DAVIS v WALL

Supreme Court (in chambers)
Spry, C.J.
31 January 1977.

Defamation — justification — need for particulars.
Practice — inherent jurisdiction to strike out defence — sparingly exercised
RSC Ord. 18, r. 19.

In an action for libel, the plaintiff applied for the defence to be struck out or, alternatively, that certain particulars be struck out.

Held: (i) Where the defence to an action for libel is justification, very precise particulars of alleged misconduct are required.

(ii) The jurisdiction to strike out a defence is one only very sparingly exercised.

Cases referred to in the order.

Wenlock v Moloney, [1965] 1 W.L.R. 1238.
Wootton v Sievier, [1913] 3 K.B. 499.
Zierenberg v Labouchere, [1893] 2 Q.B. 183.
Associated Leisure Ltd. v Associated Newspapers Ltd., [1970] 2 All E.R. 754.

Application

This was an application to strike out the defence or, in the alternative, to strike out certain particulars.

J.E. Triay for the applicant.
E. Ellul for the respondent.

4 February, 1977: An order, of which the following forms part, was read—

This is an application under RSC Ord. 18, r. 19, and invoking the inherent jurisdiction of the court, for the striking out of the defence on the ground that it is frivolous, vexatious or otherwise an abuse of the process of the court

and further that the defendant having failed to give proper particulars thereof, it discloses no reasonable defence. In the alternative, it is prayed that certain specified particulars be struck out.

(After reciting the history of the pleadings and dealing with specific particulars objected to, the order continues)

I have considered whether I should, at this stage, strike out the defence as prayed by Mr. Triay, because there is so little left that, as it stands, it might well be regarded as vexatious.

As a broad principle, I accept Mr. Ellul's submission, based on *Wenlock v Moloney* [1], that the inherent jurisdiction to dismiss an action as an abuse of the process of the court is one that ought only very sparingly to be exercised, and only in very exceptional cases, and that the same principle applies to the striking out of a defence.

On the other hand, in *Wootton v Sievier* [2], Kennedy, L.J. said "in every case in which the defence raises an imputation of misconduct against him, a plaintiff ought to be enabled to go to trial with knowledge not merely of the general case he has to meet, but also of the acts which it is alleged he has committed and upon which the defendant intends to rely as justifying the imputation." He went on to say that the propriety of this rule "is most evident in a libel case where the defendant has chosen to put the character of the plaintiff in serious jeopardy by the heinousness of the charges which are asserted or involved in the defendant's plea of justification."

Again, in *Zierenberg v Labouchere* [3], Kay, L.J., said "A libellous statement as to which no particulars are given, ought not to be allowed to be justified at all."

I feel bound to say that the fact that the defendant appears unable to produce particulars of the allegations he has made and is seeking to justify, although in the "Brief Epilogue" to the Spanish section of his pamphlet he refers to laborious investigation and firm foundations of reliable documentation, casts a grave doubt on his good faith.

This raises the suspicion that he is attempting to force the plaintiff into the witness box and then, by wide-ranging and imprecise allegations, give him the difficult, if not impossible, task of proving that over a quarter of a century, or more, he has led an umblemished life. This would be monstruously unfair and it is also, to my understanding, in law not a permitted way of justifying a libel. Above all, allegations of criminal offences ought precisely to be particularized. The statement in the particulars of 27 December 1976 that "The defendant cannot specify. This should be known to the plaintiff," used in relation to a criminal allegation is, in my opinion, most improper. As Kay, L.J., said in *Zierenberg v Labouchere* (supra),

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1 [1965] 1 W.L.R. 1238.
2 [1913] 3 K.B. 499.
3 [1893] 2 Q.B. 183.

where a defendant was unable to state the facts relied on as justification "the answer is simple and conclusive — he ought not to have published the libel, and cannot plead any justification for having done so."

Finally, I would quote the words of Lord Denning, M.R., in *Associated Leisure Ltd. v Associated Newspapers Ltd.* [1], when he spoke of the duties of counsel, saying that he "must not put a plea of justification on the record unless he has clear and sufficient evidence to support it."

I have decided, however, not to strike out the defence at this stage. This is partly because, as I have said, the formal order drafted in pursuance of my order of 9 December 1976 appears to have mislead Mr. Ellul and I think in fairness to him I must give him the opportunity for which he has asked. Also, I am reluctant to debar anyone from defending himself unless it is clear beyond doubt that his defence is utterly without merit. Accordingly, I am giving the defendant a final opportunity of furnishing, if he can, proper particulars of a precise and factual nature. I will allow for this, fourteen days from today.