VICTOR M. GASKIN (*Plaintiff*) .....APPELLANT;

AND

RETAIL CREDIT CO., JOHN HERBERT AND T. J. KELLY (*Defendants*) } RESPONDENTS.

1964
*Dec. 18
1965
Mar. 1

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Libel—Credit reports on plaintiff requested by clients of defendant company—Reports prepared and sent out to clients—No evidence of letters having been mailed or received—Whether burden of proving publication discharged—Question for jury's determination.

The defendant company was in the business of furnishing credit reports to its clients. Three of those clients requested credit reports concerning the plaintiff and such reports were "sent" by the defendant. The plaintiff brought an action for libel, claiming that the reports were defamatory. The trial judge upon motion made by counsel for the defendant for nonsuit withdrew the case from the jury and dismissed the action. The plaintiff's appeal to the Court of Appeal was dismissed by a majority of that Court. Both the trial judge and the majority of the Court of Appeal held that there was no evidence of publication fit for submission to the jury. A further appeal by the plaintiff was brought to this Court.

Held (Judson J. dissenting): The appeal should be allowed; new trial directed.

Per Cartwright, Martland, Ritchie and Spence JJ.: The question of whether or not the burden of proving publication had been discharged was one which should be left for the jury to determine, if there was any evidence from which it might reasonably be concluded to be more probable than not that a defamatory statement concerning the plaintiff had been made known to a third party or parties.

The defendant's contention that the authorities had established an exhaustive and closed category of circumstances from which publication could be inferred was not accepted. If the plaintiff proved facts from which it could reasonably be inferred that the words complained of were brought to the knowledge of some third person, a *prima facie* case was established.

In the present case there was no evidence of letters having been posted, or of their having been received by the addressees, but this did not mean that the jury should be deprived of the opportunity of drawing the inference, if they should see fit to do so, that credit reports sent by the defendant company to its customers were likely to have been received and read by them.

Per Judson J., *dissenting*: As held by the trial judge and the majority of the Court of Appeal, the evidence of publication in this case was not enough. The plaintiff, in an action of this kind, had the advantage of the two presumptions of falsity and damage but not of a third presumption of publication.

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

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APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Kelly J. Appeal allowed and new trial directed, Judson J. dissenting.

C. L. Dubin, Q.C., and *P. J. Brunner*, for the plaintiff, appellant.

Hon. D. J. Walker, Q.C., and *J. W. Burridge, Q.C.*, for the defendants, respondents.

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

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for the Province of Ontario[1] whereby the majority of that Court, with MacKay J.A. dissenting, dismissed the appellant's appeal from an order made by Mr. Justice Kelly, who had directed that the case be taken from the jury and the action dismissed, pursuant to the granting of a motion for nonsuit made by counsel for the present respondent which was based on the contention that no evidence had been adduced by the plaintiff in proof of the publication of the libels alleged in the pleadings, or of the identity of the present appellant as the person defamed.

The members of the Court of Appeal were unanimously of the opinion, which I share, that the appellant had been shown to be the person defamed, but McGillivray J.A., with whose reasons for judgment Porter C.J.O. agreed, took the view that evidence of credit reports having been sent out by the respondent at the request of its clients did not constitute evidence of publication of the contents of those reports.

There can be no doubt that proof of publication is an essential element in an action for libel and that the burden of proving this element lies upon the plaintiff. The question of whether or not that burden has been discharged is, in my opinion, one which should be left for the jury to determine, if there is any evidence from which it might reasonably be concluded to be more probable than not that a defamatory statement concerning the plaintiff has been

[1] [1964] 1 O.R. 530, 43 D.L.R. (2d) 120.

made known to a third party or parties. In this regard, I adopt the summary of the authorities, which is given in Halsbury's Laws of England, vol. 24, p. 39, where it is stated:

> If publication is disputed by the defendant and there is any evidence of publication by him, it must be left to the jury to decide whether there was in fact publication of the libel by him.

The reasons for judgment, which were delivered by McGillivray J.A., on behalf of the Court of Appeal appear to me to be founded in large measure on a quotation from Button on Libel and Slander at p. 68 which reads in part as follows:

> In the case of libel publication must be proved, as a rule by calling a witness to say that the libel was read; but in certain cases of libel the plaintiff is assisted by certain presumptions which are made in his favour, which it is for the defendant to rebut if he can.

The learned author goes on to cite certain circumstances which have been held by the Courts in England to give rise to a "presumption" that a statement has been published and he concludes by saying:

> In all other cases the plaintiff must establish affirmatively that there was publication to a third person. Where publication is denied, it is generally easily proved by means of interrogatories.

From the language of this passage McGillivray J.A. concluded:

> The exceptions to the rule that publication must be affirmatively established as they appear in the above abstract are the same or similar to those referred to in the other standard texts where similar statements of the law are made. The exceptions appear to fall into two groups—the first is where it is established that a letter to the addressee has been properly posted and the second is when a communication has been sent by telegram or through the mail in open form or has remained posted on a wall or elsewhere where some members of the public may see it. The evidence in the present instance does not fall into either category and all affirmative evidence is lacking. Evidence that reports went, or were made, sent or forwarded (in the case of one witness he was not sure whether the reports had been sent to his office in London or forwarded to the parties for whom they were made) does not come within the exceptions mentioned and by no stretch of the imagination is it evidence of receipt by the parties concerned. The objection taken as to weight to be given this evidence may be called technical but it is by no means unimportant for if this requirement as to publication, which could have been readily satisfied by proper questions upon the examination for discovery or by calling the alleged

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recipient of the document or its representative, is not insisted upon in this case one is driven to inquire how far the principle is to be extended in other cases upon other sets of facts.

It was strongly contended by counsel for the respondent that the English cases referred to in Button on Libel and Slander and in other text-books established an exhaustive and closed category of circumstances from which publication could be inferred and it appears that McGillivray J.A. subscribed to this view.

In my opinion, however, the general principle is correctly stated in Gatley on Libel and Slander, at p. 89, where it is said:

> It is not necessary for the plaintiff in every case to prove directly that the words complained of were brought to the actual knowledge of some third person. If he proves facts from which it can reasonably be inferred that the words were brought to the knowledge of some third person, he will establish a prima facie case.

As has been indicated, there is evidence in the present case to the effect that the respondent was in the business of furnishing credit reports to its clients, that some of those clients requested credit reports concerning the appellant and that such reports were "sent" by the respondent.

It is true that there is no evidence of letters having been posted, or of their having been received by the addressees, but this does not, in my opinion, mean that the jury should be deprived of the opportunity of drawing the inference, if they should see fit to do so, that credit reports sent by Retail Credit Company to its customers are likely to have been received and read by them.

I agree with MacKay J.A., when he says in the course of his dissenting judgment:

> . . . I think it would have been open to the jury to draw the inference of publication or to reject the evidence as being insufficient to prove publication, but I think it should have been left to the jury.

The appellant contends that when respondent's counsel moved for a nonsuit, he elected to call no evidence and that he is now precluded from doing so, with the result that judgment should be entered in the plaintiff's favour and a new trial directed for the purpose of assessing the damages only.

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In this latter regard the leading cases in Ontario are summarized in the decision of Harvey C.J.A. in *Hayhurst v. Innisfail Motors Ltd.*[1], at p. 277, where he says:

> . . . we see no reason why we should not apply the same rule of practice as that of Ontario. It is to be understood therefore that for the future when a defendant applies for a dismissal at the close of the plaintiff's case he does so at the risk of not having the right to give any evidence on his own behalf for if the trial Judge grants his application and the Appellate Court comes to the conclusion that it was wrong it will feel itself at liberty to finally dispose of the case on the evidence already given and will do so unless in its own discretion it considers that in the interests of justice some other course should be taken.

This statement was cited with approval in this Court in *Modern Construction Ltd. v. Maritime Rock Products Ltd.*[2]

In my view, under the somewhat peculiar circumstances of this case, and having regard to the fact that the trial took place before a jury which was never given the opportunity of determining the issue of publication, I think there should be a new trial of the whole issue. I am, however, of opinion that the respondent should bear the costs of the first trial.

For these reasons, as well as for those stated in the dissenting opinion of MacKay J.A., I would allow this appeal and direct that there be a new trial. The appellant will also have his costs in this Court and in the Court of Appeal.

JUDSON J. (*dissenting*):—Both the learned trial judge and the majority of the Court of Appeal have held that there was in this case no evidence of publication fit for submission to the jury. The evidence on this subject was scanty in the extreme and consisted only of extracts from three examinations for discovery read into the record. It was set out in full in the majority reasons delivered in the Court of Appeal. I agree with the trial judge and the majority of the Court of Appeal that it was not enough.

It amounts to no more than this—that the reports were ordered, prepared and sent out to three companies. It does not appear who sent them or when they were sent or to what address they were sent. There is no evidence that any particular third person read them at all. The plaintiff,

[1] [1935] 2 D.L.R. 272.

[2] [1963] S.C.R. 347 at 356.

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in an action of this kind, has the advantage of the two presumptions of falsity and damage but not of a third presumption of publication.

I would dismiss the appeal with costs.

Appeal allowed with costs, new trial directed, JUDSON J. *dissenting.*

Solicitors for the plaintiff, appellant: Young & Hutchinson, Woodstock.

Solicitors for the defendants, respondents: Nesbitt & Burridge, Woodstock.