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# Torts: Levi J. Jerome v. Donald J. Anderson, David Cass-Beggs, Saskatchewan Power Corporation [1964] S.C.R. 291

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## TORTS

*Levi J. Jerome v. Donald J. Anderson, David Cass-Beggs, Saskatchewan Power Corporation* [1964] S.C.R. 291.

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LIBEL — DEFENCE OF JUSTIFICATION — JUDICIAL — DISCRETION TO POSTPONE REBUTTAL OF JUSTIFICATION.

In the recent decision of *Jerome v. Anderson*[1] the Supreme Court of Canada has accepted the existence of a discretion in trial court judges to permit the plaintiff in a defamation action to reserve evidence of rebuttal to the defence of justification until after the defendant has made his plea. After giving evidence of malice, Jerome was permitted to refrain from presenting his whole case, and to separate that evidence pertinent to rebuttal of justification until Anderson had presented his evidence as to the plea of justification.

Jerome had been an employee of the Saskatchewan Power Corporation who was dismissed from his job in a most inconsiderate and abrupt fashion, after only a cursory examination of the relevant facts. The letter of dismissal, written by Anderson, was published to four other officers of the corporation. This letter contained several libelous allegations allegedly based on certain past conduct by Jerome, the same conduct, apparently, as was alleged in the particulars submitted by the defendant. The letter was the ground on which an action was brought. Anderson defended by pleading justification and delivered nine pages of detailed particulars alleging a series of previous incidents purporting to bring Jerome's honesty into question.

At trial Jerome succeeded in proof of malice and this finding was upheld by the Supreme Court of Canada. After presenting his evidence as to malice the plaintiff requested, and was granted, permission to complete his evidence in rebuttal to justification after the defendant had made his plea of justification. The defendant then elected not to enter evidence of justification.

On appeal, the trial decision was reversed on the basis of failure to prove malice, but the court did not deal with the procedural issue. The Supreme Court of Canada unanimously reversed the findings of the appellate court with regard to malice, reaffirming the trial decision. On the second issue, the majority, Judson J. dissenting[2], affirmed the exercise, by the trial judge, of the discretion to permit the alteration in the procedure of presenting evidence. The Supreme Court rested their decision directly upon the cases of *Maclaren and Sons v. Davis et al.*,[3]

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1 [1964] S.C.R. 291.

2 *Id.* at 309.

3 (1890), 6 T.L.R. 327.

*Browne v. Murray*[4] and *Beevis v. Dawson*,[5] most reliance being placed upon the last mentioned case.

The Court in *Bevis v. Dawson* exercised this discretionary power to vary the usual procedure, indicating it was a tool which the trial judge could use to mould the course of the action in a manner best fitted for the aims and goals of judicial process. In further defining the boundaries of this discretion, Singleton L.J. stated that after permission had been granted to postpone the evidence tending to rebut the defence of justification, no questions could be put to the plaintiff in cross examination pertaining to justification.[6] Thus there could be no separation of the evidence of rebuttal of justification but there could be a partition into evidence of malice and evidence of rebuttal. In *Browne v. Murray* the same changes in procedure were permitted at the discretion of the Court, Abbot L.J. stating that if the plaintiff did adduce evidence of rebuttal of justification after being granted the request to divide his evidence, he would have to proceed with his whole case.[7] So, it appears that in order to quality for this special privilege, a plaintiff in a defamation action must sever the pattern of his evidence into almost watertight compartments.

The distinction between proof of malice and rebuttal of justification must, of necessity in many cases, be a hairline difference. The task of separating evidence, as indicated above, is one of formidable proportions. In a great number of instances the same facts will be equally relevant to proving malice and to refuting the defence of justification. Similarly, questions in cross examination dealing credibility must, in many cases, be questions involving the facts alleged as a basis of justification. In view of this, it becomes obvious that a compartmentalization of evidence along any semblance of rigid lines must, in some cases, be virtually impossible without the superficial mental gymnastics which result from refined levels of semantic differentiation. These problems of shades in meaning are more within the realms of philosophy than the practicalities of the procedure of a court of law and if the court is to preserve the special privilege granted to the plaintiff, then it must be prepared to deal in a high degree of abstracts in order to rule with great precision upon the admissability of both evidence and questions at specific times in the progress of the trial. This would lead to a morass of complex technical problems in evidence resulting in a constant procedural wrangling over admissability, the final outcome being to make an action so involved that, as in *Beevis v. Dawson*, it becomes difficult for the trial judge to manage and virtually impossible for a jury to comprehend.

The possible difficulties arising when the rebuttal to justification is postponed must be considered by the trial judge called on to exercise

4 (1825), 1 R.Y. & M. 254.
5 [1957] 1 Q.B. 195.
6 *Beevis v. Dawson, supra* footnote 5 at 250.
7 *Id.* at 254.

his discretion. It would seem likely that on balance, the negative effects must outweight the positive, and the exercise of such a discretion must be virtually precluded at jury trials.

The roots of this special discretion in defamation actions are fairly obscure. In Canada there are few reported cases which deal with this issue at either the trial or the appeal level. In *Rees v. Smith,*[8] Lord Ellenborough held that when the plaintiff was aware, before the action, of the defendant's pleading, he was obliged to bring his whole case first, though he might later make reply to specific facts. This was an action for trespass, but the same logic applies to defamation. In an old case, *J'Anson v. Stuart*[9], the court held that "a plaintiff cannot come to trial prepared to justify his whole life". This appears to indicate the reason behind the discretion to alter trial procedure in an action for defamation. The postponement of the rebuttal of justification is a procedural device to protect the plaintiff, and the court, from extraneous evidentiary presentment, as well as surprises after the trial has commenced.

In *Maclaren and Sons v. Davis et al.*[10], the rebuttal of justification was delayed to spare the court the useless process of proving that every article and advertisement ever published in the plaintiff's journal had not been stolen. The discretion was used in order that the plaintiff need only rebut the allegations specifically made on certain articles. In the light of such a potential waste of the court's time, the exercise of special judicial discretion appears most justifiable.

Under the current rules of procedure, where plaintiffs in actions for defamation may move for further particulars on the statement of defence, the alteration of usual trial procedure in such cases as the *Maclaren* case becomes less necessary. A complete enumeration of all incidents alleged by the defendant in his plea of justification to the plaintiff must be delivered. The court will, on the other hand, strike out vexatious and irrelevant pleadings, thus prevent the defendant from padding his allegations for purposes of embarassing the plaintiff.

*Rees v. Smith*[11] and *Beevis v. Dawson*[12] both indicate that this special discretion may not be granted where adequate particulars have been made available. In *Arnold and Butler v. Bottomley,*[13] Farwell, L.J. states that the defendant pleading justification must state all the facts he intends to rely upon in his statement of defence, the right to discovery being limited to only these facts. Then, with regard to particulars, in *Marks v. Wilson Boyd*[14], the Court found it a usual procedure to deliver particulars in addition to the statement of defence. In this manner the plaintiff becomes fully aware of all the allegations he must meet prior to the trial of the action. In view of this, the further advan-

8 (1825), 2 Stark N.P.L. 31, 32.
9 (1787), 1 Term Rep. 748, 752.
10 (1890), 6 T.L.R. 372.
11 *Supra,* footnote 8 at 32.
12 *Supra,* footnote 5 at 205.
13 [1908] 2 K.B. 151, 156.
14 [1939] 2 All E.R. 608.

tage of the postponement of the rebuttal to the defence of justification has the appearance of sheer redundancy.

In the two leading cases involving this procedural issue the final decisions were rendered with the omission of essential evidence. In *Jerome v. Anderson*[15], the defendant intentionally did not bring proof of his allegations of justification, while in *Beevis v. Dawson*[16], the plaintiff failed to bring any evidence of rebuttal of justification in the confusion following the court's decision to permit the plaintiff's dichotomy of evidence. In both instances, had the plaintiff followed the normal course of procedure by presenting his full case initially, all the facts would have come before the court, and, as Judson J. indicated in *Jerome v. Anderson,*[17] an entirely different complexion might have been created had this evidence been brought. In both cases the final effects of the exercise of judicial discretion left much to be desired. With these cases in mind, the value of this extraordinary procedure is put further in doubt.

One major distinction between the *Beevis* case and the *Jerome* case is that in the former, the plaintiff never took the witness stand. If the plaintiff does not take the stand before the defendant brings his evidence of justification, many of the technical difficulties arising from a postponement of the plaintiff's rebuttal are removed. In such instances, the judicial discretion is well used and affords a compact approach to trial procedure. However, few plaintiffs are in the fortunate position of not having to bring evidence as to malice. Thus it appears that in *Jerome v. Anderson,*[18] the court has accepted a more general discretion where initially only a rather rare exception had existed.

The second distinction between these cases is that the action in the *Beevis* case was before judge and jury whereas the *Jerome* decision was before judge alone. Combining the differences into four possibilities there are actions before judge and jury where the plaintiff does, or does not bring, evidence prior to the defendant's plea of justification, and actions before judge alone where prior evidence is, or is not, brought. In either case where no prior evidence is given by the plaintiff, the trial judge would find this special discretion a useful tool. However, if prior evidence is given, only a trial before judge alone is reasonable as a trial procedure in the light of the possible difficulties mentioned above. *Jerome v. Anderson* was heard before judge alone, so it is possible that the Supreme Court of Canada would limit the application of this discretion to actions before a judge who, sitting alone, is better able to sort out the difficulties than would be a jury. Even with no jury the trial judge who permits the postponement of rebuttal will be faced with problems which he would have to consider in detail before giving a ruling. Under section 55 of the Judicature Act all actions for

15 [1964] S.C.R. 291.
16 *Supra,* footnote 5.
17 *Supra,* footnote 1 at 310.
18 *Ibid.*

defamation must be tried before a jury, except by agreement of the parties. The majority of defamation actions would thus be heard before a jury, since most defendants would be unwilling to voluntarily give the plaintiff procedural advantage. The inferance from this is that actions which might ordinarily be heard by judge alone would now be heard before a jury, resulting in a longer delay and higher trial cost, both of which are undesirable side affects.

As things stand at present, the discretion of the court to postpone the rebuttal of justification is limited to a minority of actions. *Jerome v. Anderson* may be looked upon as only widening the accepted use of this procedural discretion to encompass the non-jury action where prior evidence is given by the plaintiff. With regard to an action before a jury where the plaintiff gives prior evidence, Judson J., in *Jerome v. Anderson,*[19] stated in his dissent that to postpone the rebuttal by the plaintiff would have been an error so serious as to warrant a new trial being ordered. This strong dissent, in *obiter,* could not be ignored in future defamation actions, and indications are that this procedure would not be available under these circumstances. On the whole, the discretionary alteration of procedure has little to support it in terms of logic, and to limit it to actions where no prior evidence has been brought by a plaintiff offers the best alternative. However, it would appear from the *Jerome v. Anderson* decision that its recognized use has now been broadened.