IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of Ontario)

B E T W E E N:

ALLAN SPARROW

Defendant/Applicant

-and-

TERENCE DOYLE

Plaintiff/Respondent

DEFENDANT/APPLICANT'S FACTUM

CLAYTON C. RUBY, ESQ.,
Ruby & Edwardh,
11 Prince Arthur Avenue,
Toronto, Ontario,
M5R 1B2,

Of Counsel for the Defendant/
Applicant.

LEONARD M. SHORE, ESQ.,
1512-1 Nicholas Street,
Ottawa, Ontario,
K1N 7B7,

Ottawa Agent for the Defendant,
Applicant.

IAN G. SCOTT, ESQ., Q.C.
Cameron, Brewin & Scott,
181 University Avenue,
Suite 402,
Toronto, Ontario,
M5H 3M7,

Of Counsel for the Plaintiff/
Respondent.

I N D E X

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of Ontario)

B E T W E E N:

ALLAN SPARROW

Defendant/Applicant

-and-

TERENCE DOYLE

Plaintiff/Respondent

NOTICE OF MOTION FOR LEAVE TO APPEAL

TAKE NOTICE that the Applicant will apply to this Court at the hour of 10:30 o'clock on Monday the 3rd day of March, 1980 pursuant to s.41 of Supreme Court Act, R.S.C. 1970 c.5-19 as amended by R.S.C. 1970 (1st Supp.), c.44 1974-75-76, c.18 for an Order granting the Applicant leave to appeal from the judgment of the Ontario Court of Appeal dated the 17th day of December, 1979 dismissing the Applicant's appeal against the Judgment of Mr. Justice Eberle dated the 12th day of September, 1978 awarding the Plaintiff in the libel action damages in the amount of two dollars plus costs or such further or other Order that the said Court may deem appropriate.

AND FURTHER TAKE NOTICE that in support of such application will be read the Transcript of the Trial Proceedings, the Statement of Claim dated June 21, 1976, the Statement of Defence, the Jury Questions (and Answers indicated), the Judgment of Eberle, J. dated September 12, 1978, the Reasons for Judgment of Eberle, J.

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dated September 12, 1978, the Order of Eberle, J. granting leave to appeal re costs dated October 6, 1978, the following Exhibits at trial: Exhibit 1,5,6,7,8,10 and 12, the Reasons for Judgment of the Ontario Court of Appeal dated December 7, 1979, the Applicant's Memorandum of Argument and such further and other material as counsel may advise and may be permitted;

AND FURTHER TAKE NOTICE that the said application shall be made upon the following grounds :-

(a) Costs;

(b) The law of arrest;

(c) Fair comment;

(d) Qualified privilege; and

(e) Non-cross-examination on credibility.

DATED at the City of Toronto this 24th day of February, 1980.

CLAYTON C. RUBY, ESQ.,
Ruby & Edwardh,
11 Prince Arthur Avenue,
Toronto, Ontario,
M5R 1B2,

Of Counsel for the Defendant/
Applicant.

TO: The Registrar of this Court

AND TO: Ian G. Scott, Esq., Q.C.
Cameron, Brewin & Scott,
181 University Avenue,
Toronto, Ontario,

Of Counsel for the Plaintiff/Respondent.

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IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of Ontario)

B E T W E E N:

ALLAN SPARROW

Defendant/
Applicant

-and-

TERENCE DOYLE

Plaintiff/
Respondent

NOTICE OF MOTION FOR LEAVE TO APPEAL

CLAYTON C. RUBY, ESQ.
Ruby & Edwardh,
11 Prince Arthur Avenue,
Toronto, Ontario,
M5R 1B2,

Of Counsel for the Defendant/
Applicant.

3680/76

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IN THE SUPREME COURT OF ONTARIO

B E T W E E N :

JOHN BECKINGHAM and TERRY DOYLE

Plaintiffs

- and -

ALLAN SPARROW

Defendant

STATEMENT OF CLAIM

(Writ issued the 1st day of June, 1976)

1. The Plaintiffs are Police Constables and at all material times carried on their duties under The Police Act and otherwise in the employ of the Board of Commissioners of Police of the Municipality of Metropolitan Toronto. The Plaintiffs reside in the Municipality of Metropolitan Toronto.

2. The Defendant is an Alderman of the Council of the Municipal Corporation of the City of Toronto and resides in the City of Toronto.

3. During the week of November 10, 1975, the Defendant falsely and maliciously spoke and published of and concerning the Plaintiffs to Michael Hanlon, a newspaper reporter, and to other reporters and staff members of the Toronto Star, (whose names are presently unknown to the Plaintiffs) that the conduct of the Plaintiffs on November 12, 1975 was:

"a real abuse of police powers"

4. During the week of November 10, 1975, the Defendant Sparrow falsely and maliciously wrote and published to Marilyn Anderson a reporter from the Toronto Star and other reporters and employees of the Toronto Star, (whose names are presently unknown to the Plaintiffs) a letter written by him to the Board of Commissioners of Police of Metropolitan Toronto. In that letter the Defendant referred to conduct of the Plaintiffs on November 12, 1975 and said:

> "I bring this matter of my false arrest, search and detention to your attention not so much to seek personal redress, but to highlight it as a too typical example of illegal police procedures . . .
>
> I don't believe your board should tolerate such contempt for the law on the part of police officers."

5. As a result of the facts hereinbefore set out, on or about Monday, November 17, 1975, the Toronto Star, a daily newspaper with wide circulation in southern Ontario, published two articles in the following words:

(i) Toronto Alderman Allan Sparrow has accused Metro Police of abusing their power after he was stopped and searched on Yonge St. at 1:30 one morning last week.

He says he was told, "You are under arrest," was ordered into a squad car and detained for about 15 minutes by two policemen searching for a suspect who broke into a car on an Isabella St. parking lot.

"They can't arrest you just because you're walking down the street in the vicinity of something that's happened," Sparrow says. "That's a real abuse of police powers."

Deputy Chief Jack Ackroyd says he order a written report from the two constables, John Beckingham and Terry Doyle, but indicates he can see nothing wrong with their actions.

Sparrow says he has no objections being questioned since police told him that the suspect they wanted

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was wearing blue jeans and a brown coat - the same as he was wearing. But he says being detained and frisked was unwarranted because they had no evidence linking him with the crime.

"If I hadn't been the alderman I would have been in a cell all night," Sparrow says.

(ii) DETAINED ALDERMAN ASKS FOR CHANCE TO QUESTION POLICE

Toronto Alderman Allan Sparrow has sent a letter to the Metro Police Commission asking permission to appear at the next board meeting to "question . . . procedures followed by your police department" in his arrest last Thursday.

Sparrow said he was walking on the east side of Yonge St. near Isabella St. at about 1:30 a.m. when a police cruiser stopped by the sidewalk and an officer inside beckoned him.

He said when he approached and bent down to talk with the officer inside the cruiser, he was asked what he was doing. "I responded that I was doing nothing . . . that I was out for a walk."

He said he told the police officer he had come from his house on Monteith St.

Sparrow said the officer then "pointed at my jacket and curtly ordered me to open it up. I said, "No, Why?"

Both officers got out of the car and one told Sparrow he was under arrest, Sparrow said.

"I gave him my City Council identification card. He then asked for further identification and I gave him my driver's license," he said.

Sparrow said he then was driven about three blocks to the Toronto Parking Authority lot east of Yonge St. between Isabella and Charles St.

"We sat there while one officer put in a call for a further description of a suspect in a break-in of a car on that lot," he said. "The dispatcher responded that it was a man in jeans and a brown jacket.

Sparrow said the officer in the front seat asked him whether he was the ward alderman, and he said he was.

"The officer offered to explain why I had been arrested, alluding to the dispatcher's description (of the suspect being sought). I said I had heard it."

Sparrow said he declined an offer to be driven back to where the police had picked him up.

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Tom Cooke, Metro police superintendent in 52 division, the area involved, said he can't see "anything improper in the actions of the police officers from reports that we have received on this case so far."

"I bring this matter of my own false arrest, search and detention to your attention not so much to seek personal redress but to highlight it as a too typical example of illegal police procedures. Sparrow wrote the police board.

"I am aware that it is a common police practice to stop, frisk and detain citizens . . . especially in the downtown area, especially young citizens, especially poorly-dressed citizens, and especially citizens who exhibit characteristics of an alternative lifestyle." he said.

He said, "I don't believe your board should tolerate such contempt for the law on the part of police officers. I believe your board should issue a clear directive to all officers respecting arrest procedures and the rights of citizens."

6. On or about January 1st, 1976, the Defendant falsely and maliciously wrote and published to the Toronto Star of and concerning the Plaintiffs the following words:

> "I am furious at your irresponsible editorial of December 16, regarding my illegal arrest by the Toronto Police Department . . . "
>
> "The Star accepted the police version that I had refused to identify myself even after I had accused the police of lying on this matter before the police commission. I would like to see The Star's evidence which clearly established that I was lying in this matter."

7. The words hereinbefore referred to concerning the Plaintiffs were spoken and written of them in the way of their profession or calling as Police Constables and were calculated to disparage the Plaintiffs in their said professions or callings.

8. The words hereinbefore referred to in their natural and ordinary meaning meant and were understood to mean:

(a) that the Plaintiffs had been guilty of dishonest and dishonourable conduct;

(b) that they had committed criminal offences;

(c) that they were guilty of illegal or highly improper acts;

(d) that they acted beyond their powers;

(e) that they were tyrannical, high-handed and abusive;

(f) that they were unfit to act as police officers or to be employed by the Board of Commissioners of Police of the Municipality of Metropolitan Toronto.

9. By reason thereof the Plaintiffs have been greatly injured in their credit, character and reputation and have been brought into public scandal, ridicule and contempt.

10. The Plaintiffs therefore claim:

(i) Damages for defamation in the amount of $150,000.00;

(ii) Their costs of this action;

(iii) Such further and other relief as to this Honourable Court may seem just.

The Plaintiffs propose that this action be tried in the Municipality of Metropolitan Toronto.

DELIVERED at Toronto this 21st day of June, 1976, by CAMERON, BREWIN & SCOTT, 181 University Avenue, Toronto, Ontario. Solicitors for the Plaintiffs.

No. 3680/76

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IN THE SUPREME COURT OF ONTARIO

B E T W E E N :

JOHN BECKINGHAM AND TERRY DOYLE

Plaintiffs

and

ALLAN SPARROW

Defendant

STATEMENT OF DEFENCE

1. The Defendant is an Alderman of the Council of the Municipal Corporation of the City of Toronto and was acting at all material times in that capacity.

2. The Defendant pleads and the fact is that at 1:30 a.m. on Thursday, November 13,1975, the Plaintiffs acting together illegally, improperly, negligently, contrary to the rules, regulations and directions of the Metropolitan Toronto Police Commission and good police practice and without just or reasonable cause did in fact arrest the Defendant, detain, harass and humiliate him, while he was peaceably walking on the east side of Yonge Street immediately south of Gloucester Street in the City of Toronto. The Plaintiffs did not advise the Defendant of any reason for his arrest at the time of the arrest. The Plaintiffs had no reasonable or probable grounds for suspecting the Defendant had committed or was about to commit any criminal offence or any other offence.

3. The Defendant Alderman Sparrow pleads that the actions of the Plaintiffs on Thursday, November 13, 1975, were improper police conduct, abusive of civil liberties, abusive of police powers, an illegal arrest, and constituted an unwarranted and unjustified interference with the Defendant's rights of free passage on the Queen's Highway.

4. On the occasion in question a Metropolitan Toronto Police cruiser driven by one of the Plaintiffs and staffed by both Plaintiffs stopped on Yonge Street south of Gloucester Street next to the sidewalk where the Defendant Alderman Sparrow was walking and one of the Plaintiffs beckoned the Defendant to come to the police cruiser. In response to this request the Defendant went to the police cruiser and bent down to talk to one of the Plaintiffs sitting in the cruiser. The said Plaintiff demanded of the Defendant what he was doing and the Defendant replied that he was not doing anything. The said Plaintiff repeated the question and the Defendant replied that he was out for a walk. The said Plaintiff demanded of the Defendant where he had come from and was told that the Defendant had come from his home on Montieth Street. The said Plaintiff pointed at the Defendant's jacket and ordered the Defendant to open it up. The Defendant replied, "No. Why?" The said Plaintiff then said "You are under arrest" and climbed out of the police cruiser and unnecessarily, improperly, and illegally placed the Defendant under arrest.

5. The Defendant Alderman Sparrow demanded of the said Plaintiff who he was and the said Plaintiff gave a name and number. The other Plaintiff climbed out of the other side of the police

cruiser and came towards the Defendant. The Plaintiffs told the Defendant to put his hands on the roof of the police car and to spread his legs with a view to humiliating and harrassing the Defendant. The Defendant obeyed the Plaintiffs who then ordered the Defendant to empty his pockets which the Defendant did turning over the Defendant's wallet and key case. The Plaintiffs then ordered the Defendant to put his hands on the roof of the car again and to spread his legs again which the Defendant did. The Plaintiffs then physically conducted a thorough search of the Defendant's body. The Plaintiffs then ordered the Defendant into the back seat of the police cruiser and returned to the Defendant his wallet and key case.

6. One of the Plaintiffs joined the Defendant Allan Sparrow in the back seat of the police cruiser and demanded identification of the Defendant. The Defendant produced his identification card, identifying him as an Alderman Member of the City Council of Toronto. The said Plaintiff then demanded further identification and the Defendant produced his automobile driver's license.

7. The Plaintiffs then drove the Defendant to a parking lot east of Yonge Street between Isabella and Charles Streets in the City of Toronto.

8. The Plaintiffs communicated by radio telephone from their car with a police dispatcher and after the conversation one of the Plaintiffs who was driving the car inquired of the Defendant if he

was the Ward Alderman. The Defendant advised that he was. The Plaintiff driving the car offerred to explain to the Defendant why he had been arrested and referred to a dispatcher's description, and released the Defendant. The Defendant's appearance and dress did not resemble the dispatcher's description of the wanted person.

9. On November 17, 1975, the Defendant Alderman Sparrow wrote in his capacity as an Alderman a letter to the Metropolitan Board of Commissioners of Police. This letter was entitled "Re Arrest Procedures". It dealt with general police behaviour as observed and reported to the Defendant Alderman Sparrow as well as the particular incident on November 13, 1975. It said in part:

> "I bring this matter of my own false arrest, search and detention to your attention not so much to seek personal redress, but to highlight it as a too typical example of illegal police procedures.
>
> Frankly my recent experience with your Board does not lead me to believe that you will do anything about this matter except to ask for a report which will materialize in one or two months as a curt two-liner saying that your investigation uncovered no wrongdoing on the part of the two officers.
>
> I urge you not to concentrate on the two officers, but to take affirmative action based on this incident to direct officers in the field to respect the rights of citizens."

10. The Defendant Alderman Sparrow pleads and the fact is that upon presentation of the letter of November 17, 1975, to the Metropolitan Board of Commissioners of Police that he presented further evidence of other similar situations illustrating police abuse of civil liberties. The Defendant Alderman Sparrow pleads and the fact is that his objective in making these representations was always to improve the general level of respect for civil liberties by the police in Metropolitan Toronto and no malice to either Plaintiff was present, intended, implied or understood.

11. The Defendant Alderman Sparrow pleads and the fact is that the Metropolitan Board of Commissioners of Police including the Chief of Police Harold Adamson never addressed its mind to the fact in dispute between the Plaintiffs and the Defendant regarding the incident November 13, 1975, and consequently never determined whether the incident constituted an "illegal arrest".

12. The Defendant Alderman Sparrow admits that he used the words a "real abuse of police powers" when describing the incident of November 13, 1975, to a Toronto Star Reporter, Bruce Kirkland, in an interview prior to the submissions made by the Defendant Alderman Sparrow to the Metropolitan Board of Commissioners of Police.

13. The Defendant Alderman Sparrow admits that on or about January 1, 1976, The Toronto Star published a letter written by the Defendant which did in fact contain the words as set out in paragraph 6 of the Statement of Claim.

14. The Defendant Alderman Sparrow denies that any of the words complained of and pleaded refer to, or were understood to refer particularly to the Plaintiffs' actions on November 13, 1975, but rather, to police behaviour, in general.

15. The Defendant Alderman Sparrow pleads that all the words used in his correspondence with the Metropolitan Board of Commissioners of Police, and in his letter to The Toronto Star published January 1, 1976, and any oral comments pleaded and proved by the Plaintiffs were made in absolute good faith by the Defendant Alderman Sparrow for the purpose of improving the civic administration and police procedures in the Municipality of Metropolitan Toronto for the general benefit of all citizens. No malice was contained in any words written or spoken by the Defendant as pleaded and proved by the Plaintiffs. None of the words pleaded and proved by the Plaintiffs were directed at the Plaintiffs personally and none could reasonably be so understood. All the words pleaded and proved by the Plaintiffs meant and were understood to mean that the Defendant Alderman Sparrow wished to urge a general improvement on the part of police officers with the Metropolitan Toronto Police in their respect for civil liberties.

16. The Defendant Alderman Sparrow pleads and the fact is that the words written in the letters of November 17, 1975, and January 1, 1976, and all oral comments pleaded and proved by the Plaintiffs were fair comment because all allegations of fact were true and the remainder of all the statements were the honest and sincere opinion of the Defendant regarding these facts. The Defendant was offering

as his fair, sincere and considered opinion that the incident in which he was involved was typical of general abuse of police powers in the City of Toronto, a subject of general public interest. The Defendant Alderman Sparrow intends to present at trial in support of this proposition the reports of the Commission headed by Arthur Maloney Q.C. and that headed by Mr. Justice Morand on the Metropolitan Toronto Police. Furthermore the Defendant Alderman Sparrow pleads and relies upon S.24 of The Libel and Slander Act, 1970 R.S.O., C.243.

17. The Defendant Alderman Sparrow pleads and the fact is that all of the statements contained in the letters of November 17, 1975, and January 1, 1976, and all oral comments pleaded and proved by the Plaintiffs are absolutely privileged and as such no action for defamation lies as a result. The said statements were made to, or arose from submissions to, the Metropolitan Board of Commissioners of Police, a statutory tribunal exercising quasi-judicial powers in a like manner as a court of law for the purpose of hearing and settling as required complaints by the public against the Metropolitan Toronto Police Force.

18. The Defendant Alderman Sparrow pleads and relies upon the provisions of The Public Authorities Protection Act, 1970 R.S.O., C.374, S.11, and pleads that the Defendant Alderman Sparrow was at all times acting in pursuance of a public duty.

19. The Defendant Alderman Sparrow says that the statements pleaded and proved by the Plaintiffs were made in furtherance of the

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Defendant's legitimate, moral, social and public duty as an Alderman and also as a citizen; that they were made without malice, were made for the sole purpose of improving civic and police administration and respect for civil liberties; that they were made to, or arose from, submissions made to the Metropolitan Toronto Board of Commissioners of Police the appropriate and responsible statutory body to receive such complaints; and that such statements are non-defamatory by virtue of qualified privilege.

20. The Defendant Alderman Sparrow pleads that the Plaintiffs suffered no damage arising from the written and oral statements alleged. The Metropolitan Board of Commissioners of Police exonerated the Plaintiffs completely in its report on the incident. The Chief of Police, Harold Adamson, congratulated the Plaintiffs on being cleared. The professional reputation of the Plaintiffs was in fact enhanced by the incident. In particular the Defendant Alderman Sparrow relies on the fact that no special damages are pleaded arising from the oral comments attributed to the Defendant.

21. The Defendant Alderman Sparrow pleads and the fact is that the Plaintiffs have commenced this action for the purpose of silencing the Defendant Alderman Sparrow in any further comments or criticisms of the behaviour of any of the police officers in the Municipality of Metropolitan Toronto. In this objective they have been instigated encouraged and assisted by the Chief of Police for the Municipality of Metropolitan Toronto, Harold Adamson, the Metropolitan Toronto Police Association and its President Sydney Brown, other directors and officers Lloyd Gibbs, Allan Evelyn, and Daniel Cutrale, and others whose identity are presently unknown to the Defendant.

22. The Defendant Alderman Sparrow pleads and the fact is that the Plaintiffs have no interest whatsoever in the financial damages claimed or any damages but rather are acting in consort with Chief Adamson and Sydney Brown and other directors of the Metropolitan Toronto Police Association including Lloyd Gibbs, Allan Evelyn and Daniel Cutrale for the purpose of silencing criticism of police abuse of their powers.

23. The Defendant Alderman Sparrow pleads that he is not responsible in law for the re-publication of the words pleaded and proved.

24. The Defendant Alderman Sparrow pleads that the institution and prosecution of this action is vexatious and an abuse of process and that the Plaintiffs if genuinely seeking damages for defamation would have joined the Toronto Star newspaper as a party.

25. The Defendant Alderman Sparrow therefore asks that the Plaintiffs' claim be dismissed with costs on a solicitor and his own client basis.

A N D B E T W E E N :

ALLAN SPARROW

Plaintiff by
Counter-claim

- and -

JOHN BECKINGHAM, TERRY DOYLE, HAROLD ADAMSON, SYDNEY BROWN, LLOYD GIBBS, ALLAN EVELYN, and DANIEL CUTRALE

Defendants by
Counter-claim

Ex #1

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(D)

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ALLAN SPARROW
ALDERMAN, WARD 6 Alderman's office, City Hall, Toronto, Ontario, Telephone 367 7014

November 17, 1975.

TO: THE BOARD OF COMMISSIONERS OF POLICE

Re: Arrest Procedures

I wish to appear as a deputant at the next meeting of your Board to question the arrest procedures followed by your Police Department. (Please note that I will be out of the country from December 13 to December 31, 1975.)

I am aware that it is common police practice to stop, frisk and detain citizens ...especially in the downtown area, especially young citizens, especially poorly dressed citizens, and especially citizens who exhibit characteristics of an alternative life style. Quite often, I have observed that the stopping, frisking and detaining of citizens appears to be based solely on the appearance of the citizens. In those cases, it appears that the police rely on the acquiescence of the persons they detain and, in particular, the police rely on citizens not demanding that their rights as citizens are upheld.

It appears that this practice is so widespread that when citizens do demand that their rights be upheld, their demand are ignored. I don't believe your Board should tolerate such contempt for the law on the part of police officers. I believe your Board should issue a clear directive to all officers respecting arrest procedures and the rights of citizens.

To amplify on this request, I would like to bring to your attention an incident in which I was involved and which reflects the kinds of procedures presently practised by your Department.

On Thursday, November 13, 1975, at approximately 1:30 a.m., I was walking on the east side of Yonge Street in the vicinity of Isabella Street when a police cruiser stopped by the sidewalk and an officer inside beckoned me over.

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中文翻譯服務

Para interpretações em Português, não hesite contactar o meu escritorio.
Interpretazioni in Italiano sono disponibili attraverso il mio ufficio.

CITY OF TORONTO

I approached the side of the car and bent down to talk with the officer. He asked me what I was doing and I responded that I was doing nothing. He asked the question again and I said that I was out for a walk. He asked where I had come from and I told him that I had come from my house on Monteith Street.

He then pointed at my jacket and curtly ordered me to open it up. I said, "No. Why?" He then climbed out of the car and said, "You're under arrest". I asked him who he was and he rhymed off a name and number. The other officer climbed out of the other side of the car at the same time. They told me to put my hands on the roof of the car and to spread my legs. I did so without comment. They then ordered me to empty my pockets which I did, turning over my wallet and key case. They then ordered me to put my hands back on the roof of the car and to spread my legs, which I did. They then conducted a thorough search of my body. When that was completed they ordered me into the back seat of the car. One officer climbed in with me and handed back my wallet and key case.

He then demanded that I produce identification. I gave him my City Council identification card. He then asked for further identification and I gave him my driver's license.

I was then driven two or three blocks to the Parking Authority lot just east of Yonge Street between Isabella and Charles Streets. We sat there while one officer put in a call for a further description of a suspect in a break-in of a car on that lot. The despatcher responded that it was a man in jeans and a brown jacket. The officer asked for the names of any witnesses and received a response that it had been a "citizen" who had called in.

After the conversation with the despatcher, the officer in the front asked me if I was the Ward Alderman. I said that I was. The officer offered to explain why I had been arrested, alluding to the despatcher's description. I said I had heard it. The officer offered to drive me back to where they had picked me up but I declined the invitation.

One officer wrote out both their names and numbers and gave them to me. The officers were P.C. Doyle, No. 2814, and P.C. Beckingham, No. 3782.

I bring this matter of my own false arrest, search and detention to your attention not so much to seek personal redress, but to highlight it as a too typical example of illegal police procedures.

Frankly, my recent experience with your Board does not lead me to believe that you will do anything about this matter except to

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ask for a report which will materialize in one or two months as a curt two liner saying that your investigation uncovered no wrong doing on the part of the two officers.

I urge you not to concentrate on the two officers, but to take affirmative action, based on this incident, to direct officers in the field to respect the rights of citizens.

Sincerely,

Allan Sparrow

Allan Sparrow
Alderman - Ward 6

AS/la

Detained alderman asks for chance to question police

The Star Wed. Nov 19, 75

By MARILYN ANDERSON
Star staff writer

Toronto Alderman Allan Sparrow has sent a letter to the Metro Police Commission asking permission to appear at the next board meeting to "question . . . procedures followed by your police department" in his arrest last Thursday.

Sparrow said he was walking on the east side of Yonge St. near Isabella St. at about 1.30 a.m. when a police cruiser stopped by the sidewalk and an officer inside beckoned him.

He said when he approached and bent down to talk with the officer inside the cruiser, he was asked what he was doing. "I responded that I was doing nothing . . . that I was out for a walk."

He said he told the police officer he had come from his house on Monteith St.

Sparrow said the officer then "pointed at my jacket and curtly ordered me to open it up. I said, 'No, Why?' "

Both officers got out of the car and one told Sparrow he was under arrest, Sparrow said.

"I gave him my City Council identification card. He then asked for further identification and I gave him my driver's license," he said.

Sparrow said he then was driven about three blocks to the Toronto Parking Authority lot east of Yonge St. between Isabella and Charles St.

"We sat there while one officer put in a call for a further description of a suspect in a break-in of a car on that lot," he said. "The dispatcher responded that it was a man in jeans and a brown jacket.

Sparrow said the officer in the front seat asked him whether he was the ward alderman, and he said he was.

"The officer offered to explain why I had been arrested, alluding to the dispatcher's description (of the suspect being sought). I said I had heard it."

Sparrow said he declined an offer to be driven back to where the police had picked him up.

Tom Cooke, Metro police superintendent in 52 division, the area involved, said he can't see "anything improper in the actions of the police officers from reports that we have received on this case so far."

"I bring this matter of my own false arrest, search and detention to your attention not so much to seek personal redress, but to highlight it as a too typical example of illegal police procedures," Sparrow wrote the police board.

"I am aware that it is common police practice to stop, frisk and detain citizens . . . especially in the downtown area, especially young citizens, especially poorly-dressed citizens, and especially citizens who exhibit characteristics of an alternative lifestyle," he said.

He said "I don't believe your board should tolerate such contempt for the law on the part of police officers. I believe your board should issue a clear directive to all officers respecting arrest procedures and the rights of citizens."

Ex #6

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ALLAN SPARROW
ALDERMAN, WARD 6 Alderman's office, City Hall, Toronto, Ontario, Telephone 367-7914

December 29, 1975.

Mr. Martin Goodman,
Editor-in-Chief,
The Toronto Star,
1 Yonge Street,
Toronto, Ontario.
M5E 1E6

Dear Mr. Goodman:

I am furious at your irresponsible editorial of December 16, 1975, regarding my illegal arrest by the Toronto Police Department.

There were two sides to the story...mine and the police version. The Star automatically accepted the police story and rejected mine, even though I was the person who had lodged the complaint and made it public. In effect, your editorial said that I was lying when I complained that I had been arrested for simply asking the police what was going on when they stopped me on the sidewalk.

The Star accepted the police version that I had refused to identify myself even after I had accused the police of lying on this matter before the Police Commission. I would like to see the Star's evidence which clearly establishes that I was lying in this matter. If you don't have it, I demand a retraction and an apology on your editorial page.

The second thing about your editorial which infuriates me is that the Star ignored the other information which I presented to the Police Commission, including a well-documented case of what appears to have been no less than police abduction. I also relayed some of the information which had come to me as a result of some two dozen phone calls from citizens outlining cases which were much more substantial than my own. I told the Police

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Commission, with one of your reporters present, that two of the callers had expressed concern about the police alienating young people in their respective areas by using harrassing techniques.

Prior to my appearance before the Police Commission, I provided one of your reporters with details, including names and addresses, of the most flagrant case which had come to my attention. I also provided him with the name and phone number of an ex-police officer who had called me to say that he had quit the force because of pressure by his superiors to violate citizen rights. He quoted one police sergeant as saying, "The biggest weapon we have is the public's ignorance of the law. So, use it!"

The Star had all this information prior to publishing your vicious, one-sided editorial. Naturally, I am upset by the invective of your editorial which said I "should quit chirping", that I "refused to answer their questions or cooperate" (your evidence please) and that my behaviour "encourages disrespect for the police and the law itself". The editorial borders on being slanderous.

The Star has done a disservice to the citizens of Toronto by blindly and dumbly reinforcing the sanctity of the Police Commission and suggesting that citizens who do make legitimate complaints encourage disrespect for the law. One of the serious problems with the Police Commission is that it is extraordinarily defensive and does nothing to encourage citizens to come to it with problems and concerns. Only two of the 24 people who called me were willing to allow their name to be used for fear of reprisals...surely a frightening situation in a democratic society.

It is important that citizens feel free to appear before public bodies without fearing reprisals, without fearing bad publicity, and without fearing one-sided invective from the media.

The Star is not going to intimidate me, no matter how biased and vicious its editorials. I will continue to "chirp" (as the Star puts it) on behalf of my constituents and the people of Toronto, especially those who are intimidated or fearful.

Sincerely,

Allan Sparrow
Alderman - Ward 6

AS/la

28 "Ex # 10

* * *

Toronto Alderman Allan Sparrow has accused Metro Police of abusing their power after he was stopped and searched on Yonge St. at 1.30 one morning last week.

He says he was told, "You are under arrest," was ordered into a squad car and detained for about 15 minutes by two policemen searching for a suspect who broke into a car on an Isabella St. parking lot.

"They can't arrest you just because you're walking down the street in the vicinity of something that's happened," Sparrow says. "That's a real abuse of police powers."

Deputy Chief Jack Ackroyd says he'll order a written report from the two constables, John Beckingham and Terrance Doyle, but indicates he can see nothing wrong with their actions.

Sparrow says he has no objections to being questioned since police told him later the suspect they wanted was wearing blue jeans and a brown coat—the same as he was wearing. But he says being detained and frisked was unwarranted because they had no evidence linking him with the crime.

"If I hadn't been the alderman I would have been in a cell all night," Sparrow says.

* * *

STAR NOV 17/75

P.C. Kimball: Where is he now then?

Ian Lockton: Uh, I just seen him walking around the other cars down here, I'll have a look if you want.

P.C. Kimball: Andora Hotel?

Ian Lockton: Yeah, the municipal car park there.

P.C. Kimball: Where's that, opposite the, uh, hotel?

Ian Lockton: It's a, yeah, just next to the hotel, right next to it.

P.C. Kimball: Where would that be then, the municipal car park?

Ian Lockton: On Charles Street East, the corner of Yonge and Charles Street.

P.C. Kimball: Oh yeah, I think I know where you mean. Charles Street, uh, just, uh, east of Yonge, eh?

Ian Lockton: Uh, yeah.

P.C. Kimball: Charles Street east of Yonge. Municipal car park eh?

Ian Lockton: Yeah.

P.C. Kimball: He's on that lot now?

Ian Lockton: I'll have a look if you

P.C. Kimball: Okay

Ian Lockton: I'll have a look.

P.C. Kimball: Okay.

Ian Lockton: He's hanging around by the church there, uh, he went into one car

P.C. Kimball: Yeah

Ian Lockton: Uh what happened was he saw one behind the fence, bent over the car for about three minutes, uh, a car drove by, he ran away

P.C. Kimball: Mm hmm

Ian Lockton: He's about five foot eight. That's as much as I can tell you, I'm only, I couldn't sleep and I was just

P.C. Kimball: Yeah

Ian Lockton: Looking out the window

P.C. Kimball: Brown hair

Ian Lockton: (unintelligible)

P.C. Kimball: About five eight, brown leather jacket, blue jeans

Ian Lockton: Yeah, that's it.

P.C. Kimball: Okay

Ian Lockton: I can't see too much in the dark

P.C. Kimball: Yeah

Ian Lockton: now okay?

P.C. Kimball: Okay we'll check it out sir.

Ian Lockton: Yeah

P.C. Kimball: Thanks very much.

Ian Lockton: Yeah, may be a false alarm, I don't know.

P.C. Kimball: Oh, I don't think so. It sounds like he's up to no good.

Ian Lockton: Okay

P.C. Kimball: Thanks alot sir.

Ian Lockton: Bye

P.C. Kimball: Right bye.

Ian Lockton: Andora Hotel. Charles Street and Yonge.

P.C. Chapman: The Andora, that's right at the back of police headquarters, eh?

Ian Lockton: Yeah, that guy's just got into two more and he's hanging around. I just, I just watched him get into two. He's got some kind of yankee screw driver or something and he's opening them up like they're nobodys business.

P.C. Chapman: And that's on Charles Street, eh?

Ian Lockton: Yeah. The municipal car park right next to the Andora. I reckon he's going through the whole line up.

P.C. Chapman: What's the address there on, on Charles?

Ian Lockton: Yeah

P.C. Chapman: What's the address on Charles there?

Ian Lockton: Oh I don't know.

P.C. Chapman: Yeah

Ian Lockton: It's right on the corner of Yonge and Charles.

P.C. Chapman: Yonge and Charles eh?

Ian Lockton: Yeah

P.C. Chapman: Okay

Ian Lockton: Okay

P.C. Chapman: We'll get somebody over.

Ian Lockton: Bye

P.C. Chapman: Right

P.C. Chapman: Uh, he was there once before, he done four and he just finished another three, and he's still there.

Disp. Jevons: Ok, then, I just received information on it. Unit in 52 Division, O 7's area, 5 2 O 7 and one other unit. Charles Street east of Yonge Street, the Municipal Car Park. There's a man trying the doors of parked cars there. He appears to have broken into one and is presently standing in the darkness near the church now. He's male white, five foot eight, brown hair, brown leather jacket and blue jeans. That's 5 2 O 5, 15, O 3 and O 9. Further

Unknown Scout Car: Is that east of Yonge?

Disp. Jevons: That's correct. Charles east of Yonge. Information just received from the Andora Hotel on Charles Street, there's a man breaking into cars.

Scout 5209: We're on the scene.

Disp. Jevons: 10-4, I'll leave you in the conference queue, O 9.

Unknown Scout Car: Unit check the north parking lot on the north side.

Disp. Jevons: Units attending, press your press to talk, I'll keep you in the conference queue.

Scout 5207: Yeah O 7, you got a better location?

Disp. Jevons: That's negative, I don't O 7.

Scout 5207: Yeah, what (transmission broken) are you talking about dispatcher, and you got a better description?

Disp. Jevons: Is there another unit to see 5 2 0 9 at Sir Lancelot re: the alarm?

Scout 5203: Three

Disp. Jevons: 10-4 three.

Scout 5207: Yeah 5 2 0 7 can I have a further description of that man wanted tampering with the cars?

Disp. Jevons: 5 2 0 7 the only description I have is male white, five foot eight, brown hair, brown leather jacket and blue jeans.

Scout 5207: Yeah 10-4. Thank you.

Scout 5207: Yeah do you have the witness, uh, handy?

Disp. Jevons: Is there any unit with a complainant for this call on Charles east of Yonge?

Scout 5207: 5 2 0 7 call.

Disp. Jevons: 5 2 0 7

Scout 5207: Yes dispatch what time was the call to the municipal parking lot, behind the Andora?

Disp. Jevons: The original time was 1:47 and it's now 2:09.

Scout 5207: 10-4. thank you.

Scout 5207: Dispatcher, I got further description of this man wanted for, uh, attempting to break into the autos.

/Page 6

motorcycle style but has no,uh,no ornaments on it. 10-4?

Disp. Jevons: 5 2 0 7, that's male white, five foot eight, brn shoulder length hair, broad looking shoulders, well groomed, drk trousers, wearing a dark waist length shiny coat.

Scout 5207: That's,uh,dark brown. 10-4?

Disp. Jevons: 10-4.

QUESTIONS

Slander

1. Were the words "a real abuse of police powers" spoken by the Defendant to Bruce Kirkland? YES

2. If the Answer to Question 1 is "Yes", do those words refer to the Plaintiff Terry Doyle in the way of his trade, occupation or calling? NO ANSWER,

JURY NOT ASKED TO RECONSIDER

3. If the Answer to Question 1 is "Yes", were the words "a real abuse of police powers" spoken by the Defendant to Bruce Kirkland defamatory of the Plaintiff Terry Doyle in their natural and ordinary meaning?

NO ANSWER

JURY NOT ASKED TO RECONSIDER

4. If the Answer to ~~Question 1 is~~ "Yes", are the words "a real abuse of police powers" spoken by the Defendant to Bruce Kirkland defamatory of the Plaintiff Terry Doyle in any of the meanings attributed to them by innuendo?

NO ANSWER

JURY NOT ASKED TO RECONDISER

Libel

5. Did the Defendant authorize, permit or intend the publication of the words complained of in the following Exhibits in the Toronto Star?

a) Exhibit 5 — YES

b) Exhibit 6 — YES

c) Exhibit 10 — YES

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6. Are the words complained of in the following Exhibits defamatory of the Plaintiff Terry Doyle in their natural and ordinary meaning?

a) Exhibit 5 — YES

b) Exhibit 6 — 1. NO ANSWER 2. NO (when asked to reconsider)

c) Exhibit 10 — YES

7. Are the words complained of in the following Exhibits defamatory of the Plaintiff Terry Doyle in any of the meanings attributed to them by innuendo.

a) Exhibit 5 — YES

b) Exhibit 6 — 1. NO ANSWER 2. NO (when asked to reconsider)

c) Exhibit 10 — YES

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Defence: Justification

8. Has the Defendant satisfied you on the whole of the evidence that the words complained of and referred to in Question 1 (above) in their natural and ordinary meaning and in all innuendoes which you find arise from the words are true in substance and fact?

NO

9. Has the Defendant satisfied on the whole of the evidence that the words complained of in Exhibit 5 in their natural and ordinary meaning and in all innuendoes which you find arise from the words are true in substance and fact?

NO

10. Has the Defendant satisfied you on the whole of the evidence that the words complained of in Exhibit 10 in their natural and ordinary meaning and in all innuendoes which you find arise from the words are true in substance and fact? NO

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Defence: Fair Comment

11. Are any of the words complained of in the following Exhibits comment?

a) Exhibit 5 — YES

b) Exhibit 6 — YES

c) Exhibit 10 — YES

12. If the Answer to any part of Question 11 is "Yes", is such comment fair comment on facts truly stated and proved?

a) Exhibit 5 — NO

b) Exhibit 6 — 1. NO ANSWER 2. YES (when asked to reconsider)

c) Exhibit 10 — NO

13. If the Answer to Question 1 is "Yes", are any of the words complained of in that question comment? — YES

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14. If the Answer to Question 13 is "Yes", was such comment fair comment on facts truly stated and proved? NO

Damages

15. What amount do you assess damages?

For slander to Kirkland	$ 1.00
For libel to Toronto Star, Exhibit 5	$ 1.00
For libel to Toronto Star, Exhibit 6	$ 1.00
For libel to Toronto Star, Exhibit 10	$ 1.00

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IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE MR. JUSTICE EBERLE) TUESDAY, THE 12TH DAY
)
) OF SEPTEMBER, 1978.

B E T W E E N:

TERRY DOYLE

Plaintiff

- and -

ALLAN SPARROW

Defendant

J U D G M E N T

This action coming on for trial on the 12th, 13th, 14th, 15th and 16th days of June, 1978, at the sittings holden for the trial of actions with a jury at Toronto, in the presence of counsel for all parties, upon hearing read the pleadings and hearing the evidence adduced and what was alleged by counsel aforesaid, and the jury having answered certain questions:

1. THIS COURT DOTH ORDER AND ADJUDGE that the plaintiff do recover from the defendant the sum of $2.00.

2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant do pay to the plaintiff his costs of this action, including appearances on July 19th, 1978 and September 12th, 1978, forthwith after taxation thereof.

JUDGMENT SIGNED this day of , 1978.

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IN THE SUPREME COURT OF ONTARIO

B E T W E E N:

DOYLE

Plaintiff

- and -

SPARROW

Defendant

ORAL REASONS FOR JUDGMENT

--- Oral Reasons for Judgment delivered by THE HONOURABLE MR. JUSTICE EBERLE, at the Court House, City of Toronto, Judicial District of York, on Tuesday, September 12th, 1978.

APPEARANCES:

A. RYDER, Esq., for plaintiff

C. CAMPBELL, Esq.,
-and-
M. KAINER, Esq., for defendant

HIS LORDSHIP: We have heard argument today on two matters today arising out of the trial of this action. First is the judgment that ought to be entered, and I have already disposed of that: There will be judgment for the plaintiff in the sum of two dollars. The other matter heard today is as to the costs in the action.

This is a matter which is within the discretion of the Court as provided by Section 82 of the Judicature Act. More particularly relevant is the provision in sub-section 3 of that Section, which reads as follows:

> "Where an action or issue is tried by a jury, the costs shall follow the event, unless the judge before whom the action or issue is tried in his discretion otherwise orders."

In this case the amount of the judgment was fixed at two dollars in accordance with the answers of the jury to the questions asked of them, taken together with their assessment of damages in their answer to question No. 15, in which answer the sum of one dollar was placed opposite the items referring to Exhibits 5 and 10 .

A matter that is left to the discretion of the Court may, in some instances, be very difficult to deal with. There appear to be very few guidelines in this area except general principles which, because of their very generality, are not/

perhaps of great assistance. I suppose we start with the language of Section 82, that costs shall follow the event, but where a judgment is for two dollars, does that mean that costs should go to the plaintiff who obtained that judgment?

Apart from Section 82, the general principle is that a successful party can reasonably anticipate that he will be awarded costs of his action. There is, however, no guarantee of this for, again, it is within the discretion of the Court.

In this case a number of questions were asked of the jury, and the result of their answers is that a judgment has been given in respect of two of the statements which were complained of in the action: those contained in Exhibits 5 and 10; but because of the answers in relation to the words complained of in Exhibit 6, and the answers or lack thereof to questions relating to the spoken words, to Kirkland, no judgment has been given with respect to those two statements.

I must confess that I find some difficulty in reconciling all of the answers given by the jury. I say that without imputing the slightest criticism to the jury in this case. As I said earlier in this hearing, this was a most complicated matter; at least I thought it so and I think counsel found it so. I cannot help but believe that the jury found it so. They were asked to answer 15 questions, many

of them with three and even four sub-parts, and in this particularly difficult area of the law they had a good deal to struggle with.

In addition to the questions that were asked of them I also left it to th e jury to give what is called a general verdict. I believe that I said to them that it was their right not to answer the questions but simply to give a general verdict either for the plaintiff or for the defendant.

In the result, the jury answered most of the questions and went on, at the end of the question paper, to write in what I treat, and I believe counsel agree it should be treated, as a general verdict in the following terms:

"We find for the plaintiff, Terry Doyle."

It therefore appears to me, not only from the answers to the questions but from the addition of the general verdict in favour of the plaintiff, that the jury did intend to find for the plaintiff. That seems to me to be clear.

Proceeding from there, what does one make of the assessment of damages?

It seems to me that it would be clearly inconsistent with what I have said was the jury's clear intention, to find in favour of the plaintiff, to proceed and make an award on damages intending to be contemptuous of the plaintiff.

Whether the jury were led to fix the damages at $1.00 for each of the statements complained of by something which I

did not make clear in my directions to them, or whether they misunderstood something I said to them, I am satisfied from the entire trial, including the conduct of it by counsel on both sides and the atmosphere throughout, that the jury were awarding damages to the plaintiff not in an effort to be contemptuous of him or to give him contemptuous damages but to give him nominal damages.

The plaintiff's case as put to the jury was that it was not a case in which large damages were asked for. The plaintiff did not adduce any evidence to show any particular loss, such as a loss of promotion or anything of that sort. The case was not put to the jury on behalf of the defendant as a case for contemptuous damages. The case was principally fought on the question of liability, that is, whether the plaintiff had been libelled, and whether the defendant would succeed in any one or more of the defences he raised; and the case particularly turned on whether or not the defendant had been the subject of a false arrest. From the jury's answers, one must conclude that the jury found that the defendant had not been falsely arrested.

All of the statements complained of really arose out of one factual nexus; all of the statements complained of were related in that manner.

It was argued on behalf of the defendant that certain factors associated with the case should deprive the plaintiff of costs and it was further argued, although I think not as vigorously, that the defendant should get costs of the action.

The defendant submits that the allegations of malice in several paragraphs in the Statement of Claim amounts to misconduct of a kind which should deprive the plaintiff of costs in the same way that an allegation of fraud not made out may deprive one who so alleges of costs. It was pointed out

in support of the argument that no evidence of malice was led. A further factor relied upon was that in cross-examination of the defendant, counsel for the plaintiff suggested to him a certain inconsistency in his statement which, on a re-hearing of a part of the evidence of another witness, turned out not to be so.

An allegation of malice is a common and almost universal allegation in a Statement of Claim in a libel action. Malice, in the peculiar sense in which that word is understood in libel actions, is an ingredient of libel; and malice, as a matter of law, is conclusively presumed in favour of the plaintiff and against the defendant unless it is shown that the libel was published under some lawful excuse.

Bearing those factors in mind I cannot find that the allegation in the Statement of Claim in the usual form - that the defendant did falsely and maliciously make certain statements of the plaintiff - is the kind of misconduct that would deprive a plaintiff of costs.

As to the point about cross-examination of the defendant, it is my view that that, too, cannot amount to the kind of misconduct that would deprive a plaintiff of costs. No doubt in some circumstances it might amount to such misconduct if a party were to proceed in an unfounded line of cross-examination. That might, perhaps, at some point become sufficient misconduct to affect the matter of costs.

As I understood the argument, and as I recall the evidence, there was only one such incident, and when objection was made and the evidence re-read, and the record straightened out, there was no persistence by counsel for the plaintiff in the error he had made; an error of the type which does happen from time to time during the heat of a trial. I know that it is easy for counsel to think that previous evidence was to a certain effect when it may not be so. No counsel tries to misapprehend the evidence but it does sometimes happen through human error. In my view the incident in question, in this case, amounted to no more than that.

It was also argued that the plaintiff had been oppressive of the defendant in bringing the action and in his motivation for bringing it.

It is true that the plaintiff did not succeed in establishing liability in connection with the four statements upon which the action was based. He succeeded upon two of them only. Those two related directly to the principal event which gave rise to this action, and that is the confrontation between the plaintiff and the defendant on Yonge Street early one morning in late 1975, and as to whether in that confrontation what took place amounted to false arrest of the defendant or not. The trial revolved principally, although not exclusively, around that incident.

The jury found liability against the defendant for statements which includes the allegation that that incident

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did amount to a false arrest and that it was an illegal police procedure, and that the police abused their powers.

In those circumstances it seems to me that, with respect to the events with which the trial was mainly concerned, there was a substantial success by the plaintiff.

I am unable to conclude that it was in any way oppressive of the plaintiff to commence and carry through to trial this law suit.

I am well aware of the costs of litigation, and I am sure most, if not all, litigants are likewise aware of the costs and of the risks of litigation. The plaintiff having obtained a verdict from the jury in his favour as to the central statements and events, I think it would be impossible to conclude that the case was unworthy, unmeritorious or without any benefit to the plaintiff (I have taken those words from the defendant's memorandum of law filed for my assistance on the motions today) but rather he has succeeded in clearing his name.

I should record now that I am grateful to both counsel, both of whom filed such memoranda, and for their help in supplying me with a copy of their memoranda which have been of great assistance in following the argument, and for their care and industry, on both sides, in the preparation of this matter.

It was argued that there was on the part of the plaintiff something which amounted to misconduct or oppressiveness arising out of the relations between the plaintiff and the

Metropolitan Police Association.

From the material before me it appears that the plaintiff sought financial assistance for this case from that Association. I am not sure that it has really been shown that the plaintiff received such assistance, but for the purposes of the matter before me I am prepared to accept that the plaintiff did.

It was submitted that the plaintiff was not the real plaintiff in this action and that the action was brought for improper motives.

As I understand the facts, while it may be fair to say that the plaintiff sought and received financial assistance for bringing this action from the Police Association, the material before me does not show that the Police Association instigated the action. At most it is shown that the plaintiff sought financial assistance from the Association. I think it is overstating the case to say that the plaintiff gets no benefit out of the case or that the plaintiff is not the real plaintiff.

The statements complained of, at least in Exhibits 5 and 10, were statements directed directly at the plaintiff by name. Clearly, as the jury have found - accepting their findings on these points - the plaintiff was libelled and the plaintiff had a cause of action. Whether the Police Association, generally on the basis of those statements, would have had a cause of action is not before me, but it is at

least highly speculative.

What appears to me to have happened from the material before me is that the plaintiff sought financial assistance from the Association and in order to persuade that Association to give him that assistance, made the arguments to the Association to show why they might have, or might consider they had, a similar interest to his. It is not a situation where the plaintiff had no interest, as the law looks at such interest, in bringing this action. It is to my mind clearly an instance where the plaintiff had a real cause of action.

A good deal of argument was also directed to some apparent settlement negotiations that took place before and perhaps even during the trial. They bore no fruit.

While, in some instances, the settlement positions of parties may have a very important effect on costs, in the peculiar circumstances of this case I really place no weight on them in coming to my conclusion.

It was also submitted on behalf of the defendant that there was such a disparity between the amount claimed in the Statement of Claim - namely, $150,000 - and the amount ultimately recovered - namely, $2.00 - that the plaintiff should be deprived of his costs.

I can think of cases where such argument would undoubtedly carry the day. For instance, in a motor vehicle case, where a claim is made for personal injuries, if $150,000

were claimed, and if a judge or jury properly assesses the damages of the plaintiff at $2.00, it might well be a case where the plaintiff would not get his costs of the action.

This case, however, is not the ordinary case. It is well known among lawyers that the amount of money claimed in a Statement of Claim is a purely arbitrary figure and it is usually set at a very high figure simply to ensure that in the unlikely event that a jury or a judge should assess damages at a very generous figure, such assessment would still fall short of the amount claimed in the Statement of Claim.

Certainly so far as the trial is concerned, it was not conducted on behalf of the plaintiff as a trial in which $150,000 was sought, and I can give no significance in this case to that amount.

A great number of cases were cited to me as to the disposition of costs in other cases. I do not propose to deal with them in detail. Each case is somewhat different on its own facts. Decisions in other cases are useful as guidelines to show how other judges in other circumstances have dealt with the problems presented in those cases; but in a situation where the discretion of the Court must be exercised, I do not think that I can, or should, accept a decision in another case, based on the facts in that case, as binding on me in the facts of this case.

In all the circumstances, and in the peculiar

circumstances of this case, my conclusion is that this is a case in which the costs of the action, on a party-and-party basis, should be awarded to the plaintiff. Those costs should cover not only the preliminary procedures prior to the trial, but also the days at trial, and should also include the appearance before me in July when the matters that have been dealt with today were not proceeded with, as well as the proceedings today.

I have endorsed the record: On answers of jury, and on hearing submissions of counsel, judgment for the plaintiff, Doyle, for two dollars, together with costs of the action, including appearance on July the 19th, and of this day.

****

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No. 3680/76 42

IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE	)	FRIDAY, the 6TH DAY
MISTER JUSTICE EBERLE	)	OF OCTOBER, 1978

B E T W E E N :

ALLAN SPARROW

Defendant/Appellant

- and -

TERENCE DOYLE and
JOHN BECKINGHAM

Plaintiffs/Respondents

O R D E R

UPON the application of the Defendant for leave to appeal to the Court of Appeal on the question of costs and upon hearing what was said on behalf of the Plaintiff and Defendant by counsel;

1. IT IS ORDERED that leave to appeal to the Court of Appeal on the question of costs be granted.

2. AND IT IS FURTHER ORDERED that costs of this application be in the cause.

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IN THE SUPREME COURT OF ONTARIO

COURT OF APPEAL

MacKinnon, A.C.J.O., Zuber and Blair, JJ.A.

BETWEEN:	)	
	)	
TERENCE DOYLE	)	C. Campbell and
	)	Miss D. Martin, for the
Respondent (Plaintiff)	)	appellant (defendant)
	)	
- and -	)	Ian Scott, Q.C.,
	)	for the respondent (plaintiff)
ALLAN SPARROW	)	
	)	
Appellant (Defendant)	)	
	)	Heard:
	)	December 6 and 7, 1979.

MACKINNON, A.C.J.O. (Orally):

The appellant, the defendant in an action for defamation, appeals from a judgment which awarded the respondent damages in the total amount of $2.00 with costs. The learned trial judge gave leave to appeal his order as to costs and the appellant submits that, in view of the amount of damages awarded and the alleged misconception of the trial judge as to certain matters, there should be no order as to costs of the trial.

In the appeal on the merits, the appellant submits that the trial judge misdirected the jury as to the law of arrest and as to the test of fairness in the defence of fair comment. It is also submitted that the trial judge misdirected himself as to the law of qualified privilege and erred in refusing to allow a witness to be cross-examined on his criminal record. These errors, it is argued, require, at the least, the direction of a new trial.

It is clear from the jury's answers to the questions posed that they accepted the respondent's version of the events that transpired on the night of November 13, 1975. The acceptance of that version destroys the basis for the appellant's complaint that the respondent and his associate had, allegedly, failed to give him the reason for his arrest at the time of his arrest. The conclusion that such was the finding of the jury does not, in our view, establish or indicate in any way that there was a confusion or a conflict in the answers given by the jury to the questions placed before them. The further submission made as to the alleged deficiencies in the charge with relation to the definition of the right to make an arrest and of the meaning of "reasonable and probable grounds" for making an arrest must be looked at in the light of the uncontradicted facts which were before the jury. The fact that these objections were not made at the conclusion of the charge is an indication of the satisfactory nature of the charge on these issues in light of the evidence. It is true that the charge, when analyzed word by word, may be deficient in certain areas, but when it is looked at as a whole the issues and the law were put fairly and correctly to the jury and they were not misdirected on any material point so as to lead to a substantial wrong or miscarriage of justice.

We are also of the opinion that the trial judge correctly and fully directed the jury on the defence of fair comment. Indeed, at the request of the appellant's counsel the trial judge delivered a further charge on the subjective aspects of that defence. Further, as has been pointed out by the authorities, the defendant in such cases must have the facts right on which

he comments. If the comment contains implications, unwarranted by the facts, of corrupt or dishonourable motives on the part of the plaintiff, the defence of fair comment is not available. (Joynt v. Cycle Trade Publishing Company, [1904] 2 K.B. 292). If the jury viewed the allegation of false arrest as an allegation of fact, then they also found that the basis of the comment had not been proven. It should also be noted that the burden of proving each ingredient of the defence of fair comment rests upon the party asserting it (Cherneskey v. Armadale Publishers Limited. and King, [1978] 6 W.W.R. 618 at p. 623). That this was not emphasized by the trial judge could only enure to the benefit of the appellant. If there was a deficiency in the direction of the trial judge on the issue of fair comment, and we are not persuaded there was, no substantial wrong or miscarriage of justice was occasioned thereby (s. 31, The Judicature Act, R.S.O. 1970, c. 228).

Counsel for the appellant also submitted that the trial judge had erred in refusing to consider the defence of qualified privilege with relation to the publication of the defamatory matter in the press. We have concluded, as did the trial judge, that there were no grounds for saying that the appellant had a right and a duty to bring the alleged facts to the news media for publication at the time such publication was made. Newspapers are in no different position from any other citizen and their right to report and comment fairly does not give rise to a duty to report to the world such as is required to make the occasion one of qualified privilege. Globe and Mail Limited v. Boland, [1960] S.C.R. 203). The facts in Stopforth v. Goyer (1979), 8 C.C.L.T. 172 are completely different from the instant case and we do not feel that the principles there relied on have any application to this case.

The final point made on behalf of the appellant was that the denial of the right to cross-examine the plaintiff's associate in the arrest, P.C. Beckingham, as to an incident which took place some 18 months after the events involved in this law suit and in which the respondent was not involved, was a serious error in the conduct of the trial. It is clear that the plaintiff's counsel did not examine Beckingham and did not present him in support of his case. As a result, there was no testimonial assertion by Beckingham to be discredited and we do not feel, under the circumstances, that the trial judge was in error in the ruling he made. Further, if he had any discretion in the matter we think it was properly exercised.

Accordingly, the appeal on the merits must be dismissed.

We turn now to the issue of costs and the submission that the trial judge did not exercise his discretion judicially in awarding costs of the trial to the plaintiff. The Court must start with s. 82(3) of The Judicature Act which states: "where an action or issue is tried by a jury, the costs shall follow the event unless the judge before whom the action or issue is tried, in his discretion, otherwise orders". Counsel for the appellant, while acknowledging that costs always remain subject to the discretion of the trial judge, argues that the jury clearly awarded contemptuous damages and that usually in such cases the plaintiff is not awarded costs. The jury's view of the action, it is submitted, must have been that it should not have been brought. However, it should be remembered, as pointed out by Mr. Justice McCardie in reviewing the authorities on defamation in Martin v. Benson, [1927] 1 K.B. 771 at 774: "It is plain that the judge must exercise his discretion as to costs not only unfettered by, but wholly independently of

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any view expressed by the jury on that particular matter".

The trial judge may have erred in his view that the jury had awarded nominal and not contemptuous damages. That is impossible to determine in any absolute fashion now. It is clear, however, that counsel for the appellant at no stage suggested that contemptuous damages be awarded, by acknowledging the defamation but suggesting that its effect was minimal and of little consequence under the circumstances and deserved only contemptuous damages. Far from acknowledging the defamation, the appellant persisted in his justification of the facts as he saw them, to the bitter end, and the trial judge was entitled to consider that in his disposition of costs.

In reviewing the facts and proceedings the trial judge concluded that the respondent had status to maintain the action and an interest to protect. We agree with that conclusion and the trial judge did not overlook any relevant factor in that review. The trial judge carefully considered all the submissions made to him which are now made to us. His conclusion as to the kind of damages which were awarded by the jury may have been wrong, although, as stated earlier, we are not in a position to say with certainty he was wrong. However, that conclusion, even if wrong, does not vitiate his award of costs, when his careful and complete review of the facts and proceedings is examined. The authorities emphasize that the amount of the award of damages is only one element in the consideration (O'Connor v. Star Newspaper Company Limited (1898), 68 L.T.R. 146). The trial judge was in a position to know what aspect of the case had been pressed and what had not.

It was, apparently, clear to him that the respondent was only asking for nominal damages, the clearing of his name being the important consideration. Whether the cross-examination of the appellant by the respondent's counsel or the leading of certain evidence by the respondent or the seriousness of the allegation of malice could lead to another view would be for the trial judge, who heard it, to assess.

It was peculiarly within the trial judge's province, immersed as he was in the atmosphere of the case and the attitudes taken, to weigh the arguments and determine how the costs should be assessed. He found that the plaintiff had achieved substantial success and that his action was not unworthy, unmeritorious or oppressive as submitted by appellant's counsel both in the Court below and here. We are not in a position to say that the trial judge was wrong in these conclusions or exercised his discretion improperly in his disposition of the costs. Accordingly the appeal as to costs must be dismissed.

In the result, the appeal is dismissed with costs.

/sc

62.

IN THE SUPREME COURT OF ONTARIO

COURT OF APPEAL

MacKinnon, A.C.J.O., Zuber and Blair, JJ.A.

B E T W E E N :

TERENCE DOYLE

Respondent (Plaintiff)

- and -

ALLAN SPARROW

Appellant (Defendant)

ORAL JUDGMENT

Released: December 17/79

R. Blair

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of Ontario)

B E T W E E N:

ALLAN SPARROW

Defendant/
Applicant

-and-

TERENCE DOYLE

Plaintiff/
Respondent

MEMORANDUM OF ARGUMENT

PART I

STATEMENT OF FACTS

1. On December 7, 1979 the Ontario Court of Appeal dismissed the Applicant's appeal from the Judgment of Mr. Justice Eberle for two counts of libel awarding damages in the amount of two dollars plus costs.

2. The trial took place at Toronto before a jury on June 12th to 17, 1978. The jury found for the Plaintiff on two of four counts of defamation. Argument on costs was adjourned to September 12, 1978.

3. On September 12, 1978 Mr. Justice Eberle gave judgment on the jury's verdict and awarded costs against the Applicant. On October 6, 1978 the Trial Judge granted the Applicant leave

to appeal to the Court of Appeal against the Order awarding costs to the Plaintiff.

4. On November 13, 1975, the Respondent, a police officer, arrested the Applicant, an Alderman, on Yonge Street in Toronto. The Applicant loosely matched the description of a man seen by a third person breaking into parked cars.

5. The arrest incident itself was brief, and no undue force was used. The Applicant's and Respondent's version of the facts of the incident are set out, stage by stage, in paragraphs 18 to 41 hereafter. After the Applicant's arrest and release, the Respondent received further information which eliminated the Applicant completely as a suspect in the offence.

6. The Respondent and the other police officer with him at the time of the arrest sued the Applicant for defamation following the Applicant's complaints about the incident. The other police officer, John Beckingham, abandoned his action before trial. (See paragraph 46).

7. On November 13, some hours after the incident between the Applicant and Respondent, the Applicant spoke to Bruce Kirkland, a reporter for the Toronto Star. He admits he used the words "a real abuse of police powers" to describe the incident. This constitutes the first count of defamation, a slander. In its verdict, the jury did not answer the questions whether or not the words referred to the Respondent "in his profession, trade or calling," or whether the words were defamatory of the Respondent

in either their nature and ordinary meaning of the meaning attributed to them innuendo. The Respondent did not ask that the jury reconsider the unanswered questions. No judgment was given for the Respondent on this count.

(i)	Statement of Claim, Jury Questions	2 - 4
(ii)	Transcript - Answers, Charge	p.433, p.437; p.334.

8. Bruce Kirkland's story on the incident was never printed. However, facts from it and the allegations of an "abuse of police powers" were used by columnist Michael Hanlon on November 17, 1975 in the Toronto Star. This gave rise to the fourth count of defamation.

(i)	Exhibit 10 - Toronto Star column by Michael Hanlon, November 17, 1975 Statement of Claim, 5 (i)	
(ii)	Transcript - Direct Examination of Bruce Kirkland,	p.188, l.13 p.189, l. 3;
(iii)	Charge	pp.338-339.

9. The officers were named in the Hanlon story and a defence of them by Deputy Chief Ackroyd cited. The libel was an allegation of a "real abuse of police powers". The jury found the words to be defamatory, made without justification, and

not fair comment. Judgment was given on this count.

(i) Exhibit 10
Jury Questions, 5(c) - 7(c);
11(c) - 15(c);
10;

(ii) Transcript, p.433.

10. On November 17, 1975, in his capacity as Alderman, the Applicant sent, in letter form, a submission regarding police arrest procedures on Yonge Street to the Metropolitan Toronto Board of Commissioners of Police. Among other matters, this submission discussed the incident of November 13, 1975. The Applicant said, in part, (after setting out the relevant facts):-

> I bring this matter of my own false arrest, search and detention to your attention not so much to seek political redress but to highlight it as a too typical example of illegal police procedures. I am aware that it is common practice to frisk and detain citizens, especially young citizens, especially poorly dressed citizens and especially citizens who exhibit characteristics of an alternate life style... I urge you not to concentrate on the two officers, but to take affirmative action based on this incident to direct officers in the field to respect the rights of citizens.

(i) Exhibit 1 - Sparrow
letter to Police
Commission, Nov.17/75.

11. The Applicant presented this submission orally to the Board of Police Commissioners after November 19, 1975. No evidence regarding this presentation was admitted at trial. None

of the defamations alleged arose from this public discussion of the matter. This same submission was distributed to the press prior to the meeting of the Police Commission in the normal manner of making available all matters going before boards and commissions.

(i)	Transcript - Ruling,	p. 6, l.20; p. 7, l.15;
(ii)	Direct Examination of Allan Sparrow,	p.223, ll.22-25.

12. The submission was the basis of a story by Marilyn Anderson published in the Toronto Star on November 19, 1975. The Statement of Claim, paragraph 5(ii) quotes this story verbatim but says it was published November 17, 1975. The Statement of Claim paragraph 4 quotes from the Applicant's letter of November 17, 1975, including the allegation of "false arrest", and alleges it was published to Marilyn Anderson the week of November 10, 1975. The officers were not named in either version.

(i)	Exhibit 5 - Anderson article in Toronto Star, Nov. 19/75.	
(ii)	Statement of Claim,	para.4, 5(ii);
(iii)	Transcript - Charge to Jury,	pp.335-36.

13. The jury found the words in the Anderson article to be defamatory and to be comments, but the defences of justification and fair comment were found not to apply. Judgment was given on this count.

(i) Exhibit 5 - Jury Questions, 5(a) - 7(a), 11(a) -15(a), 9;

(ii) Transcript - Answers, p.433.

14. On December 16, 1975, a Toronto Star editorial criticized the Applicant regarding his complaint. The Applicant responded with a letter to the editor that was published January 1, 1976.

(i) Exhibit 11 - Editorial, Toronto Star, Dec.16, 1975.

(ii) Exhibit 6, - Letter to editor, Toronto Star, Jan. 1, 1976.

(iii) Transcript - Direct Examination of Allan Sparrow, p.25, l. 5; p.238, l.7.

15. The third alleged libel was the Applicant's statement in his letter published January 1, 1976, "I had accused the police of lying". The officers were not named. The jury found these remarks were not defamatory of the Plaintiff. Justification was not put to the jury. The jury held the remark was a comment and a fair comment on facts truly stated and proved. No judgment was given on this count.

(i) Statement of Claim, para.6,

(ii) Exhibit No. 6,

(iii) Jury Questions, 5(b) - 7(b); 11(b) - 15(b);

(iv) Transcript - Answers, p.433; p.446;

(v) Transcript - Charge, pp.336-337.

16. The jury also found a general verdict for the Plaintiff.

(i) Jury Questions,

17. The jury assessed damages in the amount of $1.00 for each count. The jury members were polled on this verdict and their answer was confirmed. The Respondent's counsel commented that this was contemptuous damages.

(i) Jury Questions,

(ii) Transcript, p.435, l. 25-26;
p.435, l. 27;
p.436, l. 8.

The Facts of the Incident

18. On November 13, 1975, Constable Terence Doyle and his partner, then Constable John Beckingham, were patrolling in the Yonge Street area and at 1:47 a.m. received a radio message to investigate a man breaking into cars at the parking lot south of Charles Street, east of Yonge Street behind the Anndore Hotel. The suspect was described as white, male, 5'8" tall, with brown hair, and wearing a brown leather jacket and blue jeans.

(i) Transcript - Direct Examination of Doyle, pp. 35-36.

19. The exact text of the radio broadcast was as follows :-

Dispatcher Jevons: "...Charles Street east of Yonge Street, the Municipal Car Park. There's a man trying the doors of parked cars there. He appears to have broken into one and is presently standing in the darkness near the church now. He's male white, five foot eight, brown hair, brown leather jacket and blue jeans..."

Unknown Scout Car: "Is that east of Yonge?"

Dispatcher Jevons: "That's correct. Charles east of Yonge. Information just received from the Andora Hotel on Charles Street, there's a man breaking into cars."

(i) Transcript - Direct Examination of P. Scott, pp.151-2;

(ii) Exhibit #8: Tape of Police Calls - November 13, 1975.

20. The Applicant Allan Sparrow was walking along Yonge Street at this time on November 13, 1975. He had left his home at about 1:30 a.m. to check on street problems at the Church-Isabella intersection (prostitution) and at the Yonge-St. Joseph intersection (late-night clubs). Both problems were the subject of constituent complaints and recent discussions with the local police.

(i) Transcript - Direct Examination of Sparrow, pp.210-211.

21. The Respondent and his partner observed a man on Isabella Street across the street from the south end of the parking lot in questio walking in a westerly direction towards Yonge Street. He was a white man, approximately 5'10" to 6' tall and was wearing a brown leather jacket and blue jeans. At this time, the Respondent contacted the radio room for a rebroadcast of the description of the suspect, and received a rebroadcast of it while at the parking lot.

(i) Transcript - Direct Examination of Doyle, pp. 37-39.

22. The exact text of the rebroadcast was as follows :-

Scout 5207: "Yeah 07, you got a better location?"

Dispatcher Jevons: "That's negative, I don't 07."

Scout 5207: "Yeah, what (transmission broken) are you talking about dispatcher, and you got a better description?"

Dispatcher Jevons: "The description I have is male white, five foot eight, brown hair, brown leather jacket and blue jeans."

(i) Transcript - Direct Examination of P. Scott, pp.152-3;

(ii) Exhibit #8: Tape of Police Calls - November 13, 1975.

23. The Applicant and Respondent agree that the Applicant was stopped by the Respondent and his partner Beckingham as he walked south on the east side of Yonge Street between Dundonald and Gloucester Streets. The police pulled their car to the east curb facing south into the oncoming northbound traffic.

Constable Beckingham was in the driver's seat and thus at the curb side.

(i) Transcript - Direct Examination of Doyle, p. 41, ll. 1-10;

(ii) Transcript - Direct Examination of Sparrow, p.212, ll. 3-10.

24. The Applicant's and Respondent's versions regarding the first stage of their disputed conversation are very similar. The Respondent says Constable Beckingham said "Good evening", beckoned the Applicant over to the police car, and asked him where he was going. The Applicant replied "Nowhere". Constable Beckingham asked "Where are you coming from?" and the Applicant replied, "From my house on Monteith Street."

(i) Transcript - Direct Examination of Doyle, p. 42, ll.18-25.

25. The Applicant says Constable Beckingham first asked him, "What are you doing?" and he answered, "Nothing". Beckingham repeated the question and the Applicant said, "I'm out for a walk". The officer asked "Where have you come from?" and he replied "My house on Monteith Street".

(i) Transcript - Direct Examination of Sparrow, p.213, l.28; p.214, l. 8.

26. It was admitted by the Respondent that the Applicant at least up to this point was polite and co-operative and that

his behaviour was in no way suspicious.

(i) Transcript - Cross-examination of Doyle, p. 85, ll.10-28.

27. Hereafter the two accounts of the incident differ.

28. The Applicant states that Constable Beckingham then pointed to his jacket and said, "Open it." The Applicant replied, "No, why?". Simultaneously, Constable Beckingham opened his car door and said. "You're under arrest".

(i) Transcript - Direct Examination of Sparrow, p.214, ll. 8-28.

29. The Applicant further states that Constable Doyle got out of the car at the same time and the Applicant was placed under arrest. He (Doyle) had not said anything during this conversation.

(i) Transcript - Direct Examination of Sparrow, p.215, ll. 8-14.

30. According to the Respondent Doyle, the incident following the facts set out in paragraph 22 evolved as follows.

31. Doyle to Sparrow - "Do you have identification?"

Sparrow - "I don't have to give you that."

Doyle - "At that point, I started to get out of the car."

(i) Transcript - Direct Examination of Doyle, p. 41, ll.24-27.

32. The Respondent further states, "While I was doing so, P. C. Beckingham asked him to open his coat..."

The Applicant said, "No, I don't need to do that either."

(i) Transcript - Direct Examination of Doyle, p. 41, ll.27-28; p. 42, ll.16-17.

33. The Respondent says he then arrested the Applicant using the following words, "You are under arrest on reasonable, probable ground that you were breaking into cars on a parking lot."

(i) Transcript - Direct Examination of Doyle, p. 43, ll.20-24.

34. The Respondent says that because the Applicant had not given his name or opened his coat, he was "forced to arrest the man. That's simply - that's what we have to do...well since he won't voluntarily co-operate with you, you have to arrest him in order to pursue your investigation".

(i) Transcript - Direct Examination of Doyle, p. 42, l. 28; p. 43, l. 2; p. 43, ll.15-20.

35. The Applicant says he was not told the reason for his arrest at this time. He was searched on the street and his

wallet was retained. He was then placed in the police car. His wallet was then returned and he produced identification on request. He was then driven to the parking lot east of Yonge Street between Charles and Isabella, in a direction away from the police station, a distance of some three blocks.

(i) Transcript - Direct Examination of Sparrow, p.216, l. 8; p.217, l. 25.

36. The Applicant says that when the car arrived at the parking lot the officers radioed for a further description and any word of a witness. The radio reply did not indicate the location of the complainant and gave a description of someone in blue jeans and a leather jacket.

(i) Transcript - Direct Examination of Sparrow, pp.218, 219.

37. The Applicant states that at this time, one of the officers said "I suppose you're wondering why we arrested you?" and noted that the radio dispatch just heard was the explanation. The Applicant was then released.

(i) Transcript - Direct Examination of Sparrow, pp.219-220.

38. The Respondent's account of events subsequent to the actual arrest differs from the Applicant's.

39. The Respondent says that he and Beckingham searched the Applicant after arresting him. They found the Applicant's wallet and had him produce identification. Then the Applicant was placed in the back seat and more identification was requested and produced.

(i) Transcript - Direct Examination of Doyle, p.44; p.46, 1.25.

40. The Respondent says that at this time, Constable Beckingham explained that the Applicant fitted the description of a man wanted for breaking into cars and that they were taking him back to the parking lot where the incident was supposed to have taken place. The Applicant alledgedly said, "Okay".

(i) Transcript - Direct Examination of Doyle, p.46, 1.26; p.47, 1. 3.

41. The purpose of this trip was to seek identification by the complainant. Without identification, the Applicant "would have been released".

(i) Transcript - Direct Examination of Doyle, p.47, ll.11-26.

42. It was agreed that the Applicant was released at the parking lot when the Respondent and Constable Beckingham could neither get a more detailed description, nor contact the complainant.

(i) Transcript - Direct Examination of Doyle, p.47, 1.25; p.49, 1. 3.

The Trial:

43. On a motion by the Respondent's counsel, the Learned Trial Judge ruled at the commencement of trial that evidence relating to the following subjects would not be admissible:

(a) the bona fides of the Respondent (Plaintiff);

(i)	Transcript	p. 5, 1.10; p. 6, 1.20.
(ii)	Statement of Defence,	para.21, 22.

(b) proceedings before the Board of Commissioners of Police;

(i)	Statement of Defence,	para.11;
(ii)	Transcript	p. 6, 1.21; p. 7, 1.16; p.248, 1.24; p.249, 1. 8.

(c) other incidents of alleged police abuse that had been brought to the attention of the Applicant;

(i)	Statement of Defence,	para.10;
(ii)	Transcript	p. 7, 1.17; p. 9, 1.24; p. 12,11. 8-10; p.246, 1. 3; p.247, 1.16.

(d) the intentions of the Respondent (Plaintiff) in bringing this action;

(i)	Transcript	p. 9, 1.25; p. 11, 1.25.

(e) the reports of the Maloney and Morand Commissions, relating to policing in Toronto;

(i) Transcript — p. 12, ll. 6-8; p.245, l.28; p.246, l.14.

(f) the Applicant's intentions;

(i) Transcript — p. 14, ll. 5-18; p.226, l.15; p.234, l.28.

44. The Applicant gave evidence at trial that all the words complained of were in his accurate and honest belief. This was not challenged by the Respondent's counsel. The Applicant was prevented from amplifying on this in any way in light of the ruling that the Applicant's intentions were irrelevant and inadmissible.

(i) Transcript Rulings — p. 14, ll. 8-18.

45. The Respondent called the former co-plaintiff Beckingham to the stand but asked him no questions. The Learned Trial Judge ruled, over the Applicant's objections, that the witness could not be cross-examined on credibility or with respect to his criminal record. The Applicant asked no questions of the witness.

(i) Transcript Examination of Beckingham, — p.126;

(ii) Ruling, — pp.114-122.

46. Subsequent to the incident between the officers and the Alderman, John Beckingham committed an assault causing bodily harm while in uniform. The assault causing bodily harm was committed in an incident unrelated to the arrest of Sparrow. Constable Beckingham pleaded guilty and was sentenced to nine months. The Crown appealed the sentence unsuccessfully and that appeal was heard by the Court of Appeal during the trial of this defamation action.

(i) Transcript omitted.

47. The jury asked for and were given further instructions by the Learned Trial Judge in response to the following questions:

(1) Does the defamatory nature of these articles hinge on the legality of the arrest?

(i) Transcript, pp.390,391;

(ii) Further Charge, pp.406-412.

(2) Could we please have a redefinition of comment and fact?

Could we have some direction as to the financial boundaries of the four levels of damages?

(i) Transcript - Further Charge, pp.420-429.

48. The jury returned a verdict for the Respondent with damages in the amount of $1.00 for each of the four counts of defamation. However, when the jury first returned it had left a number of questions unanswered relating to the allegation of slander in regard to the Applicant's conversation with Bruce Kirkland and to the allegation of libel in regard to the Applicant's letter to the editor of the Toronto Star. The Judge sent the jury back and they returned with the questions about the slander still unanswered and with the questions about the libel in the letter to the editor answered in the Applicant's favour.

(i) Transcript, pp.433-436;

(ii) Verdict, p.446.

Costs

49. The Trial Judge charged the jury about the four levels of damage awards they could make. He told them that if they thought that "the action should never have been brought" they should award contemptuous damages: "damages of a very small amount, like a dollar. That is what I mean by a "small" amount."

(i) Transcript - Charge to the Jury, p.357.

50. When the jury returned with a question about "the financial boundaries of the four levels of damages" the Trial Judge told them that he could only suggest an amount of damages

for contemptuous damages: "it is ordinarily treated as a dollar. And that is the only thing I can give you. I suppose you can conclude that nominal damages are more than a dollar."

(i) Transcript - Further Charge to the Jury, pp.426-7.

51. When the jury returned a verdict of $1.00 damages for each count the Respondent's counsel commented in front of the jury that "the jury have fixed contemptuous damages." He then asked that the jury be polled and the jury confirmed the award.

(i) Transcript - Verdict, pp.435-6.

52. In his judgment on September 12, 1978 the Trial Judge held when ruling about costs that the jury did not intend to award contemptuous damages; they intended to award nominal damages. He awards costs against the Applicant.

(i) Judgment - Eberle, J. p. 5.

PART II

POINTS FOR ARGUMENT

53. The Court of Appeal erred in holding that the Learned Trial Judge exercised his discretion as to costs judicially, given the Trial Judge's erroneous ruling that the jury awarded nominal not contemptuous damages.

54. The Court of Appeal erred in holding that the Learned Trial Judge fairly and correctly put the law of arrest to the jury.

55. The Court of Appeal erred in holding that the Learned Trial Judge correctly instructed the jury on the defence of fair comment, in that, he failed to instruct the jury that the sole test of the fairness of the comment is the honesty of the opinion expressed.

56. The Court of Appeal erred in holding that the Learned Trial Judge correctly withdrew the defence of qualified privilege from the jury with regard to the article in the Toronto Star based on the Applicant's letter to the Metropolitan Toronto Board of Police Commissioners about police procedures and his arrest.

57. The Court of Appeal erred in holding that the Learned Trial Judge correctly ruled that the Applicant could not cross-examine the witness Beckingham on any matters going solely to the witness's credibility.

PART III

BRIEF OF ARGUMENT

Re Costs

58. It is respectfully submitted that the Court of Appeal erred in finding that the Trial Judge exercised his discretion as to costs judicially. It is submitted that the Trial Judge based his awarding of costs against the Applicant on a clear misapprehension of the facts and principles of awarding costs: he held that the damages awarded by the jury of $2.00, $1.00 for each count found in favour of the Respondent were not contemptuous damages, but rather nominal damages and awarded costs against the Applicant accordingly.

(i) Ruling - Eberle, J. p. 5.

59. It is submitted that the only possible conclusion to be drawn from the jury's award was that the damages were contemptuous and that there was no basis upon which to find that the damages were nominal rather than contemptuous.

The facts surrounding the jury's award were as follows :-

(a) In his Charge to the Jury the Learned Trial Judge reviewed the four levels of damages in libel and slander actions. The jury would indicate its decision to award contemptuous damages by "[awarding] damages of a very small amount, like a dollar. That is what I mean by a "small" amount."

(i) Charge to the Jury, p.357.

(b) During its deliberations the jury asked the following question:-

"Could we have some direction as to the financial boundaries of the four levels of damages?"

The Judge further charged the jury as follows:-

"The only thing as to dollar values that I can give you is to say what has been established as contemptuous damages. At one time in England, contemptuous damages were a farthing. Well, we have come a long way since then. Now, it is ordinarily treated as a dollar. And that is the only thing I can give you. I suppose you can conclude that nominal damages are more than a dollar. I don't suppose that is very much help to you, but perhaps it is useful."

He could not give dollar values for any of the other three levels of damages.

(i) Further Charge to the Jury, pp.426-7.

(c) After the jury brought in its verdict with some questions unanswered, Mr. Scott, counsel for the Respondent, was troubled by the jury's answer to question 15, which set out the damages awarded in the amount of $1.00 for each defamation, in light of the earlier unanswered questions. He stated in front of the jury:-

"The jury have fixed contemptuous damages and I would ask they be polled with respect to Question 15."

The jury was then immediately polled as to its answers as to Question 15 and each juror apparently

agreed that that was their answer: there was no issue arising out of the polling.

(i) Verdict, pp.435-6.

From the preceeding it is submitted that the only way suggested to the jury to indicate contemptuous damages was to bring in an award of $1.00; the jury apparently faithfully followed this instruction by awarding $1.00; any other conclusion would be speculation.

60. It is respectfully submitted that had the Trial Judge correctly interpreted the jury's award as contemptuous he ~~may~~ would ~~well~~ have exercised his discretion as to costs differently. When a Plaintiff recovers only contemptuous damages the usual rule is that no costs should be awarded, although the matter always remains subject to the discretion of the Trial Judge. It is submitted that this rule accords with the meaning of contemptuous damages as correctly explained by the Trial Judge to the jury: that the jury thinks "the action should never have been brought."

(i) Charge to the Jury, p.357;

(ii) Martin v. Bensen, [1927] 1 K.B. 771 (K.B.);

(iii) O'Connor v. The Star Newspaper Co.Ltd. (1893), 68 L.T.R. 146 (C.A.);

(iv) Myers v. Financial News (1888), 5 T.L.R. 42 (Q.B.);

(v) Wood v. Cox (1889), 5 T.L.R. 272 (C.A.);

(vi) Williams v. Ward (1886), 55 L.J. 566 (Q.B.);

(vii) The Judicature Act R.S.O. 1970, c.228, s.82;

(viii) Gatley Libel and Slander (7th) para.1477, p.596;

(ix) Odger Libel and Slander (6th) p.355.

61. It is submitted that an appellate court will interfere with the exercise of a Trial Judge's discretion as to costs where that discretion is not exercised judicially or is exercised on a misapprehension as to the facts of the law.

(i) s.27 Judicature Act, R.S.O. 1970;

(ii) Henderson v. Laframboise, [1920] 4 D.L.R. 273 at pp.275-6 (Ont.C.A.).

Re The Law of Arrest

62. It is respectfully submitted that the Court of Appeal erred in finding that the Learned Trial Judge fairly and correctly put the law of arrest to the jury.

63. It is submitted that whether the arrest was a "false arrest" or an "illegal arrest" is fundamental to determining whether the Applicant was justified in so describing it. The centrality of this issue was repeatedly emphasized in the Learned Trial Judge's charge to the jury.

(i) Further Charge to the Jury, Transcript of Evidence, Vol.2, p.407, l.18 to p.411, l.15;

(ii) Charge to the Jury, Transcript of Evidence, Vol.2, p.347, l. 4 to p.349, l.22;

(iii) Charge to the Jury, Transcript of Evidence, Vol.2, p.352, ll.25-27.

64. It is submitted that, in the circumstances of this case, the arrest of the Applicant was lawful only if the following two essential ingredients, inter alia, are present:-

(a) the Respondent actually believed that the Applicant had committed the offence with which he was charged; and

(b) the grounds of that belief must be reasonable and probable.

(i) Criminal Code, s.450(1)(2).

65. In this case the grounds for the Respondent's belief are not in dispute:-

(a) information from a police radio dispatcher about the commission of an Indictable offence in a municipal parking lot south of Charles Street and east of Yonge Street;

(b) a description of the alleged offender provided in the same police dispatch: male white, five foot eight, brown hair, brown leather jacket and blue jeans;

(c) the Applicant was first observed by the Respondent and his partner near the scene of the alleged offence, walking in a westerly direction towards Yonge Street along the southside of Isabella Street across the street from the south

end of the municipal parking lot;

(d) the Applicant loosely matched the description of the alleged offender.

These facts were not contradicted or disputed.

66. It is submitted that the Applicant's refusal to identify himself or co-operate with the Respondent and his partner is of no relevance to the grounds of belief. As a private citizen is under no obligation to reveal his identity to police officers (except in statutorily prescribed situations which are of no application in this case), such refusal does not afford any evidence, one way or another, about whether he committed the alleged offence. It is submitted that a police officer who has no reasonable and probable grounds before his suspect refuses to answer questions cannot assert that those grounds are established merely because of that refusal.

(i) Koechlin v. Waugh and Hamilton (1957), 118 C.C.C. 24 (Ont.C.A.), at 26-27;

(ii) R. v. Carroll (1959), 12 C.C.C. 19 (Ont.C.A.), at 22;

(iii) Hall v. R. (1970), 55 Crim.App.R. 108 (P.C.), at 111-112;

(iv) Rice v. Connolly, [1966] 2 All E.R. 649 (Q.B.), at 652;

(v) G. L. Williams, "Statutory Powers of Search and Arrest on the Ground of Unlawful Possession", [1960] Crim.L.R. 598, at 598-600.

67. The Respondent and his partner searched the Appellant after his arrest and removed his wallet, including his identification

They found no evidence of stolen property, or break-in tools.Yet they continued to detain the Applicant.

68. It is respectfully submitted that in cases of false arrest or imprisonment, as with malicious prosecution, the decision as to whether an arrest was made upon reasonable and probable grounds is a decision for the Judge and not a question for the jury.

(i) Dallison v. Caffery, [1964] 2 All E.R. 610 (C.A.) at pp.619-20;

(ii) McArdle v. Egan and Others, [1933] All E.R. 611 (C.A.) at p.612, p.615;

(iii) Lister v. Perryman (1870), L.R. 4 H.L.521 at p.535, pp.538-39;

(iv) Kennedy v. Tomlinson (1959), 126 C.C.C. 175 (Ont.C.A.) at pp.206-7.

69. The role of the jury is only to assist the Judge where facts are in dispute. If the circumstances surrounding the arrest are clear the decision rests with the Judge and the jury has no function in this aspect of the case. If the Judge feels that the facts as to what happened are unclear he may ask the jury to reach the findings of fact necessary for the Judge to make his conclusion as to whether the arrest was on reasonable and probable grounds.

(i) Dallison v. Caffery, supra, at p.616;

(ii) McArdle v. Egan and Others, supra, at p.612;

(iii) Commonwealth Life Assurance Society Ltd v. Brain (1935), 53 C.L.R. 343 (H.C.Aust.) at p.352;

(iv) Archibald v. McLaren (1892), 21 S.C.R. 588 at pp.592-3, pp.595-96.

70. The Learned Trial Judge did not follow this procedure in his charge to the jury. He simply told them that for the arrest to be legal it must have been based on reasonable and probable grounds and that is a question that they must decide. In fact, he expressly disavows any duty to decide this issue. It is respectfully submitted that this is in clear and direct conflict with the settled law.

(i) Transcript of Evidence, Vol.2, p.348, l.27;
p.349, l. 3;
p.350, ll.27-31;
p.352, ll. 4-10.

71. In the alternative, it is respectfully submitted that even if the question of whether the arrest was made upon "reasonable and probable grounds" was properly left to the jury's consideration, the Learned Trial Judge is obliged to direct the jury as to the meaning of this phrase. It is submitted that in his charges to the jury the Learned Trial Judge failed to offer the jury any guidance as to what constitutes reasonable and probable grounds, and that such failure amounts to a misdirection in law, particularly where, as here, the importance of its determination of this issue is repeatedly emphasized to the jury.

72. It is respectfully submitted that a proper direction as to "reasonable and probable grounds" for an arrest would include the formulation of a practical test to be applied, a clear instruction that suspicion alone is insufficient to establish the

requisite grounds, and a careful review of the evidence pertaining to this issue. It is submitted that the Learned Trial Judge's charge to the jury is insufficient in all of these respects.

(i) Kennedy v. Tomlinson, supra;

(ii) Koechlin v. Waugh and Hamilton, supra;

(iii) Shaaban Bin Hussien and Others v. Chang Fook Kam and Another, [1969] 3 All E.R. 1626 (P.C.);

(iv) Dumbell v. Roberts, [1944] 1 All E.R. 326 (C.A.), at 328-9;

(v) Dallison v. Caffery, supra.

73. It is respectfully submitted that the Learned Trial Judge erred in failing to tell the jury that, as a matter of law, an arrest which was carried out "in order to pursue [the] investigation" could not be an arrest based on reasonable and probable grounds. A requirement that the arrest power only be exercised on reasonable and probable grounds forecloses the use of that power as an investigatory tool to establish those very grounds.

(i) Evidence of Doyle, Transcript of Evidence, Vol.1, p. 42, l.30; p. 43, l. 2.

(ii) Koechlin v. Waugh and Hamilton, supra;

(iii) Christie v. Leachinsky (1947), 1 All E.R. 567 (H.L.) at p.576, per Lord Simonds.

74. Further, once it is established that an arrest has been motivated by lack of "voluntary" co-operation it is impossible to contend that the arresting officer actually believes on reasonable and probable grounds the person arrested has committed an offence.

(i) Evidence of Doyle, Transcript of Evidence, Vol.1, p. 42, l.30; p. 43, l. 2.

75. It is respectfully submitted that the laying of a criminal charge will be warranted where there exists reasonable and probable grounds that the person to be charged committed the offence. Therefore, if there is no belief that a charge is warranted there can be no belief on reasonable and probable grounds that an arrest is warranted. It is respectfully submitted that since, on the Respondent's own-admission he had insufficient grounds to lay a charge, he could not have had sufficient grounds to arrest the Applicant.

(i) Evidence of Doyle, Transcript of Evidence, Vol.1, p. 47,ll.13-27.

76. It is respectfully submitted that in light of the above, the Learned Trial Judge's charge to the jury that "if you accepted the evidence of the Plaintiff as to what happened earlier that morning, you would probably come to the conclusion that there was no illegal arrest", was wrong in law. Further, this direction virtually withdrew the issue from the jury.

(i) Charge to the Jury, Transcript of Evidence, Vol.2, p.348, ll. 5-9.

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Re Fair Comment

77. It is respectfully submitted that the Ontario Court of Appeal erred in holding that the Learned Trial Judge correctly instructed the jury on the defence of fair comment.

78. It is respectfully submitted that the Learned Trial Judge, having recently charged the jury that the comment must be based on facts truly stated and proved, failed to instruct the jury that the sole test of the fairness of the comment is the honesty of the opinion expressed.

(i) Charge to the Jury, p. 355, l.20 to p. 356, l. 5.

79. It is further submitted that he failed to correct this non-direction in his recharge to the jury, but rather misdirected the jury that the honesty or dishonesty of the opinion was only one consideration, "along with other matters."

(i) Recharge to the Jury, p. 389, l.15 to p. 390, l. 5.

80. It is respectfully submitted that the honesty of the Applicant's opinions was admitted by the Respondent who called no evidence to the contrary, and did not challenge the Applicant on the point.

(i) Transcript of Evidence, Examination-in-Chief of the Applicant, pp.231-5.

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81. This Honourable Court in Chernesky v. Armadale Publishers Limited and King, [1978] 6 W.W.R. 618, in obiter dictum, relied on the honesty of the opinion expressed as the sole test of fairness. Mr. Justice Ritchie stated at p.626 :-

> "Honesty of belief has been characterized by Lord Denning M.R. in Slim v. Daily Telegraph Ltd., [1968] 2 Q.B. 157, as "the cardinal test" of the defence of fair comment, and in the context of the present case this must mean honesty of belief in the opinions expressed in the letter complained of."

Lord Denning M.R. in Slim v. Daily Telegraph Ltd., supra, expressed the rule as follows at p.170:-

> "The important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveged derogatory imputations: no matter that his opinion was wrong or exaggerated or prejudiced: ...
>
> His honesty is the carindal test. He must honestly express his real view."

Mr. Justice Martland, concurring, said at p.636 :-

> "Freedom to express an opinion on a matter of public interest is protected, but such protection is afforded only when the opinion represents the honest expression of the view of the person who expresses it...."

He went on to approve the statement of the nature of the defence of fair comment given by Diplock, J. (as he then was) in his charge to the jury in Silkin v.Beaverbrook Newspapers Ltd, [1958] 1 W.L.R. 743 at 747 :-

"I have been referring, and counsel in their speeches to you have been referring, to fair comment, because that is the technical name which is given to this defence, or, as I should prefer to say, which is given to the right of every citizen to comment on matters of public interest. But the expression 'fair comment' is a little misleading. I may give you the impression that you, the jury, have to decide whether you agree with the comment, whether you think it is fair. If that were the question you had to decide, you realize that the limits of freedom which the law allows would be greatly curtailed. People are entitled to hold and to express freely on matters of public interest strong views, views which some of you, or indeed all of you, may think are exaggerated, obstinate or prejudiced, provided - and this is the important thing - that they are views which they honestly hold. The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?"

82. It is respectfully submitted that the Learned Trial Judge in effect charged the jury in just the manner disapproved by Lord Diplock, supra, in that he directed them to consider the fairness of the Applicant's comments on the basis of the correctness of the Applicant's conduct pursuant to his moral duty to assist the police. It is submitted that by directing the jury to consider this irrelevant factor, he invited them to decide whether they agreed with the Applicant's comments and thus effectively removed the defence.

He charged them merely that it was for them to decide

if the comment was fair, and put the following to them :-

> "You may want to consider, for example, whether the officers were or were not put in the position by the defendant's responses, or lack of response, as you find the facts - whether they were put in a position by the defendant, by Mr. Sparrow, by his responses and actions, or lack of response and lack of action, put in such a position that the officers really had to run the risk of an illegal arrest, or not."

(i) Charge to the Jury, p.356, l. 5-15.

83. It is respectfully submitted that the issue is not whether the comments were justified in the opinion of the jury but whether they were an honest expression of the Applicant's belief.

It is submitted that in determining whether the comment was an honest comment the jury may consider "other matters" such as the language itself, or extraneous circumstances, indicating a dishonest object to injure the Respondent, or to offer mere abuse or invective under the guise of criticism, but that the ultimate that is the honesty of the opinion.

Lord Porter in Turner v. M.G.M. Pictures Ltd, [1950] 1 All E.R. 449 (H.L.) stated at p.461 :-

> "To a similar effect were the words of Lord Esher M.R. (20 Q.B.D. 281), in Merivale v. Carson which are so often quoted:
>
> > "...would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have [written] this criticism...?"
>
> I should adopt them except that I would substitute "honest" for "fair" that any suggestion of reasonableness instead of honesty should be read in."

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He went on to criticize the charge to the jury in the following terms :-

> "I have read the summing up as a whole more than once and I think a jury might well have come to the conclusion that both honesty and reasonableness were necessary and that the defendants were unreasonable and therefore malicious. It is, I think, difficult for the uninstructed mind to guard against such a misconception and to my mind the clearest direction is necessary to the effect that irrationality, stupidity, or obstinacy do not constitute malice, though in an extreme case they may be some evidence of it. The defendant, indeed, must honestly hold the opinion he expresses but no more is required of him."

(i) Charge to the Jury, p.463.

Re Qualified Privilege

84. It is respectfully submitted that the Court of Appeal erred in holding that the Learned Trial Judge correctly withdrew the defence of qualified privilege from the jury with respect to the article in the Toronto Star based on the letter the Applicant wrote to the Metropolitan Toronto Board of Police Commissioners about police procedures and his arrest.

(i) Transcript - Ruling, p. 318.

85. It is submitted that the defence of qualified privilege applies to the article in the Toronto Star about the letter in that the article constitutes a fair and accurate reporting on a proceeding before the Police Commission: the letter being the proceeding or part of a subsequent proceeding.

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86. It is respectfully submitted that the communication of the letter to the Police Commission is privileged on two grounds: (1) on the narrow ground that the Applicant's communication was a bona fide complaint about the officers' actions to the body which has the power or duty to inquire into the complaint and to remove, punish or reprimand the offender:

(i) Gatley on Libel and Slander (7th Edition), para.572, p.245.

(2) on the broader ground that the Applicant as an elected member of City Council has a duty and an interest to communicate to the Police Commission his concerns and submissions about police procedures in his ward and city and that the Police Commission has a corresponding duty to receive such communications.

(i) Harrison v. Bush (1855), 5 E. & B. 344;

(ii) Gatley on Libel and Slander (7th Edition) para.510, p.214.

87. It is further submitted that the proceedings of the Police Commission themselves are privileged being proceedings held in public by a public authority and thus a newspaper could report on the Applicant's oral submissions and his letter submitted at that meeting.

(i) s.3(1) 2 and 4 Libel and Slander Act, R.S.O. 1970 c.243;

(ii) Perera v. Peiris, [1949] A.C. 1 at p.21 (P.C.);

(iii) Allbutt v. The General Council of Medical Education and Registration (1889), 23 Q.B.D. 400 (C.A.).

88. The Respondent has as much conceded that the letter to the Police Commission is privileged with regard to its communication to the Police Commission and that the proceedings before the Police Commission involving the Applicant's submissions about the issues he raised in the letter are similarly privileged: no claim is made in regard to either set of communications. What the Respondent complains about is the distribution of the letter to the news media prior to the Police Commission's considering the letter and the subsequent publishing of excerpts from the letter in the Toronto Star on November 19, 1975..

(i) Statement of Claim, para.4 and 5.

89. It is respectfully submitted therefore that the issue is whether the Applicant's release of the letter before the Police Commission's meeting to deal with the letter is protected by qualified privilege. Qualified privilege attaches to the fair and accurate reporting of proceedings of public bodies both at common law and by statute. Section 3 of the Libel and Slander Act, R.S.O. 1970 c.243 provides for qualified privilege for a fair and accurate report of proceedings that are open to the public of any administrative body that is constituted by any public authority in Canada or of any organization whose members, in whole or in part, represent any public authority in Canada.

(i) s.3(1) and (3), Libel and Slander Act, R.S.O. 1970 c.243.

90. It is respectfully submitted that the submission of the letter to the Applicant is part of a proceeding of the Police

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Commission. Even if the Applicant had not read the letter aloud at the public meeting of the Police Commission it is submitted that the letter would still be part of those proceedings.

(i) Hansen v. Nugget Publishers Ltd (1927), 61 O.L.R. 239 (Ont.C.A.);

(ii) Sharman v. Merritt and Hatcher (Limited) (1916), 32 T.L.R. 360 (K.B.).

91. It is submitted that the letter is a proceeding open to the public in the sense that once filed with the Police Commission the letter was available to any member of the public. If the Applicant is granted leave to appeal on this question of law the Applicant would adduce evidence that documents submitted to the Police Commission and other similar municipal bodies and committees are available to the public once filed whether before or during the meeting of the body. At trial the Applicant was precluded about calling any evidence about the proceedings before the Police Commission.

(i) s.3(3) of the Libel and Slander Act, R.S.O. 1970 c.243.

92. It is submitted that it is in the public interest that the privilege attach to the letter as a submission before a public body. At common law the privilege attached to reports of judicial and parliamentary proceedings as well as various other public bodies, as well as certain reports of other bodies if it was to the public interest the privilege should attach to the report.

(i) Perera v. Peiris, supra;

(ii) Allbutt v. The General Council of Medical Education and Registration, supra.

(iii) Webb v. Times Publishing Co. Ltd., [1960] 2 Q.B. 535 (Q.B.).

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93. It is submitted that the usual test whether such a privilege should attach is whether the common convenience and welfare of society ought to override the individual interests of the Respondent. It is submitted that the common convenience and welfare of society is served by the dissemination of documents and submissions to public bodies such as the Police Commission before they meet so that the public can attend and deal with issues in preparation for the meeting. Because the newspapers could have published the contents of the letter after the meeting of the Police Commission and be protected by privilege it is submitted that the individual interests of the Respondent were not unduly prejudiced by its publication before the meeting.

(i) Allbutt v. General Council of Medical Education and Registration, supra;

(ii) Webb v. Times Publishing Co. Ltd., supra;

(iii) Cox v. Feeney (1863), 4 F. & F. 13.

Re No Cross-examination on Credibility

94. It is respectfully submitted that the Ontario Court of Appeal erred in upholding the Trial Judge's ruling that the Applicant could not cross-examine a witness called by the Respondent as to the witness's credibility. The witness was P.C. Beckingham, the Respondent's partner on the night in question and a co-plaintiff who discontinued his action. The Respondent called the witness and asked him no questions. When the Applicant proposed to question him as to his credibility including, inter alia,

his prior criminal record the Respondent objected. The Trial Judge ruled that the Applicant could not cross-examine him "in any way as to any matter affecting his credibility" even if the defence itself undertook to examine on the facts in issue. As a result the Applicant did not ask the witness any questions either.

(i) Ruling - Eberle, J. pp.121-2;

(ii) Transcript, p.126.

95. It is submitted that s.23 of the Ontario Evidence Act, R.S.O. 1970 c.151 gives a party the right to question a witness as to his prior criminal record and that a Trial Judge has no discretion to prevent such cross-examination. The section reads, in part, as follows :-

> "A witness may be asked whether he has been convicted of any crime, and upon being so asked, if he either denies the fact or refuses to answer, the conviction may be proved...."

(i) Ontario Evidence Act, s.23.

96. The Ontario Evidence Act and s.23 in particular supercede the old common law rules surrounding the use in evidence or cross-examination of the criminal record of a witness.

(i) Regina v. Stratton (1978), 42 C.C.C. (2d) 449 at pp.459-60 (Ont.C.A.);

(ii) Hellyer Farms Ltd. v. Biro, [1971] 2 O.R. 583 at p.588 (Ont.Ct.Co.).

97. No reported Ontario civil cases deal directly with the issue whether a Trial Judge has a discretion to prevent a witness from being cross-examined as to his previous criminal record. However, in British Columbia Mr. Justice Aikins held that under an almost identical provision in s.18 of the B.C. Evidence Act, R.S.B.C. 1960 c.134 the Court had no discretion to prevent such cross-examination.

(i) Clarke (an infant) et al v. Holdsworth, Laaja and Steelhead Ranch Resort Ltd. (1967), 62 W.W.R.1.

98. The issue has arisen more frequently in criminal proceedings where the argument has centred around the cross-examination of an accused as to his prior criminal record and s.12 of the Canada Evidence Act, R.S.C. c.E-10. s.12 of the Canada Evidence Act is almost identical to s.23 of the Ontario act; not surprisingly since both sections have a common ancestor in the Common Law Procedure Act, 1854 U.K. c.125. In Regina v. Stratton, supra, Mr. Justice Martin writing for the Ontario Court of Appeal after an exhaustive review of the authorities held that s.12 does not give the Trial Judge any discretion to prevent cross-examination on prior criminal convictions: the word "may" in the section gave the cross-examiner, not the Trial Judge, the discretion as to whether such questions should be put to the witness. It is submitted that the reasoning in Stratton applies equally well to civil trials and s.23 of the Ontario Evidence Act.

(i) Regina v. Stratton, supra.

99. It is similarly submitted that s.21 of the Ontario Evidence Act gives a party the right to cross-examine the other party's witness on any prior inconsistent statements and that a Trial Judge has no discretion to make a blanket ruling preventing such cross-examination as to credibility. The argument is identical to the above argument about s.23: the word "may" gives the cross-examiner, not the Trial Judge, a discretion about whether such questions should be put to the witness.

(i) Ontario Evidence Act, s.21.

100. More generally it is submitted that the Judge's ruling was extremely unfair to the Applicant. The Respondent presumably called the witness to show the jury that he had nothing to hide. The Judge's ruling about the witness put the Applicant in an untenable position: forced either to examine a witness that he chose not to call himself at best like a witness of his own (quaere given the judge's ruling the Applicant would even have the same right he would have towards his own witness such as applications to examine the witness on his prior inconsistent statements under s.21 of the Ontario Evidence Act or to have the witness declared hostile) or to refuse to ask any questions and have the jury possibly infer that the witness will only corroborate the Respondent's version.

101. It is submitted that this ruling could only lead to absurd results and only serve to bring the administration of justice into disrepute. The effect of the ruling if applied in the criminal arena would have disastrous consequences: the Crown Attorney calling all the police officers at a voir dire then not questioning the officers

who merely corroborate the officers who took the actual statment. Following this ruling the accused would not be able to cross-examine the corroborating officers as to credibility. Similarly, defence counsel could call the accused in his defence and not ask any questions. Under this ruling the accused could not be questioned about his criminal record or any inconsistent statements. Presumably on appeal he could argue that having waived his right to remain silent and taken the witness stand the usual rule about considering the accused's failure to testify when applying the "no substantial miscarriage of justice" provisions in the Criminal Code ought not to apply.

102. Thus, it is submitted that the case relied on by the Trial Judge as authority for his ruling, Bracegirdle v. Bailey (1859), 1 F. & F. 537, 175 E.R. 842, ought to be confined to its proper narrow interpretation, that is that evidence of justification in a case of slander cannot be of a kind that tends to show a disposition of the Plaintiff and no more. It ought not be held to stand for the broader proposition adopted by the Trial Judge, since that proposition would lead to absurd results and run contrary to the Ontario Evidence Act. The only two reported cases to cite Bracegirdle v. Bailey adopt it for the narrower proposition.

(i) Ruling - Eberle, J. pp.115-6;

(ii) Bracegirdle v. Bailey (1859), 1 F. & F. 537, 175 E.R. 842;

(iii) Myers v. Currie (1863), 22 U.C.Q.B.R. 470;

(iv) Scott v. Sampson (1882), 8 Q.B.D. 491 at p.502;505.

PART IV

ORDER REQUESTED

103. The Applicant requests this Honourable Court grant the Applicant leave to appeal on all or part of the questions of law or of mixed fact and law raised in this application for leave to appeal.

All of which is respectfully submitted,

CLAYTON C. RUBY, ESQ.,

Of Counsel for the Defendant/
Applicant.

TABLE OF AUTHORITIES

1. Martin v. Bensen, [1927] 1 K.B. 771 (K.B.).

2. O'Connor v. The Star Newspaper Co.Ltd. (1893), 68 L.T.R. 146 (C.A.).

3. Myers v. Financial News (1888), 5 T.L.R. 42 (Q.B.).

4. Wood v. Cox (1889), 5 T.L.R. 272 (C.A.).

5. Williams v. Ward (1886), 55 L.J. 566 (Q.B.).

6. Henderson v. Laframboise, [1920] 4 D.L.R. 273 at pp.275-6 (Ont.C.A.).

7. Koechlin v. Waugh and Hamilton (1957), 118 C.C.C. 24 (Ont.C.A.), at 26-27.

8. R. v. Carroll (1959), 12 C.C.C. 19 (Ont.C.A.), at 22.

9. Hall v. R. (1970), 55 Crim.App.R. 108 (P.C.), at 111-112.

10. Rice v. Connolly, [1966] 2 All E.R. 649 (Q.B.), at 652.

11. Dallison v. Caffery, [1964] 2 All E.R. 610 (C.A.) at pp.619-20.

12. McArdle v. Egan and Others, [1933] All E.R. 611 (C.A.) at p.612, p.615.

13. Lister v. Perryman (1870), L.R. 4 H.L. 521 at p.535, pp.538-39.

14. Kennedy v. Tomlinson (1959), 126 C.C.C. 175 (Ont.C.A.) at pp.206-7.

15. Commonwealth Life Assurance Society Ltd. v. Brain (1935), 53 C.L.R. 343 (H.C.Aust.) at p.352.

16. Archibald v. McLaren (1892), 21 S.C.R. 588 at pp.592-3, pp.595-96.

17. Shaaban Bin Hussien and Others v. Chang Fook Kam and Another, [1969] 3 All E.R. 1626 (P.C.).

18. Dumbell v. Roberts, [1944] 1 All E.R. 326 (C.A.), at 328-9.

19. Christie v. Leachinsky (1947), 1 All E.R. 567 (H.L.) at p.576, per Lord Simonds.

20. Chernesky v. Armadale Publishers Limited and King, [1978] 6 W.W.R. 618.

21. Slim v. Daily Telegraph Ltd., [1968] 2 Q.B. 157.

22. Silkin v. Beaverbrook Newspapers Ltd, [1958] 1 W.L.R. 743 at 747.

23. Turner v. M.G.M. Pictures Ltd, [1950] 1 All E.R. 449 (H.L.) at p.461.

24. Harrison v. Bush (1955), 5 E. & B. 344.

25. Perera v. Peiris, [1949] A.C. 1 at p.21 (P.C.).

26. Allbutt v. The General Council of Medical Education and Registration (1889), 23 Q.B.D. 400 (C.A.).

27. Hansen v. Nugget Publishers Ltd (1927), 61 O.L.R. 239 (Ont.C.A.).

28. Sharman v. Merritt and Hatcher (Limited) (1916), 32 T.L.R. 360 (K.B.).

29. Webb v. Times Publishing Co. Ltd., [1960] 2 Q.B. 535 (Q.B.).

30. Cox v. Feeney (1863), 4 F. & F. 13.

31. Regina v. Stratton (1978), 42 C.C.C. (2d) 449 at pp.459-60 (Ont.C.A.).

32. Hellyer Farms Ltd. v. Biro, [1971] 2 O.R. 583 at p.588 (Ont.Ct.Co.).

33. Clarke (an infant) et al v. Holdsworth, Laaja and Steehead Ranch Resort Ltd. (1967), 62 W.W.R.1.

34. Bracegirdle v. Bailey (1859), 1 F. & F. 537, 175 E.R. 842.

35. Myers v. Currie (1863), 22 U.C.Q.B.R. 470.

36. Scott v. Sampson (1882), 8 Q.B.D. 491 at p.502; 505.

APPENDICES

1. The Judicature Act, R.S.O. 1970, c.228

2. The Ontario Evidence Act, R.S.O. 1970, c.151.

3. Canada Evidence Act, R.S.C. c.E-10.

4. The Libel and Slander Act, c.243.

APPENDIX 1

THE JUDICATURE ACT, R.S.O. 1970, c.228

APPEALS

Section 27

27. No order of the High Court or of a judge thereof made with the consent of the parties is subject to appeal, and no order of the High Court or of a judge thereof as to costs only that by law are left to the discretion of the court is subject to appeal on the ground that the discretion was wrongly exercised or that it was exercised under a misapprehension as to the facts or the law or on any other ground, except by leave of the court or judge making the order. R.S.O. 1960, c. 197, s. 24.

COSTS

Section 82

82.—(1) Subject to the express provisions of any statute, the costs of and incidental to all proceedings authorized to be taken in court or before a judge are in the discretion of the court or judge, and the court or judge has full power to determine by whom and to what extent the costs shall be paid.

(2) Nothing herein shall deprive a trustee, mortgagee or other person of any right to costs out of a particular estate or fund.

(3) Where an action or issue is tried by a jury, the costs shall follow the event, unless the judge before whom the action or issue is tried in his discretion otherwise orders.

(4) Costs of proceedings before judicial officers, unless otherwise disposed of, are in their discretion subject to appeal. R.S.O. 1960, c. 197, s. 79.

(5) In any proceeding to which Her Majesty is a party, either as represented by the Minister of the Attorney General of Ontario or otherwise, costs adjudged to Her Majesty shall not be disallowed or reduced upon taxation merely because the solicitor or the counsel who earned such costs, or in respect of whose services the costs are charged, was a salaried officer of the Crown performing such services in the discharge of his duty and remunerated therefor by his salary, or for that or any other reason not entitled to recover any costs from the Crown in respect of the services so rendered, and the costs recovered by or on behalf of Her Majesty in any such case shall be paid into the Consolidated Revenue Fund. 1966, c. 73, s. 3.

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APPENDIX 2.

THE ONTARIO EVIDENCE ACT, R.S.O. 1970, c.151

Examination of witnesses, proof of contradictory written statements

21. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the matter in question, without the writing being shown to him, but, if it is intended to contradict him by the writing, his attention shall, before such contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of so contradicting him, and the judge or other person presiding at any time during the trial or proceeding may require the production of the writing for his inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he thinks fit. R.S.O. 1960, c. 125, s. 21.

Proof of previous conviction of a witness

23.—(1) A witness may be asked whether he has been convicted of any crime, and upon being so asked, if he either denies the fact or refuses to answer, the conviction may be proved, and a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted, or by the deputy of the officer, is, upon proof of the identity of the witness as such convict, sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Fee

(2) For such certificate, a fee of $1 and no more may be demanded or taken. R.S.O. 1960, c. 125, s. 23.

APPENDIX 3.

CANADA EVIDENCE ACT, R.S.C. c.E-10

EXAMINATION AS TO PREVIOUS CONVICTION—How conviction proved.

12. (1) A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

(2) The conviction may be proved by producing

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if for an offence punishable upon summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned; and

(b) proof of identity. R.S., c.307, s.12.

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CHAPTER 243

The Libel and Slander Act

INTERPRETATION

1.—(1) In this Act, Interpretation

(*b*) "newspaper" means a paper containing public news, intelligence, or occurrences, or remarks or observations thereon, printed for sale and published periodically, or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two of such papers, parts or numbers, and includes a paper printed in order to be made public weekly or more often or at intervals not exceeding thirty-one days and containing only, or principally, advertisements.

3.—(1) A fair and accurate report in a newspaper or in a broadcast of any of the following proceedings that are open to the public is privileged, unless it is proved that the publication thereof was made maliciously: Privileged reports

1. The proceedings of any legislative body or any part or committee thereof in the British Commonwealth that may exercise any sovereign power acquired by delegation or otherwise.
2. The proceedings of any administrative body that is constituted by any public authority in Canada.
3. The proceedings of any commission of inquiry that is constituted by any public authority in the Commonwealth.
4. The proceedings of any organization whose members, in whole or in part, represent any public authority in Canada.

(3) The whole or a part or a fair and accurate synopsis in a newspaper or in a broadcast of any report, bulletin, notice or other document issued for the information of the public by or on behalf of any body, commission or organization mentioned in subsection 1 or any meeting mentioned in subsection 2 is privileged, unless it is proved that the publication thereof was made maliciously.

(5) Nothing in this section authorizes any blasphemous, seditious or indecent matter in a newspaper or in a broadcast. Improper matter

(6) Nothing in this section limits or abridges any privilege now by law existing or protects the publication of any matter not of public concern or the publication of which is not for the public benefit. Saving

(7) The protection afforded by this section is not available as a defence in an action for libel if the plaintiff shows that the defendant refused to insert in the newspaper or to broadcast, as the case may be, a reasonable statement of explanation or contradiction by or on behalf of the plaintiff. R.S.O. 1960, c. 211, s. 3. When defendant refuses to publish explanation