Privy Council Appeal No. 44 *of* 1931.

"Truth" and "Sportsman," Limited, and another - - - *Appellants*

v.

George Stanley Thompson - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STATE OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH DECEMBER 1932.

Present at the Hearing:

LORD TOMLIN.

LORD THANKERTON.

LORD MACMILLAN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD THANKERTON.]

The appellants seek to have a new trial in an action for libel tried in the Supreme Court of New South Wales before Halse Rogers J. and a jury, in which a verdict was given in the respondent's favour for £3,000 damages on the 16th September, 1930. The Full Court of the Supreme Court of New South Wales, on the 6th November, 1930, declined to set aside the verdict, and the present appeal is taken against that judgment.

The libel was said to be contained in an article published by the appellants in the issue of their newspaper "Truth" of the 3rd March, 1929, which referred to an action heard on the 28th February and the 1st March, 1929, in which the respondent was plaintiff and one Verrender was defendant in the Small Debts Court in Sydney before Judge Camphin.

The issues submitted to the jury in the present action stated the damages claimed as £5,000 and the appellants' pleas in defence as (1) a general plea of not guilty, and (2) the statutory plea of publication in good faith for the information of the public of a fair and accurate report of the public proceedings of a Court of Justice. (Defamation Act, No. 32 of 1912, section 29). It may be noted that truth is by itself no defence to an action for libel according to the law of New South Wales.

The appellants seek to have the verdict set aside on the following grounds :—(1) as regards the issue of libel, that the Trial Judge misdirected the jury (*a*) by failing to leave the question of libel or no libel to the jury, (*b*) in the manner in which he left the question of a fair and accurate report to them, and (*c*) in declining to submit the question of fair comment to the jury concurrently with the statutory plea of fair and accurate report : and (2) as regards damages, that the misdirection as to fair comment involved also a misdirection as to damages, and that the damages awarded were excessive.

As regards libel or no libel, their Lordships agree with the view of the Full Court that the learned Trial Judge did leave the matter to the jury, though he expressed to them his own opinion, which he was clearly entitled to do.

As regards the learned Judge's directions on the question of fair and accurate report, counsel for the appellants criticised these in various respects, but, while their Lordships are not inclined to accept these criticisms as material, it is unnecessary to deal with them, for their Lordships are of opinion that no jury could reasonably find that the report was a fair and accurate one. The article consists mainly of a report of questions put to the respondent in cross-examination by the solicitor of the defendant Verrender and the respondent's answers thereto. The action was a simple one for recovery of monies which Verrender was said to have received while acting as the respondent's agent for recovery of professional accounts owing to him. The defendant's solicitor was allowed to cross-examine the respondent at great length with suggestions of blackmail and breach of professional confidence arising out of information given by the respondent to his agent to assist him in recovery of the debts. That line of examination appears to have been clearly irrelevant to the only question in issue, but, be that as it may, it is clear on the evidence in the present action that the article here complained of does not report the whole of the respondent's answers to the questions in cross-examination, but omits some of the explanations given by him. It may be that these explanations do not seem very satisfactory, but the respondent was entitled to have them included in any report, and a report which omits such explanations cannot be a fair and accurate report. Accordingly there is no sufficient ground for a new trial in this respect, even assuming that appellants had shown that there was any misdirection.

In the next place, as to the plea of fair comment the following passage may be taken from the summing up :—

> " Mr. Windeyer has asked me to say something about fair comment, but in my opinion there is no room in this case for the defence of fair comment. I know of no precedent for a combined plea that a report is a fair and accurate report in so far as it purports to be a report, and that in in so far as it is comment, it is fair comment. If such a plea had been put on, I think it would be demurrable. If such a plea is not demurrable, I think it would have to be proved in both its branches and it is apparent if you come to the conclusion it is not a fair and accurate report, then any such plea would fall to the ground. For that reason I tell you you need not worry about fair comment."

After the jury had retired, the learned Judge observed to Counsel :

> " There can be no question that Mr. Windeyer has raised the question of fair comment that I should leave to the jury some composite form of defence in regard to fair comment, also that he suggested that if necessary a plea which was not demurrable could be drawn. I have very grave doubts as to whether a plea which is not demurrable can be drawn. At any rate Mr. Windeyer has the benefit of that point."

In their Lordships' opinion the learned Judge misdirected the jury on the plea of fair comment. The general plea of absence of guilt includes a plea of fair comment and, if the article contains comment, which is separable from the report of the proceedings, their Lordships entertain no doubt that the part which contains the report may be defended under the statutory plea and the part which consists of comment may be defended under the general plea. The necessary elements for success in these two pleas are different, and the jury should be directed accordingly. It is for the jury to decide whether there is comment, which is capable of consideration, apart from the report. If the jury find that there is such separate comment, they will have to consider whether it is fair comment, subject to the direction of the Court that it is on a matter of public interest. Their Lordships may refer to the opinion of Fletcher Moulton L.J. in *Hunt* v. *Star Newspaper Co. Ltd.* (1908), 2 K.B. 309, at p. 319, where he said :

> " The law as to fair comment, so far as is material to the present case, stands as follows : In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment : see *Andrews* v. *Chapman* ((1853) 3 C. & K. 286). The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses. . . . In the next place, in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails."

It follows from the opinion that their Lordships have already expressed, with regard to the fairness and accuracy of the report in the article complained of, that the facts are not truly stated and the necessary foundation for any comment, if separable comment there be, is wanting, and therefore any misdirection by the Trial Judge does not involve any substantial wrong or miscarriage of justice, which would justify the setting aside of the verdict on this ground, either as regards the libel or the damages.

There remains the question of excessive damages. The full Court of New South Wales, with its knowledge of local standards, has declined to interfere with the verdict on this ground, and, while the damages awarded to a plaintiff, who admittedly has committed breaches of professional confidence, may appear to be somewhat large, their Lordships do not find themselves able to differ from the view of the Full Court. But this must not be taken as condonation in any degree of the respondent's conduct in respect of such breaches.

Accordingly, their Lordships will humbly advise His Majesty that the order of the Full Court of the 6th November 1930 should be affirmed and the appeal dismissed with costs.

In the Privy Council.

"TRUTH" AND "SPORTSMAN," LIMITED AND ANOTHER,

v.

GEORGE STANLEY THOMPSON.

DELIVERED BY LORD THANKERTON.

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