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Court : House of Lords

Decided On : Jul-28-1916

Judge : Lord Viscount Haldane, Lord Sumner, Lord Parmoor, Lord Wrenbury

Appeal No. : [1916] UKHL 2

Appellant : Jones

Respondent : Jones and Another

Advocate for Def. : Mr. Artemus Jones

Judgement :

VISCOUNT HALDANE

My Lords, the question in this appeal is whether the appellant, who was plaintiff in the action, can recover general damages for an untrue verbal imputation of immoral conduct with a married woman. He is a certificated teacher and is the senior master of a council school in Wales. It is not in dispute that the imputation of such conduct, if believed, would be seriously prejudicial to a person in his position, and might lead to the loss of an appointment which, concerned as it is with the teaching of the young, implies in the person who holds it freedom from reproach of this kind. At the same time it must be remembered that the position of a certificated teacher is not unique in this respect, for there are many other appointments that are held on a similar condition, express or implied.

The school in which the appellant was employed was looked after by his aunt, as caretaker, and she was in the habit of employing the husband of a Mrs. Ellen Roberts to do some of the cleaning. The respondent, Mrs. Jones, is found by the jury before which the action was tried to have spoken words imputing moral misconduct between the appellant and Mrs. Roberts. Mrs. Jones was the defendant in the action, and her husband was joined as being liable for his wife's tort. The jury found further, in response to questions from Lush J., who tried the case, that the words "were spoken of him in the way of his calling, that is, in such a way as to imperil the retention of his office," and further that "the words imputed that he was unfit to hold his office." It is, however, clear that there was no evidence that any words were used which referred to his office or his conduct in it, and the first part of the finding cannot be relied on as anything more than an inference. Nor was there any evidence of the use of words which could, by the terms used, bear out the second part of the finding. It was, moreover, not alleged that the appellant had been dismissed or otherwise pecuniarily injured in his calling, and indeed there was no evidence whatever of special damage. The jury, however, assessed general damages at 10 l. Upon these findings Lush J. reserved the question of law, whether the appellant was entitled to judgment, and afterwards, having heard arguments, delivered a considered opinion, as the result of which, after examining the authorities, he decided for the appellant. In the course of the argument before him, counsel for the present respondents admitted that the local educational authority would naturally not allow a teacher to remain in the school and teach children if he were carrying on an immoral intercourse. But he said that his admission was meant to have nothing in it distinctive of the office of a teacher, and that he admitted only what would apply equally in the case of other offices.

The Court of Appeal reversed the judgment of Lush J. and entered judgment for the respondents.

After examining the authorities, I have come to the conclusion that the Court of Appeal were right, and that the judgment of Lush J., notwithstanding the care which he had obviously bestowed on it, cannot be supported. He seems to have regarded the decided cases as having laid down a broad principle, which could be legitimately extended to a case like the present. My Lords, I think that is not so.

The action for slander has been evolved by the Courts of common law in a fashion different from that which obtains elsewhere. As one of the consequences the scope of the remedy is in an unusual degree confined by exactness of precedent. It is not for reasons of mere timidity that the Courts have shown themselves indisposed to widen that scope, nor do I think your Lordships are free to regard the question in this case as one in which a clear principle may be freely extended. Lord Herschell, in his judgment in *Alexander v. Jenkins*(1), remarked of this very point that "when you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions to meet cases which fall within the same principle; but where we are dealing with such an artificial law as this law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of cases in which it has not hitherto been held to lie, it is the Legislature that must make the extension and not the Court." There is a difference between slander and libel which has been established by the authorities, and which is not the less real and far-reaching because of the fact that it is explicable almost exclusively by the different histories of the remedies for two wrongs that are in other respects analogous in their characters. The greater importance and scope of the action for libel was mainly attributable to the appearance of the printing press. The Court of Star Chamber quickly took special cognizance of libel, regarding it not merely as a crime punishable as such, but as

(1) [1892] 1 Q. B. 797, 801.

a wrong carrying the penalty of general damages. After the Star Chamber was abolished by the Long Parliament much of the jurisdiction which its decisions had established and developed in cases of libel survived, and was carried on by the Courts of common law to whom it passed.

The history of the action for slander is radically different. Slander never became punishable in the civil Courts as a crime. In early days the old local Courts took cognizance of it as giving rise to claims for compensation. When these Courts decayed, the entire jurisdiction in cases of defamation appears to have passed, not to the Courts of the King, but, at first at all events, to the Courts of the Church.

However, after the Statute of Westminster the Second had enabled novel writs in consimili casu to be issued, the action on the case for spoken words began to appear as one which the Courts of the King might entertain. Subsequently to the Reformation, when the authority of the Courts of the Church received a heavy blow and began to wane, the Courts of the King commenced the full assertion of a jurisdiction in claims arising out of spoken defamation concurrent with that of the spiritual tribunals. As might have been expected of civil Courts, whose concern had been primarily with material rights and not with discipline as such, the new jurisdiction in claims based on slander appears to have been directed to the ascertainment of actual damage suffered and to a remedy limited to such damage. This explains the restricted character of the development of the remedy and the tendency to confine its scope by the assertion that actual damage was the gist of the action. The observations of Pollock C.B. in the course of his judgment in *Gallwey v. Marshall*(1) illustrate the importance of these considerations. The rule thus established was to some extent relaxed in its form by decisions which in certain nominate cases treated particular types of slander as so injurious by their very nature that the suffering of actual damage might be presumed and need not be proved. These exceptional types of slander comprised imputations of the commission of serious criminal offences, imputations of suffering from certain noxious diseases, and imputations of special forms of misconduct which would manifestly prejudice a man in his calling. But, as a general principle, as to the actionable character of

(1) 9 Ex. 294.

words spoken of a man to his disparagement in his calling the Courts, with an exception to which I will refer later, appear on the balance of authority to have laid down the limitation that the words must have been actually spoken of him "touching" or "in the way" of that calling. In *Lumby v. Allday*(1) Bayley B. said: "Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, and c., or connects the imputation with the plaintiff's office, trade, or business." In speaking of the imputation of such a want of "general requisite" as actionable in itself I think that Bayley B. was referring to certain decisions which show that, in the case of a trader, the Courts

construed language which might affect his credit to be presumed to be directed against his credit as a trader, although no express "colloquium" touching his trade had been proved. The Courts, who leaned specially to the protection of traders, appear to have made this presumption almost, if not quite, as matter of law for the security of commerce. But Bayley B. observed that the words must be such as to have "a natural" as distinguished from a merely probable tendency to damage the plaintiff's reputation in his calling. In *Jones v. Littler*(2) Parke B. laid down this exception to much the same effect. A brewer was alleged to have been locked up for debt. It was found that in the "colloquium" he had been referred to as a brewer. But Parke B. said that "even if" the words "were spoken of him in his private character, I think the case of *Stanton v. Smith*(3) is an authority to shew that the words would have been actionable, because they must necessarily affect him in his trade." The older case of *Reeve v. Holgate*(4) lays down the rule similarly. But it proceeds on the ground that the words themselves supply the "colloquium," for "they appear to be spoke of his trade." This readiness to make a presumption as regards language which might affect the credit of a trader of damage arising from words alleging insolvency, notwithstanding that the imputation is not in terms made about him in his capacity of trader, has not been extended to other callings. There is indeed at least one other illustration of such readiness disclosed by the books in the case of a clergyman who holds a benefice or an ecclesiastical position of temporal profit

(1) 1 Cr. and J. 301, 305.

(2) 7 M. and W. 423, 426.

(3) 2 Ld. Raym. 1480.

(4) (1671) 2 Lev. 62.

which may, by the very terms on which it is held, be put in peril of forfeiture by the slander. But this is an exception which has no application, notwithstanding peril of injury to his reputation in his calling, if the clergyman does not hold his benefice or position actually on these terms. Subject to the carefully-guarded exceptions to which I have referred, the rule is that laid down in *Comyns' Digest*, "Action upon

the Case for Defamation" (D. 27): "But words not actionable in themselves, are not actionable, when spoken of one in an office, profession or trade, unless they touch him in his office, and c." In *Doyley v. Roberts*(1) Tindal C.J. applied the law as laid down in this passage by refusing relief to an attorney of whom it was falsely said that he had defrauded his creditors and been horsewhipped off the course at Doncaster. That this is the basic principle which limits the cases in which the common law permits general damages to be awarded was laid down in striking language in the judgment of the Court of King's Bench in *Ayre v. Craven*(2), delivered by Lord Denman C.J. "Some of the cases," he said, "have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery; and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution. Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay." There a physician had been accused of adultery, but the words did not in terms connect the imputation with anything done by him when acting in a professional capacity. This decision was followed in *James v. Brook*(3), when it was said that "even if the words have a natural tendency to produce injury in the profession, the declaration is wholly wanting in any explanation of the way in which the speaker connected the conduct with the profession."

My Lords, I think that these authorities and others which were referred to in the arguments at the Bar have settled the law too firmly to admit of our extending the exceptions which have been made further than the decided cases go. I agree with what was said by Lord Herschell in the judgment in *Alexander v. Jenkins*(4), which I have already quoted, and with the carefully-guarded judgment

(1) 3 Bing. N. C. 835.

(2) 2 Ad. and E. 2, 7.

(3) 9 Q. B. 7, 14.

(4) [1892] 1 Q. B. 797.

of Swinfen Eady L.J. in the present case. If we were to admit that an action for slander can lie in the case of a schoolmaster who has not proved either that the words were spoken of him "touching or in the way of his calling," or that he has suffered the actual damage which is the historical foundation of the action, and is even now its normal requisite, I think we should be overruling *Ayre v. Craven*(1) and other decisions of great authority, and should be doing what only the Legislature can do to-day. It required an Act of Parliament, the Slander of Women Act, 1891, to enable a woman to recover general damages for an imputation of unchastity. In my opinion it would require an analogous Act to enable the present appellant to recover such damages for an imputation of adultery which was not obviously directed to his reputation as a schoolmaster. I am therefore of opinion that we have no option to do anything but dismiss this appeal with costs.

LORD SUMNER .

My Lords, the facts of this case are of a familiar kind. The appellant, Mr. David Jones, is headmaster of the Llidiardau Council school, Rhoshirwaen, Pwllheli. He is an unmarried man and lives with his aunt. In May, 1914, Ellen Jones, who is a farmer's wife, told Elizabeth Jones, and, as was alleged, Eliza Griffiths too, that Mr. David Jones had committed adultery with Ellen Roberts. What is more, she added that Ellen Roberts herself had told her so. This came to the appellant's ears, and no doubt not to his alone, and he sued Ellen Jones and her husband for slander. A Carnarvon common jury awarded him 10 l. , which seems to show that they thought it an ordinary matter, but it is only fair to him to say that the defendants did not venture to support the charge, and for their part had no merits whatever. It is accordingly just the sort of case in which a contention fundamentally challenging long-settled law would be brought before your Lordships.

Lush J. at the trial put to the jury, with other questions, these two: "Were they (the words charged) spoken of him (the plaintiff) in the way of his calling, i.e., in such a way as to imperil the retention of his office?" and "Did they impute that he was unfit to hold his office?" The jury said "Yes" to both. Evidence of the suggested tendency to affect the plaintiff in his office was not called, an

(1) 2 Ad. and E. 2.

admission having been made by counsel for the defendants. Of this admission two versions exist. The difference in form is slight, and no difference in substance was intended, but I think that the one actually made before verdict, in the hearing of the jury, is the one that should prevail. The substance of it, according to the shorthand note, is:-

"Lush J.: 'Can you suggest, Mr. Artemus Jones, that if a schoolmaster, in a place like this, is found misconducting himself with a married woman he is not likely to suffer in his employment?'

Mr. Artemus Jones (for the defendants): 'I submit that he would suffer no more than a man following any other occupation, and I submit again that in order to get this evidence in, the foundation-stone must be laid - that the words were spoken of him in the way of his profession.'

Lush J.: 'But you don't want evidence to show that he would not be kept in his employment if he misconducted himself in this way, but it does not follow that the words were spoken of him in the way of his profession.'

Mr. Montgomery (for the plaintiff): 'This is a fact upon which evidence ought to be given.'

Lush J.: 'Then you may take it that it would be injurious.'"

The words of the slander itself made no allusion to the appellant's calling at all, and Elizabeth Jones, to whom they were spoken, when asked in cross-examination "The words were spoken to you not in reference to his position as a schoolmaster at all?" said "Not at all." As for Eliza Griffiths, she failed even to prove publication. I therefore agree with the judgment of the Court of Appeal that "there was no evidence to leave to the jury on the first part of question 2, namely, 'Whether the words were spoken of the plaintiff in the way of his calling,' "and counsel's admission was merely that such words would be of an injurious tendency in the case of most men, including the plaintiff. The question, therefore, comes to be this: "In the absence of proof of special damage, of which none was given, is an imputation of adultery made against a man, who is in fact a

schoolmaster but is not spoken of as such, a matter which is actionable per se?"

My Lords, I think it was recognized in the appellant's argument that such an imputation does not necessarily and always do harm. The form in which the appellant's proposition was eventually advanced was that words are actionable per se the natural consequence of which in ordinary circumstances would be to injure the person of whom they are spoken, or, alternatively, that words which impute to one who follows a particular calling the want of a general requisite for persons in that calling are, as a natural consequence, damaging to them, and are therefore actionable without proof of special damage.

On this contention the following observations arise at the outset. If words spoken of a person following a particular calling are actionable per se, when they impute the want of a general requisite for that calling, how came it that a statute was required in 1891 to enable a woman to sue for an imputation of unchastity, whether she was in employment or not, in the absence of proof of special damage? A reputation for chastity was certainly a general requisite for many of the employments of women before 1891, and, considering that judges have not been unfriendly to such plaintiffs, I think it would have been held to be generally requisite in almost all if such a conclusion would have done the victim of the slander any good. Nevertheless the Act had to be passed, because without it no woman had a remedy for spoken charges of unchastity, unless they were either spoken of her in the way of her calling or were followed by provable damage.

Next, how comes it that several generations of pleaders, in days when pleadings followed the law and often were its best expression, always averred that slanders were spoken "of and concerning the plaintiff in his profession or calling," stating it? Nobody ever pleaded that the plaintiff's calling was this or that, and the defendant spoke and published of him the words following, meaning thereby that he was lacking in some quality generally requisite in his said calling; yet such an averment, if good, would have helped many a lame case over the stile. Nobody ever tried to demur to the averment that the words were spoken of and concerning the plaintiff in his profession or calling. On the contrary, such an averment was expressly held to be proper and necessary: *James v. Brook*.⁽¹⁾

Thirdly, except in the case of slanders imputing incontinence to beneficed clergymen of the Church of England and slanders imputing insolvency to persons who in fact are tradesmen (which last is

(1) 9 Q. B. 7.

probably not a real exception), no plaintiff, at least since the time of Comyns' Digest, has ever recovered damages for a spoken imputation of incontinence, unless he either showed that the words were spoken of him in his calling or proved actual damage. Earlier cases, so far as they seem to be to the contrary, can, I think, be accounted for. They are often badly or too briefly reported; they are often cases in which after verdict the necessary allegation and proof that the words were spoken of and touched the plaintiff in his calling were presumed as a matter of course. How is this blank in the authorities to be explained, if the appellant's proposition be sound? For three centuries the Courts have been dealing with such imputations. They are, and long have been, - such is the weakness of our nature - a favourite weapon in the armoury of controversialists, male and female, in private life, and mankind has so often acted on the proverb that "hard words break no bones," that special damage has rarely been proved to have occurred. My Lords, before these considerations can be answered, it must be shown that the law has long been grievously misunderstood, and that requires cogent proof indeed.

My Lords, I will not cite at length the case of *Ayre v. Craven*.⁽¹⁾ I will only observe that, according to the report in the Law Journal⁽²⁾, the plaintiff was an ordinary doctor at Hull, and so did not belong to that class of medical practitioners, which the appellant's counsel postulated but never defined, for whose professional wellbeing a reputation at least for continence was said not to be a general requisite. Instead I will refer to three cases long ago decided, and never, so far as I know, authoritatively impugned. In *Doyley v. Roberts*⁽³⁾, in 1837, the jury found, first, that the words were not spoken of the plaintiff in his business as an attorney, but, second, that the words had a tendency to injure him professionally. It was held in banc that this was a verdict for the defendant. As Vaughan J. said, "When the jury found that these words were not spoken of the plaintiff in his character of attorney, they took the sting out of the imputation," and the passage from Comyns'

Digest was cited with approval, which says "words not actionable in themselves, are not actionable when spoken of

(1) 2 Ad. and E. 2.

(2) 4 L. J. (K.B.) (N.S.) 35.

(3) 3 Bing. N. C. 835, 840.

one in an office, profession or trade, unless they touch him in his office."

Ten years afterwards, in *Pemberton v. Colls*(1), the Court of Queen's Bench had before it the following proposition from Starkie on Slander: "Where a person holds an office or situation, in which great trust and confidence must be reposed in him, words which impeach his integrity generally, though they contain no express reference to his office, are actionable; since they must necessarily attach to him in his particular character, and virtually represent him as unfit to hold that office or situation." In a considered judgment the Court rejected it. I think that virtually this is the very proposition which is before your Lordships to-day.

In delivering the judgment of the Court of Exchequer in *Foulger v. Newcomb*(2) in 1867 Channell B. says: "One essential ingredient of a good cause of action for defamation is damage. The rules as to the cases in which such damage is implied by law are somewhat arbitrary; but the more important principles of them are now clearly defined. First, that from spoken words which impute misconduct in an office, trade, profession or business, the law implies actionable damage. Secondly, that they are actionable if they are shown actually to cause (as their legal and natural consequence) damage of a character which the law will recognise. In order that the rule as to slander of a man in his business may apply, it is necessary that the words (being capable of having reference to his business) should in fact be spoken of him in respect of his business. Next, it must appear that they tend to prejudice him in that business."

My Lords, Lush J., in the judgment which the appellant supports, disputes the necessity thus alleged by Channell B. "I have come to the conclusion," he says, "that in certain cases depending on the circumstances of the case, it is not

necessary, in order to maintain an action, for the plaintiff to establish that the speaker did impute to the person defamed that he was guilty of some misconduct in the course of discharging the duties of his office. I think the expression 'in relation to his calling,' does not refer to the words used by the speaker in my opinion the meaning of that expression is this, that if the plaintiff cannot prove special damage,

(1) (1847) 10 Q. B. 461, 468.

(2) (1867) L. R. 2 Ex. 327, 330.

he must prove that the words were spoken of him in such a way and with such consequence, having regard to his calling that the words spoken would necessarily affect him in the following of that calling."

It was in the last words of this proposition that the appellant's counsel, at your Lordships' Bar, preferred to substitute for "necessarily" the words "as a natural consequence," or words to that effect. The learned judge relied on a class of cases in which it has been held that words imputing want of credit or insolvency to a person who, in fact, is a tradesman are actionable per se, even though the speaker has not, by his words or otherwise, shown that the imputation is made upon the plaintiff in his trade. *Best v. Loit*(1) is an early instance. Others are *Stanton v. Smith*(2) and *Whittington v. Gladwin*.(3) It is unnecessary to examine such cases in detail, for the reason for them is this, as given by Parke B. in *Jones v. Littler*(4): "Here the imputation is that of insolvency, which must be injurious; for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured." The explanation is thus peculiar to the case of tradesmen. The rule appears to be one going rather to the construction of the words used and laying down that mention of want of credit implies prima facie a reference to some trade involving credit, than one going to the question whether words can be actionable per se except words imputing crime or certain diseases or actually touching the party defamed in his trade. In any case, it has not been carried beyond cases of tradesmen, nor could it be said here that the imputation was one which must necessarily have been injurious to a schoolmaster. On the contrary, to use Parke

B.'s observation on *Ayre v. Craven*(5) and *Doyley v. Roberts*(6), "it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters."

I think that, apart from this line of cases about tradesmen, Lush J. founded himself on a misreading of the often-quoted expression of

(1) 1 Roll, Abr. 59 (case 6).

(2) 2 Ld. Raym. 1480.

(3) (1826) 5 B. and C. 180.

(4) 7 M. and W. 423, 426.

(5) 2 Ad. and E. 2.

(6) 3 Bing. N. C. 835.

Bayley B. in *Lumby v. Allday*(1), "either shows the want of some general requisite, as honesty, capacity, fidelity, and c., or connects the imputation with the plaintiff's office, trade, or business." He treated this sentence as laying down two criteria of slanders actionable per se, either of which would suffice, as if words connecting the imputation with the plaintiff's office stood in contradistinction to words which did not so connect it with his office, but merely imputed to him the want of something which would be generally requisite for such office. This sentence, however, only purports to summarize the authorities, and in the sense in which it was understood by Lush J. the authorities do not bear it out. Furthermore, the general requisites of which it speaks are qualities at large, whether moral or intellectual, and such qualities only become requisites when they are requisite for something else. Fidelity, for example, is a requisite of an employment of trust. Capacity implies such kind of capacity as the particular occupation requires. Thus the first part of the sentence, like the second, involves a reference to the plaintiff's calling; it opposes an imputation of the want of some general requisite for that calling to particular imputations on his conduct in that calling. I agree with the passage in the judgment of the Court of Appeal(2): "In our opinion, words imputing adultery,

profligacy, immoral conduct, or the like, whether referring to behaviour on a particular occasion or to conduct in general, even when spoken of a man holding an office or carrying on a profession or business, are not actionable without special damage unless they relate to his conduct in the office, profession, or business, or the imputation is connected with his professional duties."

My Lords, it has often been said that the right to sue for words spoken, when no damage can be proved, ought not to be extended. As Martin B. observes in *Allsop v. Allsop*(3), "The law is jealous of actions for mere words, and the rules limiting these actions ought to be adhered to here." I am sure that no one who has had even a short experience of the business of an ordinary civil assize would question the wisdom of this caution. If a change of the law is desired, it is from the Legislature, as it was in 1891, that relief must be sought. It could be simply obtained either by enacting that

(1) 1 Cr. and J. 301, 305.

(2) [1916] 1 K. B. 351, 360.

(3) (1860) 29 L. J. (Ex.) 315, 317.

a schoolmaster, and c., should be deemed to be a woman within 54 and 55 Vict. c. 51, s. 1, or that, for the purposes of actions of slander, imputations of incontinence in a man should be deemed to be imputations of a criminal offence, punishable by imprisonment. In the first case as to costs (no unimportant matter in these cases) a man's position would be equal, and in the latter superior, to a woman's.

My Lords, this part of the law of slander has sometimes come in for pretty sharp criticism, particularly from the judges who have applied it. The Court of Appeal in the present case says(1) "the law of slander is an artificial law It is not like a law founded on settled principles, where the Court applies established principles to new cases, as they arise." I think this does the common law on the subject less than justice. The law of defamation is founded on settled principles. Defamation, spoken or written, is always actionable if damage is proved, and, even if it is not, the law will infer the damage needed to found the action (1.) when the words are

written or printed; (2.) when the words spoken impute a crime punishable with imprisonment; (3.) when they impute certain diseases naturally excluding the patient from social intercourse; (4.) when words are spoken of a person following a calling, and spoken of him in that calling, which impute to him unfitness for or misconduct in that calling. The classification is one of words, not of persons, but it is a classification only. There is no reason why all four classes of words should be held to import legal damage for the same or for some analogous reason. I think these rules are as well established, as worthy of being called principles, and as capable of being applied to new cases when they arise, as are most rules or principles of law or equity. Perhaps they are neither ideally just nor ideally logical, but principles are like that. For myself I am quite content to take the law as I find it.

My Lords, I think that the appeal should be dismissed with costs.

LORD PARMOOR .

(2) My Lords, the appellant is a schoolmaster appointed to that office by the Carnarvonshire County Council. The female respondent spoke words imputing to him moral misconduct with a married woman. There was no proof of damage and

(1) [1916] 1 K. B. 358.

(2) Read by Lord Sumner.

no imputation of misconduct in the discharge by the appellant of his office as teacher. The words were spoken of him in his private character. The jury found that the words were spoken of the appellant in such a way as to imperil the retention of his office. It was proposed at the trial to call Mr. Evan R. Davies to give evidence on the question whether the alleged slander would tend to lose the appellant his employment. The learned judge thought it was not necessary to call evidence on a matter which no one could doubt. Mr. Artemus Jones, counsel for the respondents, did not question this inference, but made it quite clear that in his opinion no action would lie unless the words were spoken of the appellant in the way of his profession, and that the words must be distinctive - that is to say, of such a character as would, in a special manner, be injurious to a teacher as

distinguished from any other public officer. "The admission I made was that undoubtedly a public authority would remove him, just as I submit it would remove any other of its servants." Without determining how far the question is one for the jury, or of inference by the judge, in this instance the judge and the jury took the same view, and I think the case must be considered on the basis that the words spoken were such as would necessarily imperil the continuance of the appellant in his office as teacher.

The principle that damage of some kind is essential to maintain an ordinary action of slander is not open to question. There are, however, certain cases in which the law assumes the probability of damage without requiring proof. It is not necessary that the damage should be pecuniary. This is illustrated in an action for words imputing that the plaintiff is suffering from certain forms of contagious disease, which tend to ostracize him from society. In this case the law will assume damage without requiring proof, as also in cases in which a criminal offence is imputed to the plaintiff, or in which the words spoken impute to the plaintiff misconduct, or want of skill or capacity, in the duties or requirements of his office, profession, or trade. There is a further case of much difficulty, where the words on which the action is founded are spoken of the plaintiff in his private character, but impute to him the want of some quality or capacity requisite to render him a fit person to hold the office in which he is, or to pursue the profession or vocation in which he is engaged. The most common instance is that of words which impute dishonesty to a trader, in which case the law assumes damage without requiring proof. The question in debate is whether words spoken, which impute to a teacher moral misconduct with a married woman, are actionable per se upon probability of damage and come within the category of those cases in which the law assumes damage without requiring proof.

The principle above referred to is illustrated in three cases to which reference was made during the argument before your Lordships. In *Lumby v. Allday*(1) Bayley B., who delivered the judgment of the Court, said: "Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, and c., or connects the imputation with the plaintiff's office, trade, or business." This passage does not purport to say that whenever words import the

want of some general requisite they are actionable without proof of damage, but that they are not actionable unless they comply with one or other of the two conditions.

In *Jones v. Littler*(2) Parke B. says: "The learned judge did leave the question to the jury, whether the words were spoken of the plaintiff in his trade; and, indeed, it is plain that the words were so used, from the fact, that in the conversation in question, the plaintiff was spoken of as a brewer. Independently of that, however, and even if they were spoken of him in his private character, I think the case of *Stanton v. Smith*(3) is an authority to show that the words would have been actionable, because they must necessarily affect him in his trade. It is there said: 'We were all of opinion that such words spoken of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore that they were actionable.'"

Parke B. then distinguishes the case he is considering from *Ayre v. Craven*(4) and *Doyley v. Roberts*(5) on the ground that "it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters. But this case is distinguishable, because here the imputation is that of insolvency, which must be injurious; for if a

(1) 1 Cr. and J. 301, 305.

(2) 7 M. and W. 423.

(3) 2 Ld. Raym. 1480.

(4) 2 Ad. and E. 2.

(5) 3 Bing. N. C. 835.

tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured. The case of *Stanton v. Smith*(1), as it appears to me, is good law, notwithstanding the observations of Coltman J. in *Doyley v. Roberts*."(2)

Parke B. does not say that he would have come to the same conclusion as Lord Denman in *Ayre v. Craven*(3), and in *Gallwey v. Marshall*(4) Alderson B. said: "There are certain professions, the proper exercise of which depends on morality; and except for the case of *Ayre v. Craven*(3), I should have thought that that of a physician is one of them."

In *Alexander v. Jenkins*(5) Lord Herschell said that with regard to a man's business, profession, or any office of profit, the words spoken to be actionable per se "must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would show that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office. So much with regard to offices of profit; the reason being that in all those cases the Court will presume, or perhaps I should rather say the law presumes, such a probability of pecuniary loss from such imputation, in that office, or employment, or profession, that it will not require special damage to be shewn. It may be said to be an arbitrary rule. Be it so; but the rule is, at all events, laid down, and seems to me to rest on that basis."

Sir Robert Finlay, in his exhaustive review of all the relevant cases, did not bring any to the notice of your Lordships in which an imputation on a plaintiff's moral character in his private life had been held to be actionable without proof of damage, except the case of a clergyman in the Church of England, when accused of misconduct which might cause him to be deprived of his benefice, in which he otherwise had a freehold interest, or to lose a chaplaincy from which he can be removed: *Pemberton v. Colls*(6); *Payne v. Beuwmorris*.(7) It does not follow that words which would be

(1) 2 Ld. Raym. 1480.

(2) 3 Bing. N. C. 835.

(3) 2 Ad. and E. 2.

(4) 9 Ex. 294, 297.

(5) [1892] 1 Q. B. 797, 800.

(6) 10 Q. B. 461.

(7) 1 Lev. 248.

actionable in the case of a beneficed clergyman would be actionable if he is unbeneficed or without any other preferment: *Gallwey v. Marshall*.⁽¹⁾

It was argued on behalf of the appellant that, although no precedent could be found in the books, the case came within a principle which had been already recognized, and that the words spoken are actionable per se since they could not fail to be injurious to the plaintiff and imperil the continuance of his office as teacher. If the matter was open, I think that there is much weight in this argument. It is difficult to find any distinction in principle between a charge of dishonesty made against a trader in his private character and a charge of immorality made against a teacher in his private character. A teacher holds an office of high importance and responsibility, involving the care of the morality and character of his pupils. Apart from the finding of the jury, I agree with the conclusion of Lush J. that the words spoken, which imputed to the appellant moral misconduct with a married woman, cannot fail to be injurious to him in the office which he holds. The conclusion which might naturally be drawn is that the law would assume damage without requiring proof. I am forced, however, to an opposite conclusion. The matter is not open. As the law of slander stands, words imputing moral misconduct to a plaintiff who holds an office such that the imputation cannot fail to be injurious to him are not actionable without proof of special damage unless they relate to his conduct in the office, or import an imputation connected with his official duties. Accepting, in this respect, the view taken by the Court of Appeal, it is unnecessary to consider the numerous cases to which your Lordships were referred. The judgment of Lord Denman in *Ayre v. Craven*⁽²⁾ is directly in point. Dr. Ayre, a physician, was accused as being a party in a crim. con. affair that had been long talked about, the innuendo being moral misconduct with a married woman. Lord Denman, after citing Bayley B.'s judgment in *Lumby v. Allday*⁽³⁾, says: "In the present case much doubt was entertained, whether the words were not actionable within the rule just adverted to. For, being laid as spoken of the plaintiff as a physician, in which character he may have opportunities

(1) 9 Ex. 294.

(2) 2 Ad. and E. 2, 8.

(3) 1 Cr. and J. 301.

of abusing the confidence reposed in him, to commit acts of criminal conversation, the statement must be thought large enough to admit such proof to be adduced on the trial, in which case the necessary proof would be presumed to have been given, and the judgment ought not to be arrested. But, after full examination of the authorities, we think that, in actions of this nature, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession. For this defect the judgment must be arrested." The law as stated by Lord Denman has been accepted in later cases, and it cannot now be altered without an act of the Legislature.

If it is necessary to find an historical reason why the imputation of immorality has been treated in a different way from the imputation of dishonesty, it may be found in a passage in Blackstone's Commentaries, book 3, ch. 8, p. 124. "So scandals, which concern matters merely spiritual, as to call a man heretic or adulterer, are cognizable only in the Ecclesiastical Court; unless any temporal damage ensues, which may be a foundation for a *per quod*." Up to 1855 a person in the position of the appellant still had a nominal remedy in the Ecclesiastical Courts, which had power to inflict penance on the defendant, though not to award damages to the plaintiff. By the statute 18 and 19 Vict. c. 41 the power of the Ecclesiastical Courts "to entertain or adjudicate upon any suit for or cause of defamation" was taken away, but no change was made in the remedies available in the secular Court. A further argument against the contention made on behalf of the appellant may be found in the Slander of Women Act, 1891. Up to this date charges of unchastity or immorality against women were not actionable without proof of special damage. Sect. 1 enacts that words spoken and published after the passing of the Act which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable, provided always that in any action for words spoken and made actionable by the Act a plaintiff shall not recover more costs

than damages, unless the judge shall certify that there was reasonable ground for bringing the action. If protection from imputations of unchastity or adultery in their private character is to be extended to men by giving a right of action without the necessity of proof of special damage, this is a matter not for your Lordships, but for the Legislature.

My Lords, the appeal fails and should be dismissed.

LORD WRENBURY .

My Lords, slander is actionable only if either (1.) special damage is proved, or (2.) the imputation is such and the state of facts proved is such as that the law presumes or infers damage, or (3.) the case falls within the Slander of Women Act, 1891. This is a concise, and I hope an accurate, statement of the law.

Damage includes, but is not confined to, pecuniary damage. Slander by imputation of contagious disease, such as leprosy, is actionable. The damage in such case is the exclusion of the plaintiff from society. Slander by imputation of misconduct in an office which is not an office of profit is actionable. The reason for this is not very clear, but would seem to be that the slander might, if true, show that the man ought to be deprived of his office: see Lord Herschell in *Alexander v. Jenkins*.⁽¹⁾ At any rate it is not pecuniary damage. The damage need not be (although in most cases it is) pecuniary, but there must be damage proved or as matter of law presumed.

The fact that the imputation is a gross and grievous attack upon personal character is not of itself enough. For otherwise a statute would not have been necessary to enable a woman or a girl to sue for slander upon her chastity. The imputation must be such and the state of facts such, not as that a judge would necessarily or reasonably presume or infer damage, but as that judges in the past have presumed or inferred damage. This involves a confession which I fear must be made that the law of slander rests not upon any principle whose elasticity will admit new cases, but upon artificial distinctions. An artificial and arbitrary rule is not a principle. The plaintiff must for success bring his case within the very limited class of cases in which slander has been held actionable. He must show that the

imputation is such and the state of facts is such as that a presumption of damage as matter of law has been made in the past under like circumstances. I am of course here

(1) [1892] 1 Q. B. 797, 802.

speaking, and throughout this opinion I am speaking, of cases in which damage is not proved.

Setting aside the case of slander actionable by statute under the Slander of Women Act, 1891, there are only three heads within some one of which the plaintiff must bring his case; they are:

1. Imputation of crime.
2. Imputation of a contagious disease tending to exclude the plaintiff from society.
3. Imputation against the plaintiff in the way of his office, profession, or trade, or which will touch him in the way of his office, profession, or trade.

The present case is sought to be brought under the third head.

The instance of "touching a man in his trade," which is most profusely illustrated by authority, is the imputation of insolvency to a trader. In such a case it would seem that there is no necessity for a colloquium; for speaking, that is, of the insolvency with reference to the trade. The law, it appears, will take notice of the fact that solvency is so essential a factor in the existence of a trader that to speak of him as insolvent will necessarily "touch him in his trade"; it is an attack upon a necessary part of his trading equipment. This seems to be the ratio decidendi in *Read v. Hudson*(1) (a laceman), *Stanton v. Smith*(2) (a weaver), *Hooker v. Tucker*(3) (a merchant), *Whittington v. Gladwin*(4) (a merchant), and *Jones v. Littler*(5) (a brewer).

By contrast with these cases is the case of the attorney or solicitor. In that case it would seem that there must be colloquium: the words must be spoken of the plaintiff in the matter of his profession. If not, his action will fail: *Doyley v. Roberts*(6); *Dauncey v. Holloway*.(7) In that case the words are not actionable

unless they impute either impropriety or misconduct in relation to or in connection with the profession or want of capacity to carry on the profession. It seems to have been assumed, but why I cannot say, that solvency is not a necessary part of the equipment of a solicitor. But even a solicitor

(1) 1 Ld. Raym. 610.

(2) 2 Ld. Raym. 1480.

(3) (1694) Holt, 39.

(4) 5 B. and C. 180.

(5) 7 M. and W. 423.

(6) 3 Bing. N. C. 835.

(7) [1901] 2 K. B. 441.

may be allowed an opportunity of proving special damage: *A. B. v. C. D.*(1) An imputation of dishonesty seems to be enough in the case of a surveyor: *Blunden v. Eustace*.(2) The reason assigned (one which, to myself, is far from convincing) is that "a surveyor is an officer of skill and there is such an officer for the King who is mentioned in Acts of Parliament by that name." From which it seems to have been inferred that the words touched him in his profession. Probably the case is saved by the fact that the defendant had "communication with him [the plaintiff] about the measuring of land."

If the office be one of trust, an imputation of dishonesty in the calling touches the plaintiff in his calling and is actionable: *Seaman v. Bigg*.(3) If the office be an office of honour but not of profit, imputation of "misconduct in the office is actionable"; but a gross imputation such as that the plaintiff is an habitual drunkard and unfit for the office is not: *Alexander v. Jenkins*.(4) Lord Herschell's judgment in that case is most instructive, and leaves the reader convinced that to look for a principle in the law of slander is an idle quest. Legislation is the only remedy which can establish a principle or lay down a satisfactory code. Lord Herschell summarizes this part of the law by saying that in the case of the office of profit "It must be either something

said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would show that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office"; and that in the case of the office not of profit the mere imputation of want of capacity or ability is not enough; but there must be an imputation that the man ought to be deprived of his office, and which therefore involves a risk of exclusion from the office.

Solvency in a trader is perhaps the best illustration of what I take it was meant by the expression "general requisite" in the often quoted words of Bayley B. in *Lumby v. Allday*.⁽⁵⁾ It seems to mean something which the law recognizes without evidence as being necessary in the calling - something necessary in the calling as

(1) (1904) 7 F. 22.

(2) Cro. Jac. 504 (case 15).

(3) Cro. Car. 480 (case 3).

(4) [1892] 1 Q. B. 797.

(5) 1 Cr. and J. 301, 305.

distinguished from something which may lead to dismissal from the calling. "Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, and c., or connects the imputation with the plaintiff's office, trade, or business." The latter will do as, e.g., if there be an imputation of unchastity in a servant girl in relation to her employment: *Connors v. Justice*.⁽¹⁾ But if the words are not applicable to conduct in the profession or calling the slander is not actionable, even though the words impute to a clergyman incontinence (he being unbeneficed): *Gallwey v. Marshall*⁽²⁾; or to a governess prostitution: *Wharton v. Brook*⁽³⁾; or to a clerk of a gas company gross immorality: *Lumby v. Allday*.⁽⁴⁾ In such a case the law seems to be that if the imputation does not touch the plaintiff in his calling there must be the colloquium, the words must be spoken of him in his profession. The strongest case is *Ayre v. Craven*⁽⁵⁾, where the words imputed adultery to a physician. Lord Denman there concludes his judgment by saying: "In actions of this nature the declaration ought not merely to

state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession." That case was followed in *James v. Brook*(6), where the defamation was of a salaried superintendent of police, and upon motion in arrest of judgment the judgment was arrested on the ground that the declaration did not show how the speaker connected the imputation with the profession. In *Jones v. Littler*(7) the mention in the slanderous conversation of the man's trade (that of a brewer) would seemingly, apart from the fact that the imputation was of insolvency to a trader, have been enough.

The case before your Lordships' House is that of a schoolmaster and the imputation is one of moral misconduct with a married woman. The calling was not mentioned in the conversation. The jury found that the words were spoken of the plaintiff in the way of his calling, but the Court of Appeal held (and I agree) that there was no evidence to support that finding. The question put to the jury,

(1) 13 Ir. C. L. R. 451.

(2) 9 Ex. 294.

(3) 1 Vent. 21.

(4) 1 Cr. and J. 301.

(5) 2 Ad. and E. 2, 8.

(6) 9 Q. B. 7.

(7) 7 M. and W. 423.

however, goes on thus: "In the way of his calling, that is, in such a way as to imperil the retention of his office." I am unable to follow the intention of this paraphrase, or to see that it is a paraphrase. The jury answered the question in the affirmative, and further found that the words imputed that he was unfit to hold his office. What has most pressed me in the case is that Mr. Artemus Jones, who appeared for the defendants, admitted at the trial that the imputation would endanger the plaintiff's position. He admitted (to use his own expression, on

further consideration) that "undoubtedly a public authority would remove him just as it would remove any other of its servants." His point was not that the imputation would not injure him, but that it was not said of him in his profession of a schoolmaster. In consequence of his admission the plaintiff abstained from calling evidence upon this point. I feel great doubt whether under these circumstances it was not open to the jury to find as they did, and whether the only point left was not whether the absence of the colloquium was necessarily fatal. This, I think, would be a point which would require careful consideration. However, as your Lordships do not attach the importance which I do to this aspect of the case, I shall not press my view to the extent of differing from the motion proposed by the noble and learned Lord on the woolsack.

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