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Article 14

Hargreaves v. Bretherton

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HARGREAVES V. BRETHERTON — TORT — PERJURY — LACK OF REMEDY — The claims of those who have suffered from the abuses of judicial proceedings have for centuries been faced with the rule that:

> . . . neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office.[1]

The issue was recently raised again in the English case of *Hargreaves v. Bretherton*,[2] a decision of the Queen's Bench Division

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[1] *Rex v. Skinner* (1772), Lofft 55 at p. 56, 98 E.R. at p. 530.
For the problems of tort liability arising from activities of public servants see R. J. Gray, Private Wrongs of Public Servants, 47 Calif. L. Rev. (1959).

[2] [1958] 3 W.L.R. 463, [1958] 3 All E.R. 122.

which has been followed in Canada in *Oak v. Frobisher Ltd.*,[3] a decision of the Saskatchewan Court of Queen's Bench.

In the *Hargreaves* case it was alleged, in the statement of claim, that the defendant falsely and maliciously and without just occasion or excuse committed perjury and that it was a reasonable and probable consequence of the aforesaid perjury that the plaintiff was convicted. The alleged perjury had been committed during a criminal trial under the Prevention of Fraud (Investments) Act 1939, which resulted in the plaintiff being sentenced to eight years preventive detention. The issue before the court was whether an action lies at the suit of the person who states that he has been damnified by false evidence given against him.

Before discussing the decision of the court an examination of earlier decisions is in order.

As early as 1596 a similar issue was raised in the case of *Dampport v. Sympson.*[4] There a witness had falsely sworn that a silver fountain valued at £500 was worth only £180 by reason of which the jury gave only £200 damages. The plaintiff sued the witness for the difference but it was held an action did not lie for the following reasons:

(a) The law intends the oath of all to be true.

(b) Such perjury can be punished by statute and if a civil action was allowed it would be double punishment which is not reasonable.

(c) If there was such an action there would be a precedent by this time, but as there is not, it is a good argument that the action is not maintainable.

(d) Perjury is not punishable at common law and it did not become a criminal offence justicable in the ordinary courts until the reign of Elizabeth.

(e) An action based on such an order necessarily involved an inquiry into what the jury would have given by way of increased damages if it were not for the perjury, and that could not be tried. If it were otherwise, the evidence of every witness might be questioned.

In 1620, one Eyres sued a bailiff named Sedgewicke in a situation where no inquiry of the jury's action was necessary.[5] Here the bailiff had allowed a prisoner to escape, and to cover his incompetence, he made a false affidavit in Chancery alleging that the plaintiff Eyres had by force rescued the prisoner. In consequence of the bailiff's perjury Eyres was imprisoned and upon release sued

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3 (1959), 27 W.W.R. 594.

4 (1596), Cro. Eliz. 520, 78 E.R. 769.

5 *Eyres v. Sedgewicke* (1620), Cro. Jac. 601, 79 E.R. 513.

the bailiff and proved his case to the satisfaction of a jury. A motion in arrest of judgment, however, held that there was no such action.

Sir John Holt C.J. in 1703 expressed the rule:[6]

> If one perjures himself in a cause to the damage of another person who is either plaintiff or defendant no action upon the case lies: nor is it reason it should, for the perjury is a crime of so high a nature that it concerns all mankind to have it punished, which cannot be an action upon the case, where nothing but damages shall be recovered by the party injured, which is not sufficient to secure the public against so dangerous a creature who hath offended against the common justice of the kingdom. Therefore, for examples sake and public security the prosecution of such an offence is vested in the Crown.

In face of such failure various attempts were made to frame the action differently, one of which was libel; it also proved unsuccessful. Then, in 1856, after the tort of malicious prosecution had been recognized, an attempt was made to draft an action analogous to it. The action in *Revis v. Smith*[7] alleged falsity, malice and absence of reasonable cause. The court held no action was maintainable against a witness though he speak maliciously and falsely. Thus, the auctioneer who had been deprived by the court of the control of a sale due to a false affidavit as to his sharp business practices, had no remedy for the £500 of lost fees.

It was argued on behalf of the auctioneer that the rule against double punishment was no longer valid law in that there were now several legal wrongs for which there were both civil and criminal penalties; and further, that many of the old cases were overruled since actions for malicious prosecutions were now allowed and therefore there was no longer an absolute privilege for the abuse of judicial proceedings. Creswell J. replied:[8]

> It is enough to say the world has gone on very well without such actions as these; and I doubt whether it would continue to do so if such things were allowed.

Public policy was the basis of the ruling in *Dawkins v. Lord Rokeby*[9] when Lord Chief Baron (Sir F. Kelly) stated:[10]

> . . . The principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice.

In 1905, the House of Lords dealt with slanderous evidence[11] and the Earl of Halsbury L.C. stated:[12]

> By complete authority, including the authority of this House, it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a Court

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[6] *Ashby v. White*, 25 Ruling Cases 52 at p. 75.
[7] (1856), 18 C.B. 126, 139 E.R. 1314.
[8] *Supra*, footnote 7 at p. 141.
[9] (1875), L.R. 7 H.L. 744.
[10] *Ibid.*, at p. 753.
[11] *Watson v. McEwan*, [1905] A.C. 480.
[12] *Ibid.*, at p. 486.

> of Justice, is too well established now to be shaken. Pactically I may say that in my view it is absolutely unarguable—it is settled law and cannot be doubted. The remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury.

A further variation[13] failed recently in Australia where the claimant alleged "conspiracy with others to defraud the plaintiff by the giving of false evidence". The court indicated the plaintiff's only remedy was an equitable proceeding to set aside the judgment on the basis of fraud. But Williams J. stated:[14]

> I have been unable to find any case in which a judgment has been set aside when the only fraud alleged was that the defendant or a witness or witnesses alone or in concert had committed perjury.

It was therefore with no great difficulty that the court in *Hargreaves v. Bretherton*[15] dismissed the action. Lord Goddard C.J. went so far as to say the action was an obvious "try on".[16] The Chief Justice stated that the rule of absolute privilege as set out in *Rex v. Skinner*[17] is firmly supported by precedent and is still valid law. With respect, such is not the case in either England or Canada. A witness is not immune from criminal liability for perjury[18] nor does the rule account for punishment for contempt of court.[19]

From this it would appear that the ancient policy consideration of protecting the witness from liability in order that he testify freely, as enounced in *Dawkins v. Lord Rokeby*[20] and *Watson v. McEwan,*[21] lacks validity in the face of these sanctions. It necessarily follows that once a portion of the privilege for perjury is removed, there is no logic in retaining the balance against civil actions.

Practically, it could be questioned how many witnesses are aware of the privilege and testify only because they know of their immunity to civil actions. If some do, it is submitted that the court would be better served without their testimony. To state otherwise, and for the courts to hold differently is to encourage the prostitution of the judicial process. For is not the implication, in the policy that witnesses must be undeterred by fear of actions, that the judicial system has no other guarantees to protect the witness who has honoured his oath and testified truthfully? If our courts are courts

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[13] *Cabassi v. Vila* (1940), 64 C.L.R. 130.
[14] *Ibid.*, at p. 147.
[15] *Supra,* footnote 2.
[16] *Supra,* footnote 2, at p. 468.
[17] *Supra,* footnote 1, "Neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office."
[18] Canadian Criminal Code.
S. 112. Every one commits perjury who, being a witness in a judicial proceeding, with intent to mislead gives false evidence, knowing that the evidence is false.
S. 114. (1) Every one who commits perjury is guilty of an indictable offence and is liable to imprisonment for fourteen years, but if he commits perjury to procure the conviction of a person for an offence punishable by death, he is liable to imprisonment for life.
[19] See, *In the Matter of Lewis Duncan,* [1958] S.C.R. 41.
[20] *Supra,* footnote 9.
[21] *Supra,* footnote 11.

of justice, surely such a witness should have no tribulations that need protection by this absolute privilege.

Part of the difficulty originates in the historical fact that the absolute privilege rule was developed to protect witnesses from defamation actions and was later adopted by the courts in perjury cases. It is questioned whether such an adoption was judicious. If the reasoning above is accepted—i.e., that the honest witness should not require the privilege—then the extension of the rule was unnecessary. Further, if one is slandered in court he suffers only a possible loss of reputation; but if one is perjured he can be imprisoned or may even lose a civil suit—either of which could be equally as injurious as defamation.

Secondly, the Chief Justice expressed concern that an action for damages for alleged perjury could be brought, not only when there had been no conviction for perjury, but on the evidence of a single witness, while he could not be convicted in a court of criminal jurisdiction without the concurring testimony of two.[22] It is submitted that such is not a reason on which to rest a decision but is only a caution to be exercised if such an action were to be allowed.

In so stating his alarm, Goddard C.J. could not have considered the judgment of his own court in *Hornal v. Neuberger Products Ltd.*[23] which held where fraud or other matter, which is or may be a crime, is alleged against a party or against persons not parties to the action, the standard of proof to be applied is that applicable in civil actions, and not the higher standard of proof required in criminal matters. To remove all concern it could be made a condition precedent of the civil action that there be a conviction for perjury.[24]

Fear of an abundance of such actions if allowed—especially since there is Legal Aid—was Lord Goddard's next reason for disallowing the action. It is submitted that this is a fallacious basis—if it is a basis—on which to rest a judgment. Would the Chief Justice have disallowed the tort of negligence if its present prominence could have been foreseen? Surely his concern over a multitude of penniless plaintiffs is also unwarranted and hardly deserves comment. There are few cases to-day involving perjury and there is no reason to suggest that if there was a civil remedy the number of cases would increase.

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22 Canadian Criminal Code.

S. 115. No person shall be convicted of an offence under section 113 or 114 upon the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

23 [1957] 1 Q.B. 247.

24 See *Smith v. Selwyn*, [1914] 3 K.B. 98. A plaintiff against whom a felony has been committed by the defendant cannot make that felony the foundation of a cause of action unless the defendant has been prosecuted or a reasonable excuse has been given for his not having been prosecuted.

Lastly he states that the penalty for committing perjury is not that one should be asked to pay damages but that he should be sentenced for the crime which he has committed. This harks back to the rule against double punishment which is clearly no longer valid law. Thus, there would appear to be no valid explanation why the injured party should be barred from indemnification, which would in addition, serve as a further deterrent against perjury.

In conclusion it is submitted that the only true basis for Lord Goddard's judgment is that precedent prevents such an action. This rests on the old basis of the absolute privilege principle not to deter the free flow of witnesses. This principle has been undermined by the sanctions now enforced and thus there is little reason to allow this historical dogma to dictate modern thought.

Undoubtedly, however, legislation is now necessary to make perjury tortious. It is no longer sufficient to state, as the courts have done, that the "world has gone on very well without such actions".[25] The truth is that much hardship has occurred.

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