HECTOR McELROY (*Defendant*) .....APPELLANT;

AND

DAVID COWPER-SMITH and ROBERT WOODMAN (*Plaintiffs*) RESPONDENTS.

1967
*Mar. 2, 3
May 23

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Libel—Damages—Whether award so inordinately large as to be wholly erroneous estimate—Mitigating circumstance negating award of punitive or exemplary damages.

Practice—Default of defence—Proof of publication of alleged libel not required.

In an action for libel alleged by the plaintiffs (a lawyer and an insurance executive) to have been uttered in a letter and in a document entitled "To whom it may concern" which accompanied the said letter, the defendant filed no statement of defence. The plaintiffs noted the pleadings closed and applied for a *praecipe* for entry for trial for the assessment of damages. The plaintiffs' solicitor served notice of such entry personally upon the defendant. When the matter came up for trial, the defendant neither appeared nor was represented by counsel, and the Court proceeded under those circumstances to hear the action. The trial judge awarded damages in the amount of $25,000 to both plaintiffs. On appeal, that judgment was affirmed by the Appellate Division and a further appeal was then brought to this Court.

Held (Spence J. *dissenting*): The appeal should be allowed.

Per curiam: In Alberta, upon default in defence the defendant is to be taken to have admitted the facts set out in the statement of claim. Accordingly, the plaintiffs were not required to prove publication of the alleged libel. *Sulef v. Parkin and Breno* (1966), 57 W.W.R. 236, followed.

Per Martland, Judson, Ritchie and Hall JJ.: Defamation of a professional man is a very serious matter and ordinarily would be visited with an award of substantial damages, including punitive or exemplary damages if the circumstances so warrant. However, in the circumstances of this particular case, the award of $25,000 to each of the plaintiffs was so inordinately large as to be a wholly erroneous estimate. It was obvious that the plaintiff was temperamentally unstable and that he was given to making unreasoned and extravagant statements about the plaintiffs. No reasonable businessman would be likely to be affected in his dealings with the plaintiffs by the defendant's statements and as reasonable businessmen constituted the most important source of potential clientele for both the plaintiffs, their exclusion from the persons likely to be affected by the alleged libels was a factor which should have been taken into account as a mitigating circumstance negating an award of punitive or exemplary damages.

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

1967

McELROY v. COWPER-SMITH AND WOODMAN

Per Spence J., *dissenting:* This Court is justified in interfering with an award if it is of the opinion that the damages are so large that it must be considered that the trial judge applied a wrong principle of law, or that the verdict is a wholly erroneous estimate. As to the only question of principle which appeared in the reasons of the trial judge, if that judge did include amounts for exemplary and punitive damages in the awards of the two plaintiffs he was entitled in law to do so and there appeared to be sound reason for awarding such damages. As to whether the verdict was a wholly erroneous estimate, under the circumstances the award was not so inordinately high that it represented an altogether erroneous estimate of the damages which the plaintiffs had suffered.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, dismissing an appeal from a judgment of Milvain J. Appeal allowed, Spence J. dissenting.

R. J. Gibbs, for the defendant, appellant.

W. A. McGillivray, Q.C., for the plaintiffs, respondents.

The judgment of Martland, Judson, Ritchie and Hall JJ. was delivered by

HALL J.:—I agree with my brother Spence that publication of the libel sued on was admitted when no defence was filed on behalf of the defendant and also that exs. 3, 4 and 7 were properly received when tendered in aggravation of damages.

The real question in this appeal is whether the award of $25,000 to each of the respondents was so inordinately large as to be a wholly erroneous estimate in the circumstances of this particular case. I think it was. I would not, in any way, underestimate or discount the damage that can be done to a lawyer or to an insurance executive by false allegations of misconduct and dishonesty. Defamation of a professional man is a very serious matter and ordinarily would be visited with an award of substantial damages, including punitive or exemplary damages if the circumstances so warrant.

In the present case it is obvious that the appellant was temperamentally unstable and that he was given to making unreasoned and extravagant statements about the respondents. The learned trial judge made it apparent that he was aware of this instability and exs. 3, 4 and 7 are themselves additional proof of it.

My brother Spence has indicated his opinion "that the ordinary hard-headed businessman might be little affected by these statements from someone he knew to be of unstable character". I would be more inclined to say that no reasonable businessman would be likely to be affected in his dealings with the respondents by statements coming from the source which they did in this case, and as I feel that reasonable businessmen constitute the most important source of potential clientele for both the respondents, I think that their exclusion from the persons likely to be affected by the alleged libels is a factor which should have been taken into account as a mitigating circumstance negating an award of punitive or exemplary damages.

I think the appeal should be allowed and the case remitted to the trial division for an assessment of damages having regard to the foregoing. The appellant should have such costs in this Court as are taxable in a *forma pauperis* appeal and his costs in the Appellate Division.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta which, by a judgment dated June 2, 1965, dismissed without reasons an appeal from the judgment of Milvain J. made on May 11, 1964. In the latter judgment, Milvain J. awarded damages in the amount of $25,000 to both respondents.

The action was one for libel alleged by the plaintiffs to have been uttered in a letter dated January 21, 1964, and in a document entitled "To whom it may concern" which accompanied the said letter.

The defendant, the present appellant, filed no statement of defence. The plaintiffs noted the pleadings closed and applied for a *praecipe* for entry for trial for the assessment of damages. The plaintiffs' solicitor served notice of such entry for trial personally upon the defendant. When the matter came up for trial, the defendant neither appeared nor was represented by counsel, and the Court proceeded under those circumstances to hear the action.

Counsel for the appellant took the position in this Court that according to the practice in the Supreme Court of Alberta, such a default of defence by a defendant did not amount to an admission of the allegations of fact made in

1967

McELROY v. COWPER-SMITH AND WOODMAN

Spence J.

the statement of claim. However, counsel for the respondents has cited *Sulef v. Parkin and Breno*[1], where the Appellate Division of the Supreme Court of Alberta, *per* Smith C.J.A., at p. 239, held that in the Province of Alberta upon default in defence the defendant is to be taken to have admitted the facts set out in the statement of claim. This is a decision of the highest Court in Alberta on a point of practice in the province, and this Court will not interfere under such circumstances. Therefore, the respondents, as plaintiffs at trial, were not required to prove publication of the alleged libel. This Court does not deem it necessary to determine whether publication was admitted in other correspondence of the defendant produced at trial.

Counsel for the appellant also objected to the admission of exs. 3, 4 and 7, and to the reception of the evidence of one Alexander Sandy Chibree. Counsel for the appellant took the position that no publication had been proved of exs. 3, 4 and 7.

Exhibit 3 was a letter addressed to the solicitors for the plaintiffs dated February 17, 1964. The statement of claim by which the action was commenced was issued on February 10, 1964. In evidence, the plaintiff David Cowper-Smith identified the signature of the defendant to such letter and also to the letter (ex. 4) which was addressed to the Honourable Premier E. C. Manning and dated February 28, 1964, and to ex. 7, another document, which was entitled "To whom it may concern as an Assembly of Christian Believers" and dated May 5, 1964. These documents were produced at trial, not to prove the libel or the publication thereof, as they were all committed after the issuance of the statement of claim, but to prove the state of mind of the defendant in uttering the libel on January 21, 1964, and his motive in doing so.

Gatley on Libel and Slander, in the fifth edition, at p. 556, says:

> *Other defamatory words.* The plaintiff may urge in aggravation of damages that the defendant has published other defamatory words about him not set out on the record, whether such words were or were not connected with the subject-matter of the action, whether they were prior or subsequent to such publication, or writ issued, and whether they are actionable or not.

[1] (1966), 57 W.W.R. 236.

The authority cited for such proposition is *Pearson v. Lemaitre*[1], in the Court of Common Pleas, where Tindal C.J. said at pp. 719-20:

> And this appears to us to be the correct rule, viz. that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose, establishes another cause of action, the jury should be cautioned against giving any damages in respect of it.

I see no reason in principle why the publication of these subsequent defamatory words need be proved. In fact, they would be admissible if they were merely spoken to the plaintiff after the writ had been issued and had not been heard by any other person. They are not admissible for the purpose of proving the libel but in aggravation of damages. I am of the opinion, therefore, that these three exhibits were admissible apart from whatever evidence of publication may be obtained from the record, upon which I need not express any opinion.

The witness Alexander Sandy Chibree gave evidence that in the late fall of 1964, *i.e.*, after the statement of claim had been issued, he had been invited to a meeting at which were present the defendant Hector McElroy, his brother Morton McElroy, and other persons. The witness gave it as his opinion that the meeting was called to gather evidence, if possible, that would have helped the McElroys, and particularly Hector McElroy the appellant, to regain certain farm property, such relief being claimed in an action against the plaintiffs and others. Chibree, in his evidence, said:

> I was rather astounded in that the meeting was opened up by a remark by Mr. Morton McElroy that they would make sure—they would take action against the men of Melba Ranches which would cause them no longer to be able to do business in this city or make it difficult for them to live within this City and beyond that, of course, there was various discussions that followed.

On the evidence of Chibree, this statement by Morton McElroy took place in the appellant Hector McElroy's presence, and there was no dissent from him at all. The witness continued:

> In fact, there was several statements followed that where the two—Hector and Morton, signified that they had always worked as a team and that they would continue to do so in the future.

[1] (1843), 5 Man. & G. 700.

1967

McELROY v. COWPER-SMITH AND WOODMAN

Spence J.

The statement made by Morton McElroy would certainly have been admitted in evidence had it been made by Hector McElroy. Again, this evidence goes to show his motive in uttering the libels which are the subject of the evidence. Although the statements were not made by the appellant but by his brother, they were made at a meeting called for the purpose of helping the appellant in his action for recovery of possession of the farm property.

Phipson on Evidence, in the eighth edition, at p. 240, gives the principle in these words:

> Statements made in the presence and hearing of a party, and documents in his possession, or to which he has access, are evidence against him of the truth of the matters stated, if by his answers, conduct, or silence he has acquiesced in their contents.

And at p. 241, the author states:

> So, a party's silence will render statements made in his presence (or hearing only) evidence against him of their truth, provided he is reasonably called on to reply thereto: *Wiedemann v. Walpole* [1891] 2 Q.B. 534 at 539, and *Richards v. Gellatly,* L.R. 7 C.P. 127 at 131.

Certainly the appellant Hector McElroy was called upon to dissent from such a statement made by his brother at a meeting called for the purpose of assisting the appellant in his action for possession. If he did not agree with the statement, his failure to dissent is, therefore, in my view, admissible with the statement to which he gave his assent by silence, again to explain the motive of the appellant in uttering the alleged libel.

Counsel for the appellant submitted that the learned trial judge permitted counsel for the respondents to give evidence although, of course, not sworn, and cites this statement by the said counsel:

> Mr. McGillivray: But, unfortunately...if you had an opportunity of seeing this gentleman in the witness box your Lordship might well see that he is not so insane at all. This is just planned and deliberate and calculated to try and drive these people out of this lawsuit, which is our statement which, of course, makes this a very, very vicious thing. (The word "statement" is probably a misprint for "submission".)

I am in agreement with counsel for the respondent that that statement was not the giving of evidence by counsel but was argument and was argument particularly in view of the testimony of Chibree which was supported by the evidence adduced.

One of the main contentions made by the appellant is that the learned trial judge in making his award of damages included in his award an allowance for punitive or exemplary damages and that such damages are not allowed in a libel action. Counsel cites *Rookes v. Barnard*[1], a decision of the House of Lords.

Before considering that decision, it is important to consider the actual words in which the learned trial judge expressed himself. Giving judgment at the close of the argument Milvain J., in the opening paragraph, said:

> I have no hesitation on the evidence before me in reaching the conclusion that the defamation in this instance is of the nature and proportions that justify a Court in awarding heavy damages in which there is involved an element of punitive damages.

Then he continued:

> In my view Courts should take a very serious view of defamation that affects the character of men in professional life and of men in walks of life where they occupy a position of trust as does a lawyer and as does the manager of an insurance company. There is nothing more valuable to members of the human race than their reputation and a vile and deliberate attack on reputation that is designed as is the case before me to reach other ends through ulterior purposes, that in my view makes the action all the worse.

In the first part of the second paragraph which I have quoted above, the learned trial judge was emphasizing the serious nature of the libel to the persons libelled and not dealing with the punitive element.

In *Paffard v. Cavotti*[2], the Appellate Division (as it was then known) of the Supreme Court of Ontario considered a case where the trial judge had estimated the actual damages which naturally flowed from the defendant's wrong doing, deliberate and flagrant trespass by cutting down trees and depositing sand and silt on the plaintiff's lands, at $3,500 and then, taking into account the defendant's whole course of conduct and persistence in the wrong doing, fixed the total damages under the circumstances at $4,500. Masten J. said at p. 176:

> Mr. Cartwright's argument in the present case is that the trial judge was entirely unwarranted in law in his finding that $1,000 should be added to the $3,500 on account of the arrogant and improper conduct of the defendant towards this plaintiff.
>
> In my opinion, every intendment is to be made in favour of this judgment. No valid objection could be made to the judgment if the Judge

[1] [1964] 1 All E.R. 367.
[2] (1928), 63 O.L.R. 171.

1967

McELROY v. COWPER-SMITH AND WOODMAN

Spence J.

had simply said in his reasons that, taking all the facts into consideration, he fixed the damages at $4,500. The circumstance that the trial Judge, in giving his reasons, thought aloud and expressed in words his method of arriving at the $4,500 cannot in my opinion prejudice the validity of the resulting judgment.

So in this case, certainly if the trial judge had confined himself to a recital of the seriousness of the damages to the persons libelled then, in my view, the use of the one word "punitive" would not have been sufficient reason to vary the quantum of the damages. The learned trial judge, however, continued with reference to "...a vile and deliberate attack on reputation that is designed as is the case before me to reach other ends through ulterior purposes . . ." and I am ready, therefore, to consider this a case in which the trial judge did award punitive damages.

If the law in effect in Alberta is that set forth in the judgment of Lord Devlin in *Rookes v. Barnard,* then he at p. 410 outlined the two cases where an award of punitive damages in a tort action would be justified. The first category is the oppressive, arbitrary or unconstitutional action by the servants of the government. That category is not applicable in the present case. Dealing with the second class, Lord Devlin continued:

> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. ...This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object,—perhaps some property which he covets,—which either he could not obtain at all or not obtain except at a price greater than he wants to put down.

In the present case, the evidence given by Chibree, as I have said, tends to show that the purpose of the appellant in uttering these libels, which are the basis of the action, was to affect the respondent's defence to the appellant's action for possession of the farm land. In short, it was a case "in which the defendant is seeking to gain at the expense of the plaintiff some object—some property..." and even if the award of punitive damages in tort actions is as limited as outlined by Lord Devlin then the present case would fall within the second class which he sets out.

Moreover, I am of the opinion that in Canada the jurisdiction to award punitive damages in tort actions is not so limited as Lord Devlin outlined in *Rookes v. Barnard.*

In *Knott v. Telegram Printing Co.*[1], this Court was considering an appeal in an action for libel. Anglin J., giving judgment for himself and the Chief Justice, said at p. 341:

> The damages are large and were, no doubt, awarded upon a punitive or exemplary rather than on a purely compensatory basis. It was, however, within the province of the jury so to deal with this case.

Davies J., although of the opinion that the damages were so excessive that a new trial was required, said at p. 336:

> I have not failed in reaching this conclusion to consider all the facts and circumstances in this case which would justify exemplary damages being given...

And Duff J., although he also would have directed a new trial, said at p. 339:

> It is emphatically a case for the exercise of the punitive jurisdiction with which the primary tribunal is endowed in cases of defamation.

In Ontario, in two cases in recent years, exemplary damages for trespass have been allowed without evidence that the trespasser intended any profit for himself but only on the basis that he was acting in a high-handed fashion with open disregard for the plaintiffs' rights: *Carr-Harris v. Schacter and Seaton*[2] and *Pretu et al. v. Donald Tidey Co. Ltd.*[3] In the latter case, an appeal from the decision of Brooke J. was dismissed without written reasons and an application for leave to appeal to this Court was also dismissed. It is worthy of note that the latter application was made after the decision of the House of Lords in *Rookes v. Barnard* had been reported.

I am, therefore, of the view that if the trial judge did include amounts for exemplary and punitive damages in the awards in favour of the two plaintiffs then he was entitled in law to do so.

The problem still remains whether the damages are so excessive that this Court should direct a new trial on the question of damages. The awards were in the sum of $25,000 in favour of each plaintiff which were the exact amounts claimed in the statement of claim. It is certainly not a valid ground for interfering with an award of damages in such an action that none of the members of this Court, had they been sitting at the trial, would have al-

[1] (1917), 55 S.C.R. 631, [1917] 3 W.W.R. 335.
[2] [1956] O.R. 994.
[3] (1966); 55 D.L.R. (2d) 504.

1967

McELROY v. COWPER-SMITH AND WOODMAN

Spence J.

lowed such a sum: *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*[1]; *Knott v. Telegram Printing Co., supra,* at p. 341.

If, however, this Court is of the opinion that the damages are so large that it must be considered that the trial judge applied a wrong principle of law, or that the verdict is a wholly erroneous estimate, the Court is justified in interfering.

I have dealt with the only question of principle which appeared in the reasons of the learned trial judge.

I turn now to whether the award was so inordinately large as to be a wholly erroneous estimate.

The plaintiff Cowper-Smith was a solicitor practising in Calgary in a small firm. He had no partner but retained one junior solicitor. The plaintiff Woodman was the manager, in Calgary, of the Excelsior Life Insurance Company. The libels alleged and, in my view, proved were:

> My charge, made by my lawyer...is to the effect that these men have committed an act (or acts) whereby they are legally charged with conspiracy to defraud.
>
> In an examination by a psychiatrist to determine why I would trust these men, I would ask my Elders if men of Gideons, namely Mr. Jespersen and Woodman, who used our pulpit and who claimed to love the same Lord and Saviour as I do, cannot be trusted...
>
> It was brought to my attention that at a recent meeting of the Gideons, Mr. Cowper-Smith was present, and one of the Gideons rebuked a member for allowing Mr. Cowper-Smith to attend, knowing this individual's Christian testimony left much to be desired...
>
> I have been informed by Mr. Claude Cameron, a member of the local Alliance Church, who was very disturbed by their lack of Christian ethics in their business dealings, through personal experience, that one of their speakers at their C.B.M.C. campaign in the fall of 1962, left the city prematurely because he discovered the reputation of one or two of these men. Rev. Smith, you have mentioned to me your feelings regarding the spiritual deficiency of C.B.M.C. here in Calgary.

As well in the document enclosed with that letter there was set out in some detail an alleged transaction between the plaintiff Cowper-Smith and the defendant in which it was said that he agreed to make certain charges for carrying out a transfer of property and then attempted to deduct more from the proceeds of the sale which he had improperly directed should be paid to himself. I am in agreement with the view expressed by the learned trial judge that these are very serious accusations to make

[1] (1934), 50 T.L.R. 581.

against men who are in the position of trust of solicitor and local manager of an insurance company. It is true that the evidence reveals that the appellant was, to put it quite conservatively, of a somewhat fanatical view in matters with reference to religion and it is true that the ordinary hard-headed businessman might be little affected by these statements coming from someone he knew to be of an unstable character. The letter, however, purported to be addressed to a Rev. Herman L. G. Smith, District Superintendent of the Church of the Nazarene, and copies were directed to the Rev. Harold Griffin of the North Hill Church of the Nazarene, the Rev. Charles Muxworthy, First Church of the Nazarene, and to all organizations mentioned in the letter. The latter organizations included the Pastor's Gospel Fellowship, the Gideons, C.B.M.C. (said to be Christian Business Men's Club), the Youth for Christ, and the Inter-Varsity Christian Fellowship. Those persons and those organizations were those who knew well both the appellant and the respondents. The respondent Cowper-Smith could expect people such as these as being those with whom he dealt either as clients or for clients. Those persons and the members of those organizations could well be amongst those whom the respondent Woodman would wish to solicit as policyholders in the company which he represented. There is nothing to indicate that the damages which they would suffer would be lessened by any recognition of the extreme religious beliefs of the appellant. The persons to whom he addressed the libels might well be persons with similar extreme religious beliefs.

In *Ley v. Hamilton*[1], Lord Atkin said at p. 386:

> It is precisely because the "real" damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation...

It is, of course, well nigh impossible to give any evidence of either special damages or evidence which will allow an exact calculation of general damages. The plaintiff Cowper-Smith was very moderate in dealing with this matter in his evidence. I quote a few questions of such evidence:

> Q. Now, first of all, Mr. Cowper-Smith, can you tell his lordship whether—of what effect that you are aware of as to the publication

[1] (1935), 153 L.T. 384.

1967

McELROY v. COWPER-SMITH AND WOODMAN

Spence J.

of the matters alleged in the statement of claim, what effect that has had on you if you have any knowledge?

A. Well, I only have one or two concrete examples of business lost because of it and that has come to me sort of as a chain event. Aside from that it received such wide publication amongst the people that I associated with that it was extremely embarrassing and when you met someone you didn't sort of feel like being friendly because you didn't know what they had heard.

Q. You did mention something about you have a couple of instances of business loss, would you give—

A. Well, these are—there is one in particular small but I got the details on it just recently, this McElroy—this, as I say, it is sort of a chain event, it is semi-hearsay—

Q. Well, if it was—

A. Yes, I know it has affected business but it is impossible to say how much.

It is interesting to note that the plaintiff Woodman actually belonged to the Alliance Church and the Gideons International, two of the organizations which received copies of the libel.

Under these circumstances, I have come to the conclusion that I cannot say that the award was so inordinately high that it represented an altogether erroneous estimate of the damages which the plaintiffs have suffered, even apart from the jurisdiction to award punitive damages which, as I have said, I believe the trial Court did possess.

As to the latter, there would seem to be sound reason for awarding punitive damages. Firstly, there is the evidence as to the purpose which the defendant had in uttering the libels, and secondly, exs. 3, 4 and 7, which demonstrated that after the action had been commenced the defendant continued to utter defamatory statements and if anything increased the venemous nature thereof.

I would dismiss the appeal with costs.

Appeal allowed with costs, SPENCE J. *dissenting.*

Solicitors for the defendant, appellant: Prothroe, Gibbs, McCruden and Hilland, Calgary.

Solicitors for the plaintiffs, respondents: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan and Fraser, Calgary.