statement of defence publication is admitted. The defences pleaded are, (i) that the words complained of in their natural and ordinary meaning are no libel, (ii) that the said words do not bear and were not understood to bear and are incapable of bearing or being understood to bear the meanings alleged in paras. 6 to 15 of the statement of claim, (iii) a plea of qualified privilege, and (iv) the defence of fair comment, pleaded in the form of the "rolled-up" plea.

The plea of qualified privilege is set out in paras. 3 and 4 of the statement of defence which read as follows:

3. The Defendant says that the words complained of were published in the following circumstances—

During the campaign preceding the Federal Elections of June 10, 1957, the Plaintiff, as a Candidate for election, was seeking the support of the electors in Parkdale Riding in the City of Toronto, as an

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Independent Conservative Candidate. The Plaintiff, as part of his campaign, introduced the issue that the Liberal Government was employing pro-Communists in the Department of External Affairs and was soft on Communism. This issue was further developed at a Public Meeting held at Parkdale Collegiate Auditorium on 23rd May, 1957, when one, Pat Walsh, addressed the meeting in the interest of the Plaintiff. The raising of this issue by the Plaintiff was the subject of discussion and comment in the Public Press.

4. By reason of such circumstances it was the duty of the Defendant to publish and in the interests of the Public to receive communications and comments with respect to the Candidature of the Plaintiff and by reason of this the said words were published under such circumstances and upon such occasion as to render them privileged.

The rule as to the burden of proof where a defence of qualified privilege is set up is accurately stated in Gatley on Libel and Slander, 4th ed., p. 282, as follows:

> Where a defence of qualified privilege is set up, it is for the defendant to allege and prove all such facts and circumstances as are necessary to bring the words complained of within the privilege, unless such facts are admitted before or at the trial of the action. Whether the facts and circumstances proved or admitted are or are not such as to render the occasion privileged is a question of law for the judge to decide.

The learned trial judge found that the facts alleged in para. 3 of the statement of defence were proved and, for the purposes of this appeal, I will assume the correctness of that finding. He then went on to hold as a matter of law that these facts established the existence of an occasion of qualified privilege. The learned judge based this conclusion primarily on the decisions of Mackay J., as he then was, the trial judge in *Dennison et al. v. Sanderson et al.* reported in appeal at[1], and of Kelly J., the trial judge in *Drew v. Toronto Star Ltd.*, reported in appeal at[2]. In the view of the learned trial judge in neither of these cases did the Court of Appeal disapprove of the statements made by the learned judges presiding at the trials to the effect that statements made in a newspaper during an election campaign as to the fitness, or otherwise, for office of candidates offering themselves for election were made on occasions of qualified privilege. The learned trial judge continued:

> Therefore in my view we have two judges of this Court who have found that the publication of comment in newspapers as to candidates for election to public office, and made during the course of an election campaign, are uttered on occasions of qualified privilege and the opinion of neither one of those has been disturbed on appeal. Apart from the authority

[1] [1946] O.R. 601, 4 D.L.R. 314. [2] [1947] O.R. 730, 4 D.L.R. 221.

I would be much inclined to come to the same opinion. Surely no section of the public has a clearer duty to publish, for the information and guidance of the public, political news and comment, even critical comment, during a Federal Election in Canada than the great Metropolitan daily newspaper such as the Defendant. Just as certainly the public, every citizen in Canada, has a legitimate and vital interest in receiving such publications. At this point I do not intend to deal with either the bona fides of the publication or with the alleged over extension of the publication thereof, to both of which I shall refer later, but only with the question of whether the occasion was one of qualified privilege. I have come to the conclusion that a Federal Election in Canada is an occasion upon which a newspaper has a public duty to comment on the candidates, their campaigns and their platforms or policies, and Canadian citizens have an honest and very real interest in receiving their comments, and that therefore this is an occasion of qualified privilege.

With respect, I am of opinion that this is an erroneous statement of the law. It is directly opposed to the unanimous judgment of this Court in *Douglas v. Tucker*[1], particularly at pp. 287 and 288 (which does not appear to have been brought to the attention of the learned judge) and to *Duncombe v. Daniell*[2], which was approved and followed in *Douglas v. Tucker*.

An attempt was made to distinguish the case at bar from *Duncombe v. Daniell* and *Douglas v. Tucker* on the ground that in each of those two cases the libel referred to the private life rather than the conduct in public affairs of the plaintiff; but the judgments in both of those cases proceeded on the basis that the defamatory statement made about the candidate would, if true, have been relevant to the question of his fitness for office and was such as the electors had an interest in hearing. In my opinion there is nothing in this suggested distinction which renders the principle of *Douglas v. Tucker* inapplicable to the case at bar.

With respect it appears to me that, in the passage from his reasons quoted above, the learned trial judge has confused the *right* which the publisher of a newspaper has, in common with all Her Majesty's subjects, to report truthfully and comment fairly upon matters of public interest with a *duty* of the sort which gives rise to an occasion of qualified privilege.

[1] [1952] 1 S.C.R. 275, 1 D.L.R. 657.

[2] (1837), 8 Car. & P. 222, 143 E.R. 470, 2 Jur. 32, 1 W.W. & H. 101.

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It is well to bear in mind the following passage from the judgment of Lord Shaw in *Arnold v. The King Emperor*[1], quoted by Lebel J.A.:

> The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

To hold that during a federal election campaign in Canada any defamatory statement published in the press relating to a candidate's fitness for office is to be taken as published on an occasion of qualified privilege would be, in my opinion, not only contrary to the great weight of authority in England and in this country but harmful to that "common convenience and welfare of society" which Baron Parke described as the underlying principle on which the rules as to qualified privilege are founded. See *Toogood v. Spyring*[2]. It would mean that every man who offers himself as a candidate must be prepared to risk the loss of his reputation without redress unless he be able to prove affirmatively that those who defamed him were actuated by express malice. I would like to adopt the following sentence from the judgment of the Court in *Post Publishing Co. v. Hallam*[3]:

> We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.

and the following expression of opinion by the learned author of Gatley (*op. cit*) at page 254:

> It is, however, submitted that so wide an extension of the privilege would do the public more harm than good. It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation.

[1] (1914), 30 T.L.R. 462 at 468.
[2] (1834), 1 C.M. & R. 181 at 193, 149 E.R. 1044.
[3] (1893), 59 Fed. 530 at 540.

The passages just quoted recall the words of Cockburn C.J. in *Campbell v. Spottiswoode*[1]:

> It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation.

The interest of the public and that of the publishers of newspapers will be sufficiently safeguarded by the availability of the defence of fair comment in appropriate circumstances.

As, in my opinion, it is settled by authority binding upon us that the facts pleaded by the appellant even if established would not render privileged the occasion on which the editorial complained of was published, I do not find it necessary to consider those parts of the reasons of the learned trial judge and of the Court of Appeal which discuss the question whether there was evidence of express malice.

At the new trial, in view of the state of the pleadings it should be taken that, as a matter of law, the defence of qualified privilege is not open to the defendant.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: MacDonald & MacIntosh, Toronto.

Solicitor for the plaintiff, respondent: C. I. O'Reilly, Toronto.

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[1] (1863), 3 B. & S. 769 at 777, 122 E.R. 288.