[HIGH COURT OF AUSTRALIA.]

MILES . . . . . APPELLANT;
PLAINTIFF;

AND

COMMERCIAL BANKING Co. OF SYDNEY . RESPONDENT;
DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 25, 26.

Griffith, C.J., Barton and O'Connor, JJ.

Practice—New trial—Excessive Damages—Action for dishonor of cheque and libel—Misdirection as to measure of damages.

If a Judge at Nisi Prius wrongly directs the jury as to the measure of damages, and they give damages the amount of which can only be explained on the assumption that it was due to the improper direction, a new trial may be granted, although no specific direction on the point was asked for by defendant's counsel at the trial.

Knight v. *Egerton*, 7 Ex., 407, followed.

In an action by a trader for dishonoring cheques and for libel, contained in the memorandum written on a cheque in explanation of the dishonor, in which the plaintiff claims only general damages for injury to his credit and reputation, evidence that he lost a particular agency business, upon which the rest of his business depended, by reason of the dishonors or libel complained of, is not admissible. Such damage is special damage, and must be pleaded and proved.

In such an action the Court will grant a new trial on the ground of excessive damages if they think that, having regard to all the circumstances of the case, the damages are so large that no reasonable jury, properly applying their minds to the relevant evidence, could have given them.

Metropolitan Railway Co. v. *Wright*, 11 App. Cas., 152, explained; *Praed* v. *Graham*, 24 Q.B.D., 53, followed.

Judgment of the Supreme Court, (1904) 4 S.R. (N.S.W.), 223, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

The plaintiff brought an action against the defendant bank for dishonoring two cheques, and for a libel consisting of certain words written upon one of the cheques, giving the reason for dishonoring it. No evidence was offered at the trial by the defendant bank, and the case resolved itself practically into one of assessment of damages. The jury found for the plaintiff, with £800 damages. A new trial was granted by the Full Court, on the ground (*inter alia*) that the damages were excessive and that the verdict was against the weight of evidence. The facts sufficiently appear in the judgment of *Griffith*, C.J.

The plaintiff now appealed from the decision of the Full Court.

Bruce Smith, K.C., and *Rolin*, for the appellant. It cannot be said that the verdict was one which reasonable men could not honestly find. There was no contradiction of the plaintiff's evidence, and the evidence as to the profits previously made by the plaintiff justifies the amount of the verdict. Although there was no direct evidence that the plaintiff suffered the loss of his agency business in consequence of the dishonors or of the libel, there was evidence from which the jury might infer that that was the case, and his storekeeping business depended for its success upon the agency. The Supreme Court practically retried the case, and set aside the verdict because the amount of damages was much greater than they themselves thought the plaintiff ought to have recovered. The damages were practically at large. Substantial damages may be given although there is no evidence of actual loss; *Dowling* v. *Jones*, 2 N.S.W.L.R., 359, following *Marzetti* v. *Williams*, 1 B. & Ad., 415; *Rolin* v. *Steward*, 14 C.B., 595; *Odgers, Libel and Slander*, 3rd ed., p. 339. There is no standard by which the amount of damages can be tested; *Odgers, Libel and Slander*, 3rd. ed., p. 201. The fact that the Supreme Court thought the amount of the verdict larger than ought to have been given is not a sufficient ground for granting a new trial; *Duberley* v. *Gunning*, 4 T.R., 651; *Robey* v. *Oriental Bank*, 2 N.S.W. S.C.R. (N.S.), 56; *Solomon* v. *Bitton*, 8 Q.B.D., 176. It must be such as no reasonable men could have found; *Webster* v. *Friedeberg*, 17 Q.B.D., 736; *Metropolitan Railway Co.* v. *Wright*, 11 App. Cas., 152; *Commissioner for Railways* v. *Brown*, 13 App. Cas.,

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133; *Cross* v. *Goode*, 8 N.S.W.L.R., 255; *Phillips* v. *Martin*, 15 App. Cas., 193; *Ellis* v. *South British Fire and Marine Insurance Co.*, 10 N.S.W. W.N., 105; *Municipal Council of Brisbane* v. *Martin*, (1894) A.C., 249; *Australian Newspaper Co.* v. *Bennett*, (1894) A.C., 284; *Pearse* v. *Schwder & Co.*, (1897) A.C., 520. In libel cases the assessment of damages is peculiarly the province of the jury; *Bray* v. *Ford*, (1896) A.C., 44; *Davis* v. *Shepstone*, 11 App. Cas., 187.

Rolin followed. The loss of the agency was general, not special, damage. Where the libel is in reference to a man's trade, the jury are entitled to take into consideration as general damage a loss which is not specifically alleged, nor proved to have been the consequence of the libel, if it might naturally have been so caused; *Ratcliffe* v. *Evans*, (1892) 2 Q.B., 524; *Ingram* v. *Lawson*, 6 Bing. N.C., 212; *Harrison* v. *Pearce*, 1 F. & F., 567; 32 L.T. (O.S.), 298; *Odgers, Libel and Slander*, 3rd ed., p. 352. Evidence of it was admitted and left to the jury, without objection. It is impossible for the Court of appeal to say what amount of damages ought to have been awarded.

[GRIFFITH, C.J., referred to *Fleming* v. *Bank of New Zealand*, (1900) A.C., 577; and *Jones* v. *Spencer*, 77 L.T., 536.]

C. B. Stephen, for the respondents. The Court is bound to consider all the facts where the amount of damages is in question. The damages are clearly out of proportion to the injury which the plaintiff could have suffered; *Lees* v. *Evans*, 12 N.S.W.L.R., 7. The evidence was objected to on the question of damages, though the judge was not specifically asked to direct the jury to leave it out of consideration in assessing damages. The loss of the agency was special damage, and, therefore, should have been claimed in the declaration, and proved to have been the consequence of the dishonors or libel. Neither was done in this case. The loss of a particular individual's custom is special damage, and must be so alleged and proved; *Fleming* v. *Bank of New Zealand*, (1900) A.C., 577, at p. 587. Where there is no special damage proved, the amount of the verdict will be more severely criticised; *Cox* v. *E. S. and A. Bank*, (1903) Q.S.R., 294.

Bruce-Smith, K.C., in reply. The Judge was not asked to direct the jury that they must leave the damages out of their consideration. The evidence was material, and having been admitted, the jury were entitled to make what use of it they pleased, unless counsel had asked the Judge to direct them otherwise. The practice in this respect is the same in our Courts as in England. If counsel lies by, his client cannot avail himself of the point afterwards. Parties are bound by the course taken by their counsel at the trial; *Seaton* v. *Burnand*, (1900) A.C., 135.

[GRIFFITH, C.J.—A Judge cannot escape doing his duty owing to the silence of counsel at the trial. He is bound to inform the jury of the proper measure of damages; *Knight* v. *Egerton*, 7 Ex., 407.]

GRIFFITH, C.J. This is an appeal from a decision of the Supreme Court of New South Wales making absolute a Rule Nisi for a new trial on the ground that the damages awarded by the jury were excessive.

It was contended before us on behalf of the appellant that the power of the Court to grant a new trial on the ground that the damages are excessive is one which practically cannot be exercised except under very extraordinary circumstances. The true rule was laid down in the case of *Praed* v. *Graham*, 24 Q.B.D., 53, by Lord *Esher*, who said (p. 55), "If the Court, having fully considered the whole of the circumstances of the case, come to this conclusion only:—'We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them,' then they ought not to interfere with the verdict. If, on the other hand, the Court thinks that, having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them, then they ought to interfere with the verdict." That is really only an instance of the general rule which is followed by the Court in dealing with applications for new trials on the ground that the verdict of the jury is against the weight of evidence. In each case the Court must consider the whole of the circumstances and give its judgment in accordance with its view of the weight of those circumstances.

In view of the authorities that were cited by Mr. Bruce Smith,

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and which he contended laid down a different rule, it will be useful to refer to the latest case on the subject, *Jones* v. *Spencer*, 77 L.T., 536. It was a case before the House of Lords. Lord *Halsbury*, L.C., who had been one of the Judges in the case of *Metropolitan Railway Co.* v. *Wright*, 11 App. Cas., 152, speaking of that case, in which, in the opinion of Lord *Esher*, a new rule had been laid down, making it nearly if not quite impossible, short of perverseness on the part of the jury, to interfere with their verdict on the ground that the damages were excessive, said (p. 537): "Certainly, so far as I am concerned, in using the language which I am reported to have used in delivering judgment in the case of *Metropolitan Railway Co.* v. *Wright* (*supra*), I was not under the impression that I was suggesting any new rule. I merely gave expression to what I have always believed to be the rule ever since I entered the profession. It is a rule which I see no reason to alter, even if I had jurisdiction to do so, which I have not. . . . I have been looking into the authorities to see what can have given rise to the impression that it was a new rule, and I find that, in the case of *Rafael* v. *Verelst* (2 Wm. Bl., 987), now more than a century ago, *De Grey*, C.J., said in substance very much what I said in *Metropolitan Railway Co.* v. *Wright*." Then he goes on: "If there is a question of fact left to the jury, and they have reasonably answered it, their verdict cannot be disturbed. I am not aware of any observation of my own in the case of *Metropolitan Railway Co.* v. *Wright*, which would suggest any other rule than that which has certainly been held as established with the authority of that learned Judge more than a century ago. I have thought it right to say this because some misapprehension appears to have existed in the mind of Lord *Esher*, M.R., that your Lordships in this House had laid down a new rule. He appears to have said that now it is almost impossible to get a new trial; I am not aware of the impossibility, and I am not aware of any authority in this House to lay down any such new rule on the subject." In this judgment Lord *Herschell* concurred, as did also Lords *Macnaghten*, *Morris* and *Shand*.

Clearly, therefore, the Supreme Court was justified, and indeed bound, to inquire whether the verdict in this case was such as reasonable men, applying their minds to the material facts of the case, could have given. It is not advisable in cases of this kind

on appeal to say more than is absolutely necessary about the particular facts of the case, but, shortly stated, the facts are these. The plaintiff was a small storekeeper in the country, at a place called Bellinger, where he also acted as agent for a contractor named Fitzgerald in procuring timber sleepers in large quantities from the district. The storekeeping business, apparently, was not prosperous, and the plaintiff stated that what success it had was altogether dependent upon his retaining the position of agent for Fitzgerald. He examined the sleepers for him, approved of them, and paid the sleeper getters for them as they were brought in. In that way he was brought into contact with the men engaged in the trade, and got their custom for his store. Such prosperity as he enjoyed therefore depended directly or indirectly upon his agency for Fitzgerald. For the purpose of making payments for the sleepers money was advanced to him by Fitzgerald from time to time, and was placed to the plaintiff's credit in the defendant bank on a trust account. He paid the men by cheques drawn upon this account. No evidence was given on behalf of the defendant, so that the jury had before them only the plaintiff's view of the facts.

Before September, 1903, some difficulty had arisen with regard to the payment of the men for the sleepers, owing to delay on the part of Fitzgerald in sending remittances for that purpose, with the result that the plaintiff was unable to pay for the sleepers as promptly as was to be desired. On 14th September the plaintiff called a meeting of his creditors, but before that, on 21st August, he had had a cheque dishonored, drawn on his private account, for £10. Other cheques of his for £10 and £4 16s. 6d., had also been dishonored. One or two of the men had sued him for money due to them for sleepers, and in addition to that he had dishonored a promissory note. At the meeting of his creditors a resolution was carried that his estate should be sequestrated. That would, by the law of the State, be an act of bankruptcy. That was the position of the plaintiff's affairs in September, and from it can be gathered the value of his business and the extent of his credit, and, knowing the nature of the business, one can form an idea of the injury he would suffer in his credit and reputation by the dishonor of a cheque. It appears that on 17th

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September, four or five days after the meeting of creditors, the plaintiff gave a cheque for £2 to one of the timber cutters. This cheque, which was drawn upon the trust account, was dishonored on the 24th, and another cheque, for £2 5s. 0d., drawn upon the same account, was dishonored on the 28th. When the first cheque was returned by the bank it was endorsed "Drawer's estate sequestrated." The plaintiff then sued the defendant bank for dishonoring these two cheques, and also for libel, the libel being contained in the words written by the bank on the first cheque. At the time of the dishonor the plaintiff's estate had not been sequestrated. This statement was therefore inaccurate. But he had committed an available act of bankruptcy, and his estate was liable to be sequestrated at any moment. The defendants by their plea refuted this statement, and a point was made that the jury was justified by this plea in giving exemplary damages. Under the circumstances of the case I think there is nothing in this point. It appeared further that the plaintiff on 6th October made a composition with his creditors, having previously drawn the balance standing to the credit of the trust account and paid it to Fitzgerald. Shortly after that Fitzgerald discontinued operations in that district and transferred his business to another place. Plaintiff now complains that by the dishonor of the two cheques and by the publication of the defamatory statement already mentioned, he was injured in his credit and reputation, and claims damages in respect thereof. That was the only damage claimed, and that was how it was put by counsel, I suppose, to the jury. Now, the plaintiff evidently lost his business at Bellinger. But that altogether depended upon his being the agent for Fitzgerald in his dealings with the timber getters, and Fitzgerald, having ceased to obtain timber from that district, no longer needed an agent there. No evidence was given as to the cause of Fitzgerald's withdrawal. It is plain that the plaintiff would have lost this business whether the cheques had been dishonored or not. Now, the jury having had the evidence on this point of the loss of Fitzgerald's business left to them by the Judge, must be taken to have attached weight to it, and they appear to have given the plaintiff damages for the loss of this agency. But it is clear that, if the plaintiff intended to claim that he had lost the

agency by reason of the dishonor of the cheques and the libel, he was bound to allege it in his declaration and to prove it. That would be only fair to the defendants, for, if the matter had been alleged and so brought to their attention, they would have had an opportunity of inquiring into the matter and giving evidence to show that the loss had not been caused in that way. But the defendants were not put upon inquiry on this point, and it could not be given in evidence at the trial, and could not properly be taken into consideration by the jury in estimating the damage which the plaintiff had suffered. In the case of *Knight* v. *Egerton*, 7 Ex., 407, the Court held that it was the duty of the Judge to inform the jury what was the true measure of damages on the issues raised before them, whether the point was taken at the trial or not. In the present case, however, the learned Judge told the jury that they were entitled to take the probability of this loss into consideration. As the plaintiff had alleged that he made £400 a year out of the business, the jury may have arrived at the amount of their verdict by giving him damages to the extent of two years' profit. But, if Fitzgerald's business left him for other reasons altogether, that must be left out of consideration, and the only damage remaining is that which a man in the plaintiff's position would be likely to suffer in his credit and reputation by the dishonor of two small cheques. As the learned Chief Justice put it, the business of a man who had committed an available act of bankruptcy, who had had cheques previously dishonored, who had just made a composition with his creditors and had only a deficiency of £32, must have been in a very small way of business indeed. Regarded from that point of view, the award of £800 damages is manifestly absurd, as compared with the loss which he could have sustained in such a business under the circumstances. The learned Judge was wrong in giving the direction that he did, and the jury must be assumed to have attached weight to that direction in assessing the amount of damages. That in itself would be a sufficient ground for granting a new trial. But, even if it were not, the jury could not have properly applied their minds to the only question which they had to try. Supposing they had been properly directed, they should have been told that they could not give vindictive damages, but merely compensation for

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the injury the plaintiff was likely to suffer in his business as a natural and probable consequence of the dishonors and the libel. They were not entitled to take into consideration the possible chance of plaintiff's continuing to be employed as the agent for Fitzgerald, nor the possibility that Fitzgerald would have continued to carry on business there if the cheques had not been dishonored. There was no evidence whatever to connect Fitzgerald's abandonment of that district with the dishonours or the libel. The amount of the verdict was, therefore, entirely out of proportion to any loss which the plaintiff could possibly have suffered, and was such as no reasonable men, understanding the subject to which they ought to apply their minds, could have found. I think, therefore, that the judgment of the Supreme Court was quite right.

As to the point of misdirection, when the objection is such that the damages awarded are excessive, and only to be explained on the assumption that they were due to an erroneous idea in the minds of the jury, the point need not have been formally taken at the trial.

For these reasons I am of opinion that the appeal fails and must be dismissed, unless the plaintiff agrees to a reduction of the damages and to accept a reasonable sum instead of £800. If I am asked my opinion, I think that the £100 suggested by *Darley*, C.J., would be a very fair amount under the circumstances.

BARTON, J., and O'CONNOR, J., concurred.

Bruce Smith, K.C., for the plaintiff, stated that the plaintiff would not agree to accept the £100 suggested, and the appeal was therefore dismissed.

Appeal dismissed with costs.

Solicitors, for appellant, *Sly & Russell.*

Solicitors, for respondents, *Cape, Kent & Gaden.*