JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 48 of 1967

BEFORE: The Hon. President.
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins J.A.

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| B E T W E E N | NEVILLE THEOBALDS | PLAINTIFF-APPELLANT |
| A N D | MORRIS CARGILL | |
| A N D | THE GLEANER COMPANY LTD. | DEFENDANTS-RESPONDENTS |

D. Coore, Q.C., Ian Ramsay and D. Muirhead for the Appellant.

V. Blake, Q.C., and R.H. Williams for the Respondents.

July, 1971

GRAHAM-PERKINS, J.A.

In the Daily Gleaner of Wednesday the 5th of January, 1966 there appeared an article written by Morris Cragill (hereinafter called "the defendant") entitled "Candidly Yours". This article was in the following terms:

"Official sharp practice

This column has complained a number of times in the past about the manner in which the Government deals with claims against itself, and has given examples of the delays and the sharp practice which seems to have become part of the normal behaviour.

In spite of these complaints, and in spite of the fact that the Government's scandalous behaviour and delays is well within the legal profession and to those members of the public who have suffered from it, nothing has been done to improve matters. Let me give you a current example.

About the middle of September, 1964 an accident occurred which resulted in the owner of the damaged vehicle making a claim against a certain Ministry.

On September 26th, 1964, to be exact, the owners' solicitors wrote to the Ministry concerned making a claim for the damage.

Two months' silence.

Two months went by without even the courtesy of a reply. So, on the 27th November, 1964, the solicitors wrote again, stating that unless a reply was received by December 15th they would file a suit.

To this letter a reply was received. The Permanent Secretary of the Ministry apologised for the delay in replying to the solicitors' letter and said that the matter was being investigated.

On January 25th, 1965, the solicitors received a letter from the Crown Solicitor saying that the matter had been passed to him for attention and requesting that details of the claim be sent to him for consideration. So the solicitors replied immediately setting out details of their client's claim for £193.10.2.

On the 5th February the Crown Solicitor acknowledged receiving the letter and claim and said that he would communicate with the solicitors again with a view to an early settlement.

There was dead silence thereafter for seven weeks. On March 22nd, the solicitors wrote again. It should at this point be mentioned that in the meantime, at the end of January, the solicitors had filed in order to protect their client.

On April 20th, the Crown Solicitor wrote offering £98.10.2, plus costs in settlement. Six days later, the solicitor attended on the Assistant Crown Solicitor, Mr. Theobalds, and told him this offer was not acceptable. After a discussion Mr. Theobalds said that he would recommend settlement in the sum of £175. and that he would write again soon.

More discourtesy.

Again silence. On May 29th, the solicitor wrote again. No notice was taken of the letter. So, on July the 22nd the solicitor sent a telegram demanding a reply; and a telegram in reply came back saying 'Matter receiving attention letter follows.'

When that letter dated July 27th arrived, the tune had changed a bit. Mr. Theobalds was now only prepared to offer £150, plus costs in settlement.

Then silence once more fell upon the whole thing. So the solicitor wrote again on September 16th, a date one year after the damage had been done to the truck.

Again silence. Then, on November the 16th, two months later, the solicitor received a letter from the Crown Solicitor dated November 3rd. To his amazement, he was now told that the Attorney General would only approve a settlement of £80 inclusive of costs.

So the matter is now being taken to trial after more than a year of the most outrageous delays and dilly dallying.

The Attorney Ginnal

If any private businessman were to behave in that way, he would soon get such a bad reputation that nobody would deal with him.

> Yet this kind of thing goes on constantly in the case of claims against the Government. Of all institutions, the Government of a country ought to be beyond reproach. It is disgraceful that, on the contrary, the Government has built up a reputation for delays and artful dodging that brings the whole process into disrepute, and reflects no credit whatever upon the Ministries involved, or upon the officers of the Crown Solicitor and the Attorney General.
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> A bit more of this kind of thing, and we shall have to talk about the office of Attorney Ginnal, to say nothing of the office of the Half-Crown Solicitor."

Following on the publication of this article Mr. Theobalds (hereinafter called "the plaintiff") consulted Mr. John Forrest, solicitor, who, on the 25th January 1966, wrote the Manager of the Gleaner Co. Ltd. demanding, on behalf of the plaintiff, an apology and adequate compensation for libel. In this letter Mr. Forrest said, inter alia,

> "The personal references directed to him are a gross, and, under the circumstances, a malicious libel and one calculated to have far reaching consequences.
> The article suggests that Mr. Theobalds, a Solicitor of the Supreme Court of Judicature of Jamaica, was guilty of sharp practice in connection with the work that he did whilst he was attached to the Office of the Crown Solicitor, Kingston."

The company referred Mr. Forrest's letter to its solicitors and so advised him on the 29th January, 1966. It does not appear that either the company or the defendant did anything further in connection with the plaintiff's claim and, in the result, the plaintiff issued a writ on the 15th July, 1966.

In his statement of claim the plaintiff alleged, in paragraph 7, that:

> "By the said words the Defendant meant and was understood to mean:
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> (a) That the plaintiff had been guilty of sharp practice and unprofessional conduct.
> (b) That the plaintiff had been guilty of wilful and unreasonable delay in discharging the duties of his office.
> (c) That the plaintiff was not a fit and proper person to discharge his duties of Assistant Crown Solicitor.
> (d) That the plaintiff's conduct had brought the office of Crown Solicitor into disrepute and discredit. "

The defendant, in his defence, stated, inter alia,

> "3. The defendants deny that the said words bore or are capable of bearing any of the meanings set out in paragraph 7 of the Statement of Claim or any meaning defamatory of the plaintiff.
> 4. Insofar as the said words consist of statements of fact they are true in substance and in fact, and insofar as the said words consist of expressions of opinion they are fair comment made without malice on the said facts which are a matter of public interest. "

At all material times up to the 25th of May, 1965, the plaintiff was an Assistant Crown Solicitor in the Crown's Solicitor's Office. He is also a solicitor of the Supreme Court of Jamaica, and is now a Resident Magistrate. The essence of the plaintiff's case, as appears from the record of the trial of the action before Fox, J., (as he then was) sitting with a jury, was that whether or not the strictures directed at the offices of the Crown Solicitor and Attorney General were fair in relation to other persons, he was the only person mentioned by name and, as pointed out in his solicitor's letter above noted, the article had suggested that he had been guilty of sharp practice and inexcusable delay. This, the plaintiff contended, was an unwarranted and unfair attack upon his professional integrity since, among other things, he had played no part in the events occurring subsequent to the 25th May, 1965. That being so, Mr. Coore says, no comment or stricture arising out of such later events as recounted in the article could possibly be fair or true in relation to the plaintiff. Further, Mr. Coore says, unless the jury were able to find that the events prior to the 25th of May formed a sufficient factual basis for the comments - insofar as they are comments - made in the article, then there could be no question of fair comment in relation to the plaintiff. The trial judge's directions entirely failed to put this essential contention of the plaintiff adequately or at all. We accept as valid these submissions by Mr. Coore. We are, however, firmly of the view that there are, in this case, problems much more fundamental and which require to be resolved in order to arrive at a just and sensible conclusion in this appeal.

At the end of the trial judge's summing up he left three questions to the jury, namely:

(1) Are the words complained of (a) statements of fact; or (b) expressions of opinion, or (c) partly statements of fact and partly expressions of opinion?

(2) If they are expressions of opinion or partly statements of fact and partly expressions of opinion, do the expressions insofar as they refer to the plaintiff exceed the limits of fair comment, having regard to such of the facts alleged or the words complained of as are proved to be true?

(3) Assuming the plaintiff is entitled to a judgment, how much do you award for general damages?

We have not the least doubt that the first two questions were quite inadequate in the context of the issues that arose for decision. We would observe that no useful purpose can ever be served by leaving stereotyped questions to a jury unless such questions reflect the precise issues raised by the pleadings and the evidence. The really critical issue was whether the words complained of and, more particularly, the words "sharp practice", were allegations of fact or merely comment. Of the questions left to the jury none was calculated to provide an answer to this vital question. Put another way, if the trial judge deemed it desirable to leave it to the jury to determine whether the allegation of sharp practice was to be regarded as an assertion of fact or as a comment, then the questions he thought it proper to leave to them and the answers given by them certainly did not enable him to ascertain whether the jury had found that allegation to be a comment or an assertion of fact and, if the latter, whether the jury found it to be true.

Of unquestionably greater importance is the question whether Fox, J. should have ruled, as a matter of law, that the words complained of were not reasonably capable of being comment. We pose this question with particular reference to the words "sharp practice". Mr. Blake concedes, and, in our view, quite properly, that in a libel action in which the defence of fair comment is pleaded it is for the judge to determine as a matter of law whether the words of which complaint is made are reasonably capable of being regarded as comment. In London Artists, Ltd. v. Littler (1969) 2 A.E.R. 193, Edmund Davies, L.J., said at p.201,

> "While in my judgment he fell into error in applying it, that was the correct test, for, as Lord Porter said in Turner (otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures Ltd.(1950, 1 A.E.R. 449 at p.461):

> '... it is for the jury in a proper case to determine what is comment and what is fact, but a prerequisite to this right is that the words are capable of being a statement of a fact or facts. It is for the judge alone to decide whether they are so capable ...'
>
> It follows that the question whether the words complained of were reasonably capable of being regarded as mere comment is likewise essentially a matter for the judge, it being incumbent on the defendant to establish that they were so capable - see Jones v. Skelton (1963, 3 A.E.R. 952 at p.964). If the judge takes the view that they amount clearly to assertions of fact alone, no question of fair comment arises and that plea must accordingly not be left to the jury."

In our view the learned trial judge should have ruled that the words "sharp practice" were not capable of being regarded as comment. Paragraph 1 of the article alleged in clear terms that several complaints had been made in the past by the defendant. Those complaints were directed to a particular state or condition of things, i.e. the manner in which the Government dealt with claims against itself. The defendant proceeded to assert that he had given examples of the delays and sharp practice that characterized the manner in which the Government dealt with those claims. In paragraph 2 the defendant alleged that notwithstanding his many complaints (about the delays and sharp practice that characterized the manner of Government's dealings), and in spite of the fact that Government's scandalous behaviour and delays were well known, nothing had been done to improve matters. He then proceeded, in the twelve paragraphs following, to give a "current example" of these scandalous delays and behaviour, and this sharp practice. From a fair reading of paragraphs 1 and 2 it is quite impossible, in our view, to conclude that these paragraphs contain the vaguest suggestion of comment. We are compelled to the conclusion that the impugned words were, quite unmistakably, assertions of fact. A trial judge cannot, merely because he entertains some doubt as to the precise category (fact or comment) into which questioned words fall, abdicate his responsibility for ruling whether those words are reasonably capable of being regarded as comment, or whether they are not so capable. The reasons for this are too plain to require mention. Had the trial judge ruled, as in our firm view he ought to have done, that the words "sharp practice" were incapable of being regarded as comment, then clearly, there would have been no question of fair comment in issue. In the result the

only real issue would have been whether in the context of the article read as a whole, the allegation of "sharp practice" did or did not refer to the plaintiff.

It is not easy to understand the approach of the learned trial judge to this issue. It is possible that he felt that he could not decide as a matter of law - and this was essentially a matter for him in the first instance - whether the allegation of sharp practice was referable to the plaintiff or not. In that event he clearly ought to have asked the jury to say whether on their fair reading of the article as a whole that allegation did refer to the plaintiff. No such question was left. Had such a question been left to the jury, and had they answered in the affirmative, that would have been an end of the matter in favour of the plaintiff. The approach adopted by the trial judge, quite inappropriately we think, was to ask the jury a question - the second question - which ex facie assumed that the impugned expression did refer to the plaintiff. The answer found by the jury was that "the expressions of opinion, insofar as they referred to the plaintiff, did not exceed the limits of fair comment". While it is at least arguable that the jury had not, as a matter of pure fact, specifically said that the impugned expressions referred to the plaintiff, it is, nevertheless, perfectly legitimate to conclude that they must have so found. A contrary conclusion would render their answer quite meaningless. The record of the trial discloses (at p.35) that Mr. Blake conceded that the article on its face referred to the plaintiff. The record also discloses that Mr. Williams, in his opening, said: "We do not say that there is no criticism of the plaintiff in the article". It may very well be that in view of these concessions, and in view of the concession by the defendant that to accuse a solicitor of sharp practice would be to accuse him of discreditable conduct, and in view of the defendant's evidence (and this was the only evidence) as to the meaning he sought to attribute to the words "sharp practice", the trial judge concluded that the question whether these words should be taken to be referable to the plaintiff had ceased to be a live issue. The very nature of his second question would suggest this. We have not the least doubt, however, that, whatever the reason for the trial judge's failure to leave the particular question to the jury, had the question been left to them after appropriate directions the inevitable

answer would have been that the allegation of sharp practice in the context of the article as a whole did refer to the plaintiff. In his judgment in London Artists, Ltd. v. Littler (1968) 1 A.E.R. 1075, Cantley, J., said at p.1088:

> "The situation may be stated in summary form as follows: A expresses a defamatory opinion of B as an essential and major part of his comment on the conduct of C, and when sued by B says that he has a complete defence because what he said was fair comment on the conduct of C. The industry and experience of counsel engaged in this case, and my own endeavours, have failed to disclose a single reported case where a plea of fair comment of this type has ever been asserted. I cannot say that I am surprised, because if this is the law, it seems to me to be grossly unfair."

These observations were made in relation to the plea of fair comment but we think they apply with equal force in the context of the evidence on this aspect of the case. A defendant cannot, in our view, be heard to say "I took a good and deliberate aim at A. I did not intend to hit B". If B is hit the defamer cannot escape the consequences of his misguided shot. In the result we allow the appeal.

If, contrary to what we hold, it was thought desirable to leave the issue of fair comment to the jury, i.e. on the assumption that the words were reasonably capable of being regarded as comment, then it was the duty of the trial judge to rule, as a matter of law in the first instance, whether there was a sufficient substratum of fact to warrant the comment which a fair-minded man might, on that basis of fact, honestly hold. Mr. Blake conceded that even though the substratum of fact stated or indicated in the article might warrant the comment, if, at the end of the evidence, that substratum of fact is not established the judge cannot leave the defence of fair comment to the jury. It is fundamental to the plea of fair comment that the facts on which it rests must be proved to be true. In London Artists, Ltd. v. Littler (supra) Lord Denning, M.R., said at p.199:

> "I take it to be settled law that, in order for the defence of fair comment to be left to the jury, there must at least be a sufficient basis of fact to warrant the comment, in this sense, that a fair-minded man might on those facts honestly hold that opinion. There is no need for the defendant to hold that his opinion was correct or one with which the jury agree. He is entitled to the defence of fair comment unless

> it can be said: 'No fair-minded man could honestly hold that opinion.' See what Buckley, L.J., said in Peter Walker & Son, Ltd. v. Hodgson (1909) 1 K.B. 239 at p.253)".

Assuming that the allegation of sharp practice could reasonably be regarded as comment what was the relevant substratum of fact on which that comment was based? The factual situation established by the evidence was as follows: On the 5th February, 1965 the plaintiff wrote Messrs. Robinson, Phillips & Whitehorne (hereinafter called "the solicitors") acknowledging the receipt of their letter of the 25th January, 1965, and advising them that he was taking further instructions and would communicate with them "with a view to settlement at an early date". On the 22nd March, 1965 the solicitors wrote the Crown Solicitor saying: "We would be pleased to hear from you further in the matter at an early date." On the 14th April, 1965 the plaintiff wrote the solicitors in the terms following:

> "I acknowledge receipt of your letter of the 22nd ultimo. My instructions are that the pre-accident value of £300 which has been placed by you on this vehicle is exorbitant. I am prepared to settle on the valuation of £200 which would reduce your claim to £98.10.2 plus costs £10.10.0. Kindly let me know whether this figure is acceptable to your client."

On the 23rd April, 1965 the solicitors wrote the Crown Solicitor asking that the estimate of the pre-accident value be reconsidered in the light of certain factors. On the 26th of April, 1965 Mr. Phillips, a member of the firm of solicitors above mentioned, attended on the plaintiff. What occurred at this interview is not clear, but it is agreed that Mr. Phillips was then prepared to accept £175. in settlement. On the 25th of May, 1965 the plaintiff was involved in a traffic accident and, as a result, was incapacitated until the 1st of June, 1965 when he resumed as Acting Resident Magistrate in St. Thomas. He never returned to the Crown Solicitor's office. This, then, was the factual situation established. In our view it is manifestly unthinkable that any reasonable and fair-minded man could be heard to say that this factual situation could warrant a comment as to sharp practice. Indeed, the defendant said in evidence that it was intended to refer to the Attorney General only. He agreed that such an allegation in relation to the plaintiff would not have been fair or honest. Is it not therefore beyond debate that there was nothing in the facts proved to warrant

an imputation of sharp practice in relation to the plaintiff? It would follow logically that here again the only real issue was whether the impugned words were referable to the plaintiff in the context of the article as a whole. We have already expressed our conclusion on this issue. On this ground, too, we would allow the appeal. In view of the conclusion at which we arrived we found it unnecessary to deal with the many other interesting submissions advanced by Mr. Blake and Mr. Coore in connection with the other grounds of appeal.

In the result, the judgment of the court below is set aside. We enter judgment for the plaintiff with costs to be agreed or taxed and order a new trial on the issue of damages. The plaintiff will have his costs of this appeal.

We wish to place on record our appreciation of the great measure of industry, research and learning which both Messrs. Blake and Coore brought to the hearing of this appeal.