1964
*Dec. 14, 15, 16, 17
1965
Mar. 1

SUN LIFE ASSURANCE COMPANY OF CANADA, W. G. ATTRIDGE, A. G. DENNIS AND BLYTHE MOORE (*Defendants*) ..... APPELLANTS;

AND

KENNETH C. DALRYMPLE (*Plaintiff*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Slander—Qualified privilege—Whether sufficient evidence of malice to warrant the question of malice or the absence of malice being put before the jury.

The plaintiff, a local manager of the defendant company, brought action against the company and three employees thereof for damages for alleged slander uttered by the three employees in the course of their duties for their employer. The plaintiff had been engaged in a dispute for some time with his head office concerning decisions made there in connection with the management of his district. Eventually the plaintiff submitted his resignation and at the same time told the company that he expected that a number of agents would be resigning with him. Subsequently the company sent men to persuade the agents not to resign.

At the close of the plaintiff's evidence at the trial, the defendants moved to dismiss the action on the ground that the alleged slanders were uttered on an occasion of privelege and that there was no evidence of express malice. The trial judge held that the alleged slanders were uttered on occasions of qualified privilege and that the plaintiff had failed to adduce sufficient evidence of express malice to justify sending the case to the jury. On an appeal by the plaintiff, the Court of Appeal

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

in its judgment presumed without deciding that the trial judge had been correct in holding that the occasions were occasions of qualified privilege but differed with the trial judge in holding that there was both extrinsic and intrinsic evidence of express malice giving a sufficient probability to warrant the question of malice or not being put to the jury. The defendants appealed to this Court.

Held (Judson J. dissenting): The appeal should be dismissed.

Per Cartwright and Ritchie JJ.: The trial judge was justified in concluding that the words complained of were spoken on occasions of qualified privilege, but he erred in holding that there was no evidence upon which a properly instructed jury could find that they were spoken maliciously. Whether the words were in fact spoken maliciously was a different question and one upon which the plaintiff was entitled to the verdict of a jury based upon evidence to be adduced at a new trial.

Per Martland J.: There was sufficient evidence of malice to warrant the question of malice or the absence of malice being put before the jury. Consequently, even assuming, in favour of the defendants, that the occasions in question were occasions of qualified privilege, a new trial should be directed.

Per Spence J.: On the question of whether the alleged slanders were or were not spoken on occasions of qualified privilege, the occasion advanced by counsel for the defendants was that the individual defendants as company officers were concerned with what they believed to be a wholesale resignation of agents in the local area. That situation was one with which they could validly be concerned. Statements which were fairly made by a person in the conduct of his own affairs in matters where his own interest was concerned were *prima facie* privileged. The plaintiff's contention that the occasion of privilege had been lost could not, on the evidence, be accepted.

There was the further question whether the statements made by the individual defendants were so irrelevant to the proper protection of their employer's interest that the privilege was lost. The comments could be described as being an attempt to show to the agents that their loyalty to the plaintiff was not justified in their own interests. It might well be said that these comments, if they were justified in evidence given by the defendants, or reasonable grounds for them found, would not be irrelevant to the attempt to retain the agents in the service of the company.

The alleged slanders, therefore, were all uttered on occasions of qualified privilege. However, there was both extrinsic and intrinsic evidence of express malice on the part of each of the individual defendants. Although upon an occasion held to be one of qualified privilege the court, in determining whether there is any evidence of malice fit to be left to the jury, will not look too narrowly on the language used in the alleged slander, the slander if utterly beyond and disproportionate to the facts may provide evidence of excess malice. Moreover, one piece of evidence tending to establish malice was sufficient evidence on which a jury could find for the plaintiff and therefore if more than a mere scintilla, it should be submitted to the jury for its finding of fact.

Toogood v. Spyring (1834), 1 Cr. M. & R. 181; *Halls v. Mitchell,* [1928] S.C.R. 125; *Adam v. Ward,* [1917] A.C. 309; *Jerome v. Anderson,* [1964] S.C.R. 291; *Taylor et al. v. Despard et al.,* [1956] O.R. 963;

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Turner v. M-G-M Pictures, Ltd., [1950] 1 All E.R. 449; *Spill v. Maule* (1869), L.R. 4, Exch. 232; *Egger v. Viscount Chelmsford et al.*, [1964] 3 All E.R. 406, referred to.

Per Judson J., *dissenting*: There was no evidence of malice in this case fit to be considered by the jury. There was nothing in the evidence to indicate that the individual defendants did not believe in any of the statements that they made or that in the circumstances known to them, it would have been unreasonable to believe in these statements. Nor were the statements so disproportionate to the occasion as to provide evidence in themselves that they were using the occasion for an improper purpose.

In order to have the question of malice submitted to the jury, it was necessary that the evidence should raise a probability of malice and be more consistent with its existence than its non-existence. The problem did not arise here at all. It was a case of reasonable, honest persuasion in the protection of a clearly established reciprocal interest.

Arnott v. College of Physicians and Surgeons of Saskatchewan, [1954] S.C.R. 538; *Adam v. Ward, supra; Taylor et al. v. Despard et al., supra*, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario allowing an appeal from a judgment of Richardson J. and directing a new trial of the plaintiff's action for slander. Appeal dismissed, Judson J. dissenting.

C. L. Dubin, Q.C., and *P. J. Brunner*, for the defendants, appellants.

R. N. Starr, Q.C., for the plaintiff, respondent.

The judgment of Cartwright and Ritchie JJ. was delivered by

RITCHIE J.:—I agree that this appeal should be disposed of in the manner proposed by my brother Spence.

On the evidence before him the learned trial judge was in my view justified in concluding that the words complained of were spoken on occasions of qualified privilege, but he erred in holding that there was no evidence upon which a properly instructed jury could find that they were spoken maliciously. Whether the words were in fact spoken maliciously is a different question and one upon which the respondent is entitled to the verdict of a jury based upon evidence to be adduced at a new trial.

MARTLAND J.:—I am in agreement with the conclusion reached by my brother Spence and by the Court of Appeal of Ontario that there was, in this case, sufficient evidence of malice to warrant the question of malice or the absence of malice being put before the jury. Consequently, even

assuming, in favour of the appellants, that the occasions in question were occasions of qualified privilege, I am of the opinion that a new trial should be directed. That being so, I prefer not to express any opinion as to whether or not the occasions in question were, in fact, occasions of qualified privilege.

I would, therefore, dismiss the appeal with costs.

JUDSON J. (*dissenting*):—I agree with the learned trial judge that there was no evidence of malice in this case fit to be considered by the jury. The Court of Appeal directed a new trial on the ground that the evidence adduced by the plaintiff raised a sufficient probability of malice to warrant this question being put before the jury.

The plaintiff, a local manager of the defendant company at Peterborough, had been engaged in a dispute for some time with his head office concerning decisions made there in connection with the management of his district. The rights and wrongs of the dispute do not in any way determine the issues in this action. The plaintiff had one view, which he did not hesitate to express, and the company another. Eventually the plaintiff submitted his resignation and at the same time told the company that he expected that a number of agents would be resigning with him. This was a serious threatened disruption of the company's business in this district. They were justified in treating it seriously and they sent men to persuade the agents not to resign but to stay with the company.

There is nothing in the evidence to indicate that the individual defendants, who were head office employees of the company, did not believe in any of the statements that they made or that in the circumstances known to them, it would have been unreasonable to believe in these statements. Nor were the statements so disproportionate to the occasion as to provide evidence in themselves that they were using the occasion for an improper purpose.

In order to have the question of malice submitted to the jury, it is necessary that the evidence should raise a probability of malice and be more consistent with its existence than its non-existence. I cannot see that this problem arises here at all. My opinion at the end of four days' argument in this Court was that this was a case of

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reasonable, honest persuasion in the protection of a clearly established reciprocal interest.

The learned trial judge showed by his ruling that he was of the same opinion. He was in the best position to judge. He had watched and heard from start to finish the unfolding of this case with all its emphasis on the spoken word and its exaggeration of the trivialities of discussion on both sides. I think that he ruled correctly in accordance with the judgment of Kerwin C.J., and Estey J., in *Arnott v. College of Physicians and Surgeons of Saskatchewan*[1], and its foundation in *Adam v. Ward*[2], and the judgment of the Ontario Court of Appeal in *Taylor et al. v. Despard et al.*[3].

I would allow the appeal with costs both here and in the Court of Appeal and restore the judgment at trial.

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on November 5, 1964, on an appeal from the judgment of Richardson J. at trial dismissing the plaintiff's action.

This is an action against the Sun Life Assurance Company of Canada and three employees thereof, W. G. Attridge, the director of agencies, and A. G. Dennis and Blythe Moore, two supervisors of agencies, for damages for alleged slander uttered by the three employees on the 13th, 14th and 15th of January 1960 in the course of their duties for their employer.

At the close of the plaintiff's evidence at the trial, the defendant moved to dismiss the action on the ground that the alleged slanders were uttered on an occasion of privilege and that there was no evidence of express malice. After a very lengthy argument, the trial judge held that the alleged slanders were uttered on occasions of qualified privilege and that the plaintiff had failed to adduce sufficient evidence of express malice to justify sending the case to the jury.

The Court of Appeal for Ontario in an oral judgment given at the close of the argument, presumed without deciding that the trial judge had been correct in holding that the occasions were occasions of qualified privilege but differed with the trial judge in holding that there was both extrinsic and intrinsic evidence of express malice giving

[1] [1954] S.C.R. 538.
[2] [1917] A.C. 309.
[3] [1956] O.R. 963.

a sufficient probability to warrant the question of malice or not being put to the jury. The defendants appealed to this Court.

Considerable argument in this Court was concerned with the question of whether the alleged slanders were or were not spoken on occasions of qualified privilege. The occasion advanced by counsel for the appellant was that the individual defendants as company officers were concerned with what they believed to be a wholesale resignation of agents in the Peterborough branch territory including the district offices in Peterborough, Trenton and Oshawa. That situation was one with which they could validly be concerned as it was said in evidence that a very large sum of money must be expended to establish a branch agency of the company and train the agents. Statements which are fairly made by a person in the conduct of his own affairs in matters where his own interest is concerned are *prima facie* privileged: *Toogood v. Spyring*[1], at p. 193; *Halls v. Mitchell*[2], *per* Duff J. at p. 132; Gatley on Libel and Slander, 5th ed., p. 253.

The respondent's submission was that almost immediately upon the arrival of Messrs. Dennis and Moore at the branch office in Peterborough and the district office in Oshawa, respectively, they were re-assured upon the topic of the feared resignation of the agents and that therefore they knew the occasion for privilege did not exist in fact, yet they continued to utter and to repeat the alleged slanders. I am of the opinion that this is too cursory a view of the evidence.

The plaintiff in telephone conversation with the defendant Attridge on January 13 had informed Attridge that he, Dalrymple, was resigning and that others would follow, perhaps as many as 8 or 9. The plaintiff in conference with the defendant Dennis on the morning of January 14 in Peterborough had answered when the defendant Dennis read out a list of the names of the agents that a similar number might well resign. The individual defendants were surely justified in taking the view that these agents when purporting to disavow to them, the defendants, their intentions to resign were not altogether frank and that such intention to resign did exist, despite their declarations. There was considerable justification for this belief shown, *inter*

[1] (1834), 1 Cr. M. & R. 181. [2] [1928] S.C.R. 125.

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alia, in two pieces of evidence. Firstly, Moore, in Oshawa, had attempted to have the various agents there "make a commitment", *i.e.,* undertake that they would not resign, and failed to obtain this undertaking. Secondly, on January 15, when the agents met in Cobourg, and invited the defendants Dennis and Moore to attend this meeting, which invitation the defendants had refused, the agents passed a resolution the second part of which was a declaration that if the plaintiff were not reinstated they would all resign. It is true that the plaintiff insisted that this second part of the resolution should be eliminated as it might have been interpreted as a threat, but the incident does indicate that there was a real possibility of wholesale resignations continuing up to as late as January 15. On this evidence, I could not accept the view that the occasion of privilege had been lost.

There is a further grave question whether the statements made by the three individual defendants were so irrelevant to the proper protection of their employer's interest that the privilege was lost. Certainly, statements irrelevant to protecting the interests will result in loss of privilege: *Adam v. Ward*[1], *per* Lord Loreburn, at pp. 320-1, Lord Dunedin, pp. 326-7, and Gatley, *op. cit.,* pp. 267ff.

Were the comments irrelevant? The comments may be generally described as being an attempt to show to the agents that their loyalty to the plaintiff was one not justified in their own interests. The defendants Dennis and Moore attempted this by saying to the agents that this man whom they admired so much was one who had previously made a threat to resign and that then he had waited until his pension had vested so that he would suffer no financial loss upon his resignation, while they, on the other hand, having had much shorter employment, would, if they resigned, have no benefit from vested pensions and that in addition the plaintiff was a troublemaker not only within the company but in dealing with others outside the company. It might well be that if these comments were justified in evidence given by the defendants, or reasonable grounds for them found, these comments would not be irrelevant to the attempt to retain the agents in the service of the company. The agents' loyalty to the plaintiff was certainly a very moving factor. It was not the sole factor. The

[1] [1917] A.C. 309.

loyalty was inspired in a very material fashion by the plaintiff's resolute insistence of non-interference with the opportunity for profit in the Peterborough branch and that, of course, was to the pecuniary advantage of the agents as well as the plaintiff. It was argued that these defendants coming to the Peterborough branch territory with the purpose of retaining in the organization the agents then on staff, could have carried out that purpose by assuring the staff proper co-operation of head office and the appointment of a new manager who would work for the interest of the company and of those agents. This argument, however, is not convincing. As I say, it was the loyalty of the agents to the manager who had just resigned which was the matter of prime importance and unless that loyalty were broken it would seem of little use to make rosy prophesies of what his successor would do.

I am, in summary, of the view that the alleged slanders were all uttered on occasions of qualified privilege. However, it would seem that the Court of Appeal were, with respect, correct in their view that there was both extrinsic and intrinsic evidence of malice.

"Malice" of course does not necessarily mean personal spite or ill-will; it may consist of some indirect motive not connected with the privilege: *Jerome v. Anderson*[1], *per* Cartwright J. at p. 299; *Dickson v. Wilton (Earl)*[2], *per* Lord Campbell at p. 427.

Firstly, it must be determined what evidence of malice is sufficient to go to the jury. Whether the defendant was actuated by malice is, of course, a question of fact for the jury but whether there is any evidence of malice fit to be left to the jury is a question of law for the judge to determine: Gatley, *op. cit.* p. 272; *Adam v. Ward, supra, per* Lord Finlay L.C. at p. 318.

Roach J.A. in *Taylor et al. v. Despard et al.*[3], at p. 978 said:

> The law is well settled that in order to enable a plaintiff to have the question of malice submitted to the jury—and I am of course dealing only with occasions of qualified privilege—it is necessary that the evidence should raise a probability of malice and be more consistent with its existence than with its non-existence and that there must be more than a mere scintilla of evidence.

This would seem to be supported by other authorities.

[1] [1964] S.C.R. 291.

[2] (1859), 1 F. & F. 419.

[3] [1956] O.R. 963.

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In *Turner v. M-G-M Pictures, Ltd.*[1], Lord Oaksey said at p. 470:

> Did the appellant prove that it was more probable than not that the respondents were actuated by malice?

And Lord Porter said at p. 455:

> No doubt, the evidence must be more consistent with malice than with an honest mind, but this does not mean that all the evidence adduced of malice towards the plaintiff on the part of the defendant must be set against such evidence of a favourable attitude towards him as has been given and the question left to, or withdrawn from, the jury by ascertaining which way the scale is tipped when they are weighed in the balance one against the other. On the contrary, each piece of evidence must be regarded separately, and, even if there are a number of instances where a favourable attitude is shown, one case tending to establish malice would be sufficient evidence on which a jury could find for the plaintiff.

Although upon an occasion held to be one of qualified privilege the court will not look too narrowly on the language used in the alleged slander, *Spill v. Maule*[2]; *Adam v. Ward, supra,* at p. 334; *Taylor et al. v. Despard, et al., supra,* the slander if utterly beyond and disproportionate to the facts may provide evidence of excess malice: *Spill v. Maule, supra,* p. 236.

Moreover, as Lord Porter pointed out in the judgment quoted and adopted by Cartwright J. in *Jerome v. Anderson, supra,* at p. 299, one piece of evidence tending to establish malice is sufficient evidence on which a jury could find for the plaintiff and therefore if more than a mere scintilla, it should be submitted to the jury for its finding of fact.

Express malice must be found against each one of the three defendants: *Egger v. Viscount Chelmsford et al.*[3], *per* Lord Denning M.R., at p. 412:

> It is a mistake to suppose that, on a joint publication, the malice of one defendant infects his co-defendant. Each defendant is answerable severally, as well as jointly, for the joint publication: and each is entitled to his several defence, whether he be sued jointly or separately from the others. If the plaintiff seeks to rely on malice to aggravate damages, or to rebut a defence of qualified privilege, or to cause a comment, otherwise fair, to become unfair, then he must prove malice against each person whom he charges with it. A defendant is only affected by express malice if he himself was actuated by it: or if his servant or agent concerned in the publication was actuated by malice in the course of his employment.

Of course, the express malice which actuated any of the three individual defendants will make the corporate defendant liable since the statement was made by the employee in the course of his employer's business.

[1] [1950] 1 All E.R. 449. [2] (1869), L.R. 4 Exch. 232.
[3] [1964] 3 All E.R. 406.

The Court of Appeal for Ontario in its judgment said, in part:

> Because as a result of this unanimous view, there must, in the opinion of this Court, be a new trial, we refrain from more specific comment on the evidence so that the matter may in fairness to both parties be left at large for disposition in the new trial.

I have come to the conclusion, with respect, that such a course is a proper one under the circumstances and, therefore, I shall only state that I am convinced that there is both extrinsic and intrinsic evidence of express malice on the part of each of the three individual defendants. In coming to this conclusion, I have not considered the many references to what would seem to be minor matters indicating express malice such as a certain occurrence during the course of the trial. The trial seems to have been a rather acrimonious contest between counsel and if the evidence of express malice were limited to such slight matters it might well be said that there was only a scintilla of evidence. I have preferred to rely on items of evidence which are not of such limited character having considered them in the manner outlined by Lord Porter, *supra,* and as approved by Cartwright J. in this Court in *Jerome v. Anderson, supra,* at p. 300.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs, JUDSON J. *dissenting.*

Solicitors for the defendants, appellants: Kimber & Dubin, Toronto.

Solicitors for the plaintiff, respondent: Starr, Allen & Weekes, Toronto.