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 SUBMITTED BY COUNSEL FOR THE RESPONDENT TERRENCE DOYLE

1. This is an application for leave to appeal made by Allan Sparrow from the Order of the Court of Appeal dated December 17, 1979 dismissing the Applicant's appeal from the Judgment of The Honourable Mr. Justice Eberle upon answers of a jury dated September 12, 1978.

2. The Statement of the Respondent filed in the Court of Appeal for Ontario is attached hereto as Appendix "A".

The facts out of which the case arose are set out in paragraphs 3 - 10 inclusive of Appendix "A".

The facts surrounding the libel itself and the expanded plea of justification are set out in paragraphs 12 - 16 inclusive of Appendix "A".

3. The jury found that the words spoken by the Respondent and set out in the two articles were not true.

4. The jury rejected the defence of fair comment.

5. The trial Judge ruled that the occasion was not one of qualified privilege.

6. At trial counsel for the Appellant sought repeatedly to lead "similar fact" evidence; that is, evidence that other police officers (not the Respondent Doyle) had on other occasions committed allegedly illegal acts. For instance, counsel sought, inter alia, to lead evidence of the Morand Report, the Maloney Report and the subsequent unrelated conviction of Beckingham. This evidence was rejected by the learned trial Judge.

7. It is respectfully submitted that none of the five issues raised in the Applicant's Statement is of sufficient importance to warrant review in this Court.

Costs

8. The authority of the trial Judge to award costs is fixed by Section 82(3) of The Judicature Act. That Section plainly makes his determination discretionary. The discretion was judicially exercised.

There is thus no issue of principle warranting review by this Court.

The Judicature Act, R.S.O. 1970, c. 228 (see Appendix I in Applicant's Factum at P110)

The Law of Arrest

9. No objection was raised by the Applicant at trial in relation to the trial Judge's charge on the point raised here. It is accordingly submitted that the Applicant should not be permitted to raise this issue in the Supreme Court of Canada.

10. It should be noted that the Applicant admitted at trial that the sole basis for his complaint of illegal arrest

was the alleged failure of the police constables to inform him of the reason for his arrest before searching him and placing him in the backseat of the police car. The jury heard the Respondent's evidence to the contrary.

It is respectfully submitted that the jury's findings make it clear that they accepted the Respondent's version of the events. There is therefore no foundation whatever for the present submission.

Fair Comment

11. At the request of counsel for the Applicant the jury was re-charged on the issue of fair comment in a way that was more than favourable to the defence.

12. In any event the Court of Appeal was right to conclude that the defence of fair comment is not available. The burden of proving each factual ingredient of the defence of fair comment rests upon the Applicant. This burden was clearly not discharged.

13. In any event the Court of Appeal concluded that there was no substantial wrong or miscarriage of justice as required by Section 31 of The Judicature Act, R.S.O. 1970, c. 228.

Qualified Privilege

14. There is no factual basis for the defence of qualified privilege. Newspapers and those who give press releases to newspapers are in no different position than any other citizen.

Cross-Examination

15. Beckingham did not give evidence. As a result there was no testimonial assertion to be discredited. The maximum legitimate effect of cross-examination as to credit is to destroy the impact of testimony already given. No such testimony was in fact ever given.

16. The submissions made in the Applicant's Statement with respect to the effect of The Ontario Evidence Act were not made either at trial or in the Court of Appeal.

17. It is respectfully submitted that this application for leave to appeal should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

IAN SCOTT, Q.C.
Of Counsel for the Plaintiff/
Respondent

APPENDIX "A"

IN THE SUPREME COURT OF ONTARIO

B E T W E E N:

ALLAN SPARROW

Appellant

- and -

TERENCE DOYLE

Respondent

RESPONDENT'S STATEMENT

1. This is an appeal from the Judgment of The Honourable Mr. Justice Eberle dated September 12, 1978 following a jury trial at Toronto. In accordance with the answers of the jury the Respondent was awarded damages of $1.00 on each of two counts of libel together with his costs of the action.

PART I - STATEMENT OF FACTS

2. The Respondent accepts generally the statement of the evidence contained in paragraphs 1 to 46 of the Appellant's Statement. It is clear however that the jury accepted the Respondent Doyle's account of the events as fact.

The Appellant has incorrectly recorded the jury's answer to Question 12(a). The jury's answer was "No".

The Appeal Case, p. 27

3. On November 13, 1975, shortly before two o'clock in the morning, a resident of the Andorre Hotel on Isabella Street at Yonge Street telephoned the police to say that he had just seen a person breaking into cars parked on the municipal parking lot beside the hotel. He gave a description of the person.

Five minutes later the citizen called again to say that the person was breaking into more cars and he had with him "some kind of yankee screw driver" with which "he's opening them up...".

Exhibit 7, Appeal Case, p. 54

Exhibit 12, Appeal Case, p. 57 - 62

4. Immediately thereafter the police dispatcher notified all police cruisers in the area. Terence Doyle's police cruiser indicated that it would respond to the call. Doyle was told by the dispatcher that the person being sought was "presently standing in the darkness near the church now (the church is adjacent and west of the parking lot). He's male, white, five foot eight, brown hair, brown leather jacket and blue jeans...".

Exhibit 12, Appeal Case, p. 60

5. Constable Doyle went to the parking lot immediately and saw a male person walking east on the south side of Isabella Street toward Yonge Street. He was first seen just west of the parking lot. He was male, white, five foot ten to six feet and was wearing a brown leather jacket and blue jeans. There were no other persons on Isabella Street or in the parking lot.

The Evidence, Doyle, V. 1, p. 37, l. 5 - p. 38, l. 10

6. Constable Doyle said that because the person appeared to fit the broadcast description he asked to have the description re-broadcast. That was done. Having concluded that the person met the description the police car pulled up beside him. The officers said "Good evening sir, can we speak to you for a minute". The suspect was asked where he was going and he said "No where". He was asked, "Where are you coming from then"; the man replied, "My house on Monteith Street". He was asked if he had any identification; he said, "No, I don't have to give you that". Then Constable Doyle got out of the police car. The suspect was asked to open his coat. He replied, "No, I don't have to do that either". Following that he was arrested and informed of the reason for his arrest.

The Evidence, Doyle, V. 1, p. 38, l. 22 - p. 49, l. 10

7. Following the routine search required by police regulations the suspect was placed in the police car. Shortly thereafter he produced identification. Constable Doyle was satisfied with the identification produced. An effort was made to locate the complaining citizen to determine whether identification could be made and when that failed, the Appellant Sparrow was immediately released.

The Evidence, Doyle, supra, para. 5

8. The elapsed time between the Appellant's first encounter with the police officers and his release was between two and one half minutes and four and one half minutes.

9. The Appellant admitted that the police officers treated him in a polite and respectful manner throughout the brief incident.

10. The Appellant admitted that the sole basis for his complaint of illegal arrest was the alleged failure of the police constables to inform him of the reason for his arrest before searching him and placing him in the back seat of the police car.

The Evidence, Sparrow, V. 2, p. 266, l. 8 - p. 267, l. 20
p. 273, l. 10 - 25

11. On the next day, November 14, 1975, the Appellant Alderman Sparrow gave an unsolicited interview to a reporter from the Toronto Star, one Kirkland, in which he purported to describe the events. Mr. Kirkland did not recall that the Appellant had told him that he had refused to identify himself to the police when asked to do so or that he had refused to open his jacket when requested to do so. He told Mr. Kirkland that the events were "an abuse of police powers".

At the same time the Appellant Alderman Sparrow wrote a letter to the Metropolitan Toronto Police Commission which he immediately made available to all municipal newspapers, radio and television stations.

The Evidence, Sparrow, V. 2, p. 302, l. 30

12. As a result of the interview with Mr. Kirkland and the release of his letter to the media, the Toronto Star on November 17, 1975 under the logo and by-line of columnist Michael Hanlon printed the following article:

* * *

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.

* * *

13. As a result of the interview with Mr. Kirkland and the release of his letter to the media the Toronto Star on November 19, 1975 under the by-line of reporter Marilyn Anderson printed the following article:

Detained alderman asks for chance to question police

TOR 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."

14. On December 16, 1975 the Toronto Star printed the following editorial:

Sparrow should quit chirping at police

As a community leader, Alderman Allan Sparrow did Toronto no good recently when he told the Metro Police Commission that illegal questioning practices are turning young people against the police.

His complaint came from his own poor citizenship in failing to give the police normal co-operation during an incident last month.

Sparrow was stopped on Yonge St. at night by two officers who were investigating car break-ins in the area. The alderman simply happened to fit the description of a suspect.

There was no evidence that the police were rude or physically abusive, but Sparrow refused to answer their questions or co-operate. He was arrested and later released when his identity was clearly established.

Last week he lodged a complaint of false arrest to the Metro Police Commission, where he was told by Chief Harold Adamson: "They were perfectly within their rights to take you into custody."

Certainly they were. And Sparrow could have avoided arrest if he had simply co-operated with the police—as any citizen with a clear conscience would be expected to do, and as most would do.

Sparrow says his main concern is that incidents like this one tend to alienate young people from the police. On the contrary, it is behavior such as Sparrow's that encourages disrespect for the police and for the law itself.

On December 29, 1975 a letter from the Appellant Alderman Sparrow appeared in the Toronto Star "boxed" with his photograph. It read in part:

> 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.

15. In paragraphs 3 to 6 inclusive of his Statement of Claim the Respondent Constable Doyle claimed that the statements made by the Appellant Alderman Sparrow were defamatory of him.

16. In his Statement of Defence the Appellant Alderman Sparrow asserted that the statements were made by him on an occasion of qualified privilege and that in any event they were fair comment on true facts relating to a matter of public interest.

In paragraph 3 of the Statement of Defence the Appellant Alderman Sparrow pleaded an expanded justification:

> 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.

The Appellant repeated his plea of justification in his evidence at trial.

The Evidence, Sparrow, V. 2, p. 231, l. 10 - p. 233, l. 1
V. 2, p. 303, l. 25 - p. 305, l. 30

17. The Appellant Alderman Sparrow admitted that he spoke the words complained of with the intention, knowledge or expectation that they might be published.

The Evidence, Sparrow, V. 1, p. 223, l. 25 - p. 224, l. 8
V. 1, p. 225, l. 8 - l. 17
V. 2, p. 251, l. 15 - p. 253, l. 25

18. The jury found that the words complained of printed in the Toronto Star in the articles by Marilyn Anderson and Michael Hanlon were defamatory of the Respondent Constable Doyle in their natural and ordinary meaning and in the meanings attributed to them by innuendo.

19. The jury found that the words complained of in those two articles were not true.

20. The jury rejected the defence of fair comment.

21. The trial Judge ruled that the occasion was not one of qualified privilege.

22. At trial counsel for the Appellant sought repeatedly to lead "similar fact" evidence; that is, evidence that other police officers (not the Respondent Doyle) had on other occasions committed allegedly illegal acts. For instance, counsel sought, inter alia, to lead evidence of the Morand Report, the Maloney Report and the subsequent unrelated conviction of Beckingham. This evidence was rejected by the learned trial Judge.

PART II - POINTS INTENDED TO BE ARGUED

23. Counsel for the Respondent will address the following points in his submissions:

(a) The learned trial Judge committed no reversible error when he instructed the jury on the defence of fair comment;

(b) The learned trial Judge was correct in ruling that the defamatory words contained in Exhibit 5 were not protected by the defence of qualified privilege;

(c) The learned trial Judge committed no reversible error of law in instructing the jury as to the applicable law of arrest;

(d) The learned trial Judge was correct in ruling that since Constable Beckingham was not questioned in chief by the Respondent, the Appellant was free to question him as to the matters in issue between the parties but not as to the collateral question of his credibility;

(e) The Appellant has demonstrated no grounds which justify appellate interference with the exercise of the learned trial Judge's discretion in the matter of costs.

THE DEFENCE OF FAIR COMMENT

24. Successful assertion of the defence of fair comment involves proof of three elements, all of which were drawn to the attention of the jury by the learned trial Judge:

(a) The comment must be based on facts on a matter of public interest;

Lefroy v. Burnside (No. 2) (1879), 4 LR. Ir. 556

Davis v. Shepstone (1886), 11 App. Cas. 190

(b) The comment must satisfy the objective test; i.e., it must be "fair and legitimate criticism...in the light of all the surrounding conditions and circumstances."

HH ✓ Bulletin Co. v. Sheppard 55 S.C.R. 454 at pp. 461-62, 39 D.L.R. 339, [1917] 3 W.W.R. 279

An alternative formulation can be found in the jury charge of Mr. Justice Diplock in

KK ✓ Silkin v. Beaverbrook Newspapers Ltd., [1968] 2 All. E.R. 516, [1958] 1 W.L.R. 743, at p. 520 All. E.R.:

"Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view--could a fair-minded man have been capable of writing this?"

See also:

LL ✓ Merivale v. Carson (1887), 20 Q.B.D. 275 (C.A.)

Lyon & Lyon v. Daily Telegraph Ltd., [1943] 1 K.B. 746, [1943] 2 All. E.R. 316 (C.A.)

Duncan and Neill on Defamation (1978), at pp. 62 (para. 12.02) and 68 (para. 12.14)

Salmond on Torts (17th Ed., 1977), pp. 187-88

Fleming, The Law of Torts (5th Ed., 1977), pp. 579-81

(c) The comment must satisfy the subjective test; i.e., it must be the honest expression of the Defendant's real opinion;

FF ✓ Cherneskey v. Armadale Publishers Ltd., [1978] 6 W.W.R. 618, 7 C.C.L.T. 69, 90 D.L.R. (3d) 321 (S.C.C.)

25. In his charge to the jury, the learned trial Judge dealt with each of these matters. In fact, at the request of counsel for the Appellant, His Lordship delivered a supplementary charge on the subjective requirement of this defence.

26. The objective criterion set out above has been formulated in an alternative way, which is equally applicable to the present case. The defence of fair comment is not available where the comment contains "imputations of corrupt or dishonourable motives on the person whose conduct or work is criticized, save insofar as such imputations are warranted by the facts."

> Gatley on Libel and Slander (7th Ed. 1974), para. 716

It is respectfully submitted that the far-reaching allegations contained in the last three paragraphs of Exhibit 5 and the third and last paragraphs of Exhibit 10 fall within the category of unwarranted allegations of dishonourable conduct and therefore provide independent support for the dismissal of the fair comment defence in relation to these Exhibits.

27. It is therefore submitted that, even if the learned trial Judge's instructions are considered to be misdirection,

no substantial wrong or miscarriage of justice resulted at trial, and thus the Appellant's submissions on fair comment cannot prevail.

Judicature Act, R.S.O. 1970, c. 228 as amended, s. 31

Arland v. Taylor, [1955] O.R. 131 (C.A.)

THE DEFENCE OF QUALIFIED PRIVILEGE

28. In its classic formulation, the defence of qualified privilege is applicable only

> "where the person who makes communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

Adam v. Ward, [1917] A.C. 309, per Lord Atkinson at p. 334

29. It is clear that the Appellant's submission to the Board of Commissioners of Police on the topic of police arrest procedures was made on an occasion of qualified privilege. This privilege is founded on the right and duty of any citizen who bona fide believes that wrong has been done to bring the alleged facts before the person or body who has the power or duty to remove, punish or reprimand the offender, or merely to inquire into the subject-matter of the complaint.

TT ✓ Harrison v. Bush (1855), 5 E. & B. 344

30. It is equally clear that publication to the news media, standing alone, does not constitute an occasion of qualified privilege. News media stand in no different position than any other corporate or individual Canadian citizens; their right to report truthfully and comment fairly upon matters of public interest does not imply a duty of the sort which gives rise to an occasion of privilege.

WW ✓ Globe and Mail Ltd. v. Boland, [1960] S.C.R. 203

VV ✓ Banks v. Globe and Mail Ltd., [1961] S.C.R. 474

31. No difference in principle results from a combination of the factual circumstances described in the preceding two paragraphs. In applying the principle in Adam v. Ward, which is intended "for the common convenience and welfare society", courts have been vigilant to confine the privilege so as to stop short of permitting publication to uninterested persons on a privileged occasion. The fact that a section of the public has a legitimate interest in the subject-matter will not of itself excuse publication to members of the public who have no such interest.

Duncombe v. Daniell (1838), 2 Jur. 32

Cutler v. McPhail, [1962] 2 Q.B. 292

Simpson v. Downs (1867), 16 L.T. 391

Hopewell v. Kennedy (1904), 9 O.L.R. 43

Globe and Mail Ltd. v. Boland, supra

Banks v. Globe and Mail Ltd., supra

32. It is respectfully submitted that the present case is clearly distinguishable from the recent decision of this court in Stopforth v. Goyer (1979), 23 O.R. (2d) 696, 8 C.C.L.T. 172. The latter case, insofar as it is consistent with the Supreme Court of Canada Judgment in Banks and Boland, is predicated on the interest of the electorate having been created by the unique nature of House of Commons proceedings, prior to the

statements by the defendant in that case, and to have been demonstrated by the request for repetition by reporters. None of these elements is applicable in the present case.

DIRECTION ON THE LAW OF ARREST

33. It is respectfully submitted that the learned trial Judge's charge to the jury on the law of arrest must be read in the light of the Appellant's admission at trial that the sole basis for his complaint of illegal arrest was the alleged failure of the police constables to inform him of the reason for his arrest before searching him and placing him in the back seat of the police car. Given this fact, the Appellant's submissions in paragraphs 65, 66, 68 and 69 of his Statement are not relevant.

34. There was no obligation on the trial Judge to instruct the jury that any onus of proof rested on the Respondent in respect of the proof of the facts relating to arrest. On the contrary, the expression "illegal arrest" and similar defamatory descriptions of the incident were to be presumed false unless the Appellant succeeded in demonstrating on a balance of probabilities that the arrest was unlawful.

35. The learned trial Judge's use of the term "moral duty", read in conjunction with his careful statement of the technical requirements of a lawful arrest, is entirely in keeping with the leading Ontario decision on the subject of arrest. A similar juxtaposition of competing interests is to be found in the judgment of the Court of Appeal in Koechlin v. Waugh and Hamilton, [1957] O.W.N. 245, at pp. 247 and 249:

> "A police officer has not in law an unlimited power to arrest a law-abiding citizen. The power given expressly to him by the Criminal Code to arrest without warrant is contained in section 435, but we do direct careful attention of the public to the fact that the law empowers a police officer in many cases and under certain circumstances to require a person to account for his presence and identify himself and to furnish other information, and any person who wrongfully fails to comply with such lawful requirements does so at the risk of arrest and punishment...It would have been wise and, indeed, a duty as a good citizen, for the infant plaintiff to have identified himself when asked to do so by the police officers. It is altogether likely that if the infant plaintiff had been courteous and co-operative, the incident giving rise to this action would not have occurred, but that does not in law excuse the defendants for acting as they did in the particular circumtances....

> Nothing in these Reasons for Judgment should be taken as encouragement to any person to resist a police officer in the performance of his duties; on the contrary, it is not only highly desirable, but vitally important, that every person should co-operate to the utmost with police officers for the good of the public and to ensure the preservation of law and order in his community.

36. The learned trial Judge provided a balanced and accurate statement of the law and the relevant facts relating to the timing of the Appellant's notification of the reasons for his arrest. No more precise criterion can be gleaned from the case law than that a citizen is entitled to be told of the reason for his arrest "at the time of arrest".

Charge to the Jury, p. 349, l. 5 - p. 352, l. 24

A ✓ Christie v. Leachinsky, [1947] A.C. 573 (H.L.)

U ✓ Gamracy v. The Queen (1973), 37 D.L.R. (3d) 405 (S.C.C.)
12 CCC (2d) 209

37. In any event, no objection was raised by the Appellant at trial in relation to the learned trial Judge's charge on the subject of timing of notification. It is accordingly submitted that the Appellant should not be permitted to raise this issue for the first time on appeal.

THE RULING ON CROSS-EXAMINATION OF BECKINGHAM

38. The learned trial Judge ruled that since Constable Beckingham was not examined in chief by the Respondent, the Appellant was free to question him as to the matters in issue between the parties, but not as to the collateral question of his credibility. The learned trial Judge gave two reasons for his ruling, both of which are in accord with principle and authority:

(a) The Appellant was not to be permitted to discredit a witness who had provided evidence against him;

(b) In any event, the "similar fact evidence" sought to be adduced by the Appellant from a non-party witness had minimal probative value and would have been grossly prejudicial to the Respondent.

The Evidence, Ruling, p. 114, l. 28 - p. 122, l. 17

39. It follows from the rule of evidence against impeaching one's own witness that a person who is asked no questions in chief by the party tendering him cannot be cross-examined by the opposite party in order to discredit him. "Until he has contributed, by way of testimonial assertion, to the general mass of evidence...the person is only prospectively and not de facto a witness". Briefly stated, there is no testimonial assertion to be discredited.

Wigmore On Evidence (Chadbourn revision, 1976, para. 1892-93)

Phipson On Evidence (12th Ed., 1976, para. 1591)

Cross On Evidence (4th Ed., 1974), p. 227

Sopinka & Lederman, The Law of Evidence in Civil Cases (1974), p. 515

MacRae On Evidence (2nd Ed.), at p. 358

EE ✓Bracegirdle v. Bailey (1859), 1 F & F 537

DD ✓Hobbs v. Pinling, [1929] 2 K.B. 1, per Scrutton, L.L. at p. 12

40. A trial Judge has a discretion to exclude evidence which is of a trifling probative value and is greatly prejudicial to a party. "Prejudice" is here used in the sense that the evidence would operate unfairly toward the party; i.e., it would result in the jury deciding against the party on insufficient evidence or for the wrong reason, this "wrong reason" being the impugned evidence.

R v. Wray, [1971] S.C.R. 272, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673, per Martland, J. at pp. 689-90 D.L.R.

Noor Mohamed v. The King, [1949] A.C. 182

Harris v. D.P.P., [1952] A.C. 694

41. This judicial discretion, demonstrated above in the area of criminal evidence, exists as well in the realm of civil cases. This is clear from the jurisprudence on admissibility of real evidence.

Laughlin v. Harvey (1897), 24 O.A.R. 438

Yachuk v. Blais, [1944] 3 D.L.R. 615

Draper v. Jacklyn, [1970] S.C.R. 92, 9 D.L.R. (3d) 264

42. The test of admissibility in civil cases is in fact a more exclusionary criterion than that employed in criminal law. It is clear from the Judgment of Mr. Justice Spence in Draper v. Jacklyn, supra, that the civil test requires a simple balancing of probative value against prejudicial effect; we do not have the dual requirement of tenuous probative value and grave prejudice, as set out in Wray.

43. It is therefore submitted that considerations of fairness point unequivocally toward the exclusion of cross-examination directed at Beckingham's conduct in an unrelated

NOTE: P. 24 follows!!

I.B.M. Corporation v. Xerox Canada Ltd. (1977), 16 N.R. 355 (Fed. C.A.)

45. The prima facie rule is that the successful party to an action is entitled to costs against his adversary and that this rule should not be departed from for anything but very good reasons. It is not a judicial exercise of the trial court's discretion to order a litigant who has been successful in his suit and against whom no misconduct is proved, to pay the costs of the proceeding.

Re Dingwall, [1967] 2 O.R. 671

Campbell v. Pollack, [1927] A.C. 732

46. The wide scope of the Judge's discretion was emphasized in Henderson; the English rule that costs should follow the event unless for a good cause does not formally apply in Ontario to limit the discretion of the trial Judge.

Henderson v. Laframboise, [1930] 65 O.L.R. 610

Byers v. Kidd, [1906] 13 O.L.R. 396

incident some eighteen months after the Sparrow arrest. The net effect of both counsel refraining from questioning Beckingham was that he produced no "testimonial assertion" either for or against the Respondent. In terms of probative value, this "zero level" is the most that the Appellant could have achieved by adducing Beckingham's version of the facts in issue and then nullifying the effect of that evidence by undermining his credibility. On the other hand, there was a grave risk that the Respondent would be "smeared" by revelations of Beckingham's later misconduct if an inference were drawn as to the manner in which Beckingham customarily carried out his police duties. This would, of course, be wholly unwarranted, given that the Sparrow arrest occurred much earlier, Doyle played no part in the later incident and there was no allegation of physical abuse or other misconduct on the night of Sparrow's arrest.

THE RULING ON COSTS

44. It is respectfully submitted that a Court of Appeal will not interfere with the exercise of discretion by a trial Judge unless he proceeds on an erroneous principle or mis-apprehension of the facts, or the order is not just and reasonable.

47. The return of a small monetary award by a jury is in itself insufficient to deprive a successful plaintiff of costs, particularly in respect of a cause of action that requires no proof of damage as a prerequisite to success. Some element of misconduct on the part of the plaintiff must be shown to be present.

Marbe v. Edwards, [1928] 1 K.B. 273

Groom v. Crocker, [1937] 3 All. E.R. 844

Harnett v. Vise (1885), Ex. D. 307

Nicolas v. Atkinson (1909), 25 T.L.R. 568

Bell v. Wilson (1900), 19 P.R. 167

48. In the present case the Appellant has made numerous allegations of misconduct against the Respondent, but none of them is founded in fact:

(a) The common, almost universal, allegation of malice in a Statement of Claim cannot be considered tantamount to a pleading of fraud. It should also be noted that the allegation of malice was not withdrawn entirely, but only with respect to one defence;

(b) In a case in which the central facts are in dispute, cross-examination of the sole defence witness on matters of credibility, whether by suggestions of recent fabrication or otherwise, cannot constitute misconduct on the part of the Respondent;

(c) The Respondent's decision not to adduce evidence of substantial damages and to rely on available legal presumptions does not stigmatize his action as "unworthy, oppressive, and without merit or real benefit." This is especially so where there is no evidence of the action having been instigated by the Chief of Police, or of the Respondent's motive being "to punish Alderman Sparrow on behalf of the Metropolitan Toronto Police Association for his criticism of police procedures";

(d) It is probable that the Respondent, by applying at one point for several rulings in respect of inadmissible evidence sought to be adduced by the Appellant, saved time for the Judge, the jury and the parties. In any event, any delay caused by the Respondent must be weighed alongside the numerous interruptions of the trial that were caused by the Appellant's repeated attempts to adduce "similar fact" and other evidence ruled inadmissible by the learned trial Judge at the outset of the proceedings.

49. It is respectfully submitted that inherent in the discretion exercised by a trial Judge under Section 82 of The Judicature Act is his right and duty to take into account all aspects of the proceedings before him, including those which were not revealed to the jury. The learned trial Judge demonstrated his acceptance of this role in his costs award when he stated that notwithstanding any instruction or mis-instruction that he may have given to the jury, "the case was not put to the jury on behalf of the Defendant as a case for contemptuous damages." No evidence or suggestion was put to the jury that would justify a demonstration of contempt on their party toward the Respondent.

50. The Appellant was guilty of unnecessarily prolonging the proceedings by refusing reasonable offers of settlement made several days before and then just prior to the commencement of trial.

Appeal Book, Affidavit of Ian Roland, p. 83

✓ Cameron v. Cameron (1978), 19 O.R. (2d) 18

✓ Calderbank v. Calderbank, [1975] 3 All. E.R. 333

51. It is respectfully submitted that the jurisdiction of a court to award costs against "the real party" is limited to situations in which the true litigant

(a) puts forward a "man of straw", for example to afford protection against an adverse costs award;

(b) could have brought the action on his own behalf; and

(c) instigated another party to bring action instead.

None of these circumstances is present in this case.

III ✓ Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd., [1972] 3 O.R. 199

JJJ ✓ Currie v. Davidson (1922), 23 O.R. 3

KKK ✓ Re Sturmer and Town of Beaverton (1911), 25 O.L.R. 190; aff'd 25 O.L.R. 566, 2 D.L.R. 501

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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