In The Supreme Court of Bermuda

CIVIL JURISDICTION

2007: No. 116

BETWEEN:

PETER FREDERICK BROMBY

1st Plaintiff

and

JOHN MARK BROMBY

2nd Plaintiff

-and-

HENRY A. TALBOT

Defendant

Date/s of Hearing: 20 – 23 April 2009
Date of Judgment: 12 June 2009

Richard Horseman of Wakefield Quin, for the Plaintiffs; and
Rick Woolridge of Phoenix Chambers for the Defendant.

JUDGMENT

1. This Judgment is given on the trial of the plaintiffs' action for malicious prosecution. The background is as follows. The parties are neighbours. On 16th May 2004 the defendant had workmen and an excavator working on a beach which adjoins the plaintiffs' properties. The plaintiffs, who objected to the work, armed themselves with a piece of pipe and a stick respectively and went to the beach, where they had a discussion with the driver of the mechanical excavator, and then an altercation with the defendant. The police were called, and various officers attended the scene at the beach. At some point thereafter the defendant

made a statement to the police, and subsequently the plaintiffs were charged with unlawful assault contrary to section 314 of the Criminal Code, and uttering threatening words, contrary to section 12 of the Summary Offences Act 1926. They were tried before a Magistrate, and on 18th May 2005 convicted of the charges, but given absolute discharges.

2. Notwithstanding the discharges, the plaintiffs were aggrieved by this outcome and appealed to the Supreme Court. On 10th March 2006 Bell J quashed the convictions and directed "that a judgment of dismissal of the informations as against both appellants be entered". He did so because of the learned Magistrate's failure to address and resolve various conflicts in the evidence at trial:

> "77. If the learned magistrate had, in his judgment, reviewed the evidence and made proper findings of fact in relation to that evidence, he would no doubt have identified the conflicts in the evidence which I have referred to in paragraphs 34 and 40 above, and having identified such conflicts, it would obviously have been necessary for him to resolve them. Hence the learned magistrate would necessarily have needed to explain why it was that he preferred the evidence of Mr. Talbot to that of PS Tucker on one issue, why he preferred the evidence of Mr. Talbot to the three police officers and Mr. Waldron on another issue, and how he felt able to disregard the evidence of Ms. Lima and Mr. Simons in relation to yet another issue."

Bell J concluded –

> "It is the lack of proper findings of fact which render the judgment as a whole unsafe."

3. The matter may have rested there, but it did not. More than a year later, on 3rd May 2007, the plaintiffs issued the writ in this action, alleging that "On or about 28th October 2004 the Defendant maliciously and without reasonable and probable cause made a complaint to the Police which resulted in an information laid in information (sic) before . . .

a Magistrate". It is then alleged that the Magistrate issued a summons to the plaintiffs to appear in the Magistrates' Court on 28th April 2005, where, after a summary trial, they were eventually convicted.

4. The plaintiffs plead the following particulars of malice and lack of reasonable and probable cause –

(i) "The Defendant knew that the charges alleged were false.

(ii) The Defendant requested that his employees, namely Earl Waldron, Fernando Landingin and another employee known as "Rudi", give false evidence against the said Peter and John Bromby.

(iii) That the charges alleged were false in that both Peter and John Bromby on the day of the alleged offence, did approach the First Defendant and did have a conversation with him but at no time did they unlawfully assault, use threatening words to either the First or Second Defendant (*sic*);

(iv) The First Defendant was motivated to make a false charge against the Plaintiffs due to an ongoing dispute between the Plaintiffs and the First Defendant over a right of way and planning violations committed by the First Defendant.

(v) Earl Waldron gave false evidence against the Plaintiffs and was motivated to give false evidence in order to support the Defendant who was his employer at the time."

5. The defendant filed a Defence, denying the allegations, and in particular pleading that the charges against the plaintiffs were true, and denying that he solicited his employees to give false evidence. He also pleads:

> "As to paragraph 4 of the Statement of Claim, the Defendant regards it as frivolous as he is not responsible for the exercise of the Crown's Prerogative in bringing Prosecutions and the subsequent exercise of the Court's role to determine evidence".

The defendant also counterclaimed for the injuries he says he suffered as a result of the assault, being an abdominal aneurysm, and he claims $43,777.10 in special damages plus general damages for pain and suffering. I have dealt with that further below.

THE LAW

6. In order to make out a case of malicious prosecution the plaintiff must plead and establish that[1]:

(a) he was prosecuted by the defendant, i.e. that proceedings on a criminal charge were instituted or continued by the defendant against him;

(b) the proceedings were terminated in the claimant's favour;

(c) the proceedings were instituted without reasonable and probable cause;

(d) the defendant instituted the proceedings maliciously; and

(e) the claimant suffered loss and damage as a result.

7. By a summons of 10th January 2008, the defendant applied to strike out the action, on the grounds that the nominal prosecutor was a police constable, Angela Cox, and it was she who swore and laid the Informations which instituted the prosecutions against the plaintiffs. I dealt with that in a ruling of 19th March 2008, holding that it is a question of fact whether a defendant is a prosecutor, and that a person may be a prosecutor even thought the charge is laid by the police. I took the law to be definitively set out in the headnote to the report of the House of Lords decision in Martin v Watson [1995] 3 All ER 559, HL:

> "A person who in substance was responsible for a prosecution being brought against the plaintiff was liable to the plaintiff for malicious prosecution if the other essentials of the tort were fulfilled. The mere fact that a person gave information to the police which led to their bringing a prosecution did not make that person the prosecutor, but if that person falsely and maliciously gave a police officer information indicating that some person was guilty of a criminal offence and stated that he was willing to give evidence in court of the matters in question, it was properly to be inferred that he desired and intended that the person he named should

[1] This is taken from paragraph 2-12 of Bullen & Leake & Jacob, Precedents of Pleading, 16th ed. (2008)

> be prosecuted. Where the circumstances were such that the facts relating to the alleged offence could be within the knowledge only of the complainant . . . then it was virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution was instituted by the police officer the proper view was that the prosecution had been procured by the complainant. The fact that he was not technically the prosecutor should not enable him to escape liability where he was in substance the person responsible for the prosecution having been brought."

8. I held, therefore, that whether the defendant's complaint did in fact initiate the prosecution was a matter for trial. On a subsidiary issue, I also held that the truth or falsity of the original complaint is not decided by the Magistrate's findings, which were set aside. I consider, therefore, that in this trial there is no issue estoppel either from the Magistrates' Court proceedings, or the subsequent appeal, and that the facts are a matter for me to decide *de novo,* the burden being on the plaintiffs to the civil standard of proof. I also considered the merits of the underlying property dispute were not raised as an issue by the pleadings.

PE-TRIAL ISSUES

9. I had given trial directions early in this action on 3rd January 2008, ordering that witness statements be exchanged two weeks prior to trial. I did not order discovery of documents, the parties representing that they had already exchanged lists, as indeed they had. The strike-out application then followed, but after that, on 28th May 2008, the plaintiffs entered the matter for trial[2], and it was set down for three days from 29th September 2008. In the meantime, however, the defendant changed representation: he had initially been represented by James & Associates, but they were given leave to come off the record on 18th September 2008, although before that order was perfected Phoenix Law Chambers came on the record in their stead on 17th September 2008. Almost as soon as Phoenix came on the record, Mr. Woolridge applied by letter of 24th September to adjourn the matter on grounds personal to him, although on 29th September the defendant's doctor provided a report stating that the defendant had possible heart problems, and stating that he had left the Island to seek urgent medical help. The matter was then adjourned to a date to be fixed, and eventually it was set for trial on 23rd February 2009. On 17th February Mr. Woolridge wrote attaching a doctor's

[2] It was entered for trial by judge alone, neither side exercising their right to apply for a jury trial, pursuant to RSC Ord. 33 r. 2(2)(b).

letter stating that the defendant had undergone coronary bypass surgery on 18th November, and was not fit enough for trial. That application was formalized into a summons of 20th February seeking an adjournment *sine die*, although in the upshot the matter was adjourned by consent to 20th April. In the meantime Mr. Horseman began pressing for the exchange of witness statements. They were not forthcoming, and on 9th April 2009 the plaintiffs took out a summons seeking an "unless order" for judgment in their favour if witness statements were not exchanged, and that came before me on the 14th April. At the hearing Mr. Woolridge asserted that he was having difficultly getting instructions due to his client's medical condition, and that they were awaiting a report from his overseas cardiologist. I refused to adjourn the trial unless I was presented with medical evidence of the defendant's continuing incapacity, but I also refused an unless order on the basis that the remedy for a failure to serve witness statements is that the court may exclude the evidence. Indeed Ord. 38, r. 2A (10) states:

> "(10) Where a party fails to comply with a direction for the exchange of witness statements he shall not be entitled to adduce evidence to which the direction related without the leave of the Court."

10. No further medical evidence was forthcoming as to the defendant's unfitness for trial, and on the day of trial he appeared and produced a witness statement (in the form of an unsworn affidavit), and I allowed him to give evidence, the plaintiffs' counsel not objecting. He did not apply for leave to call any further witnesses as to the events of the day in question, although he called a medical witness, Dr. Femi Bada, whose evidence I will deal with in due course.

11. The one other point of note is the state of the trial documents. There is a procedure for compiling the trial bundle. Ord. 34, r. 10 requires the defendant to notify the plaintiff of 'those documents central to his case' which he wishes included at least 14 days before trial. The plaintiff is then obliged to lodge a composite bundle including both the documents central to his case and those identified by the defendant. That was not done here, both parties simply putting before the court at the outset bundles of the documents contained in

their respective lists. The plaintiffs lodged their bundle under cover of a letter of 24th September 2008, that being shortly before the trial date of 29th September. They explained in the letter that the defendant had failed to provide any documents, despite being asked to do so. The defendant's bundle was put before me during the course of the trial. The problem with this approach is that the court is unable to say which documents are material, and which documents the parties rely upon, unless they are canvassed in the evidence, either by way of reference in a witness statement or in cross-examination. I have, therefore, confined myself to those documents that were dealt with in that way, save that some photographs which were not produced by the defendant eventually came in by agreement. They were marked D1. However, as they were not canvassed with the witnesses, I know little about what they show.

THE FACTS – AN OVERVIEW

12. The plaintiffs are brothers, and they respectively reside at 34 and 17 East Shore Road, Sandys, close to the defendant's property. The defendant lives at 5 East Shore Drive, and he owns some or all of the land around a small, rocky bay with a beach, known as Gilbert's Bay. It is shown in the photographs in D1. The beach runs roughly north/south. The defendant has a house set back from the shore, and also a beach house down on the sea at the southern end of the beach. It can be seen in plaintiffs' photograph #3[3]. The plaintiffs claim access to the beach by means of a right of way down the cliff at the northern end of the beach. It consists of a steep flight of rough steps, facilitated by a thick rope, and it can be seen in the photographs in D1. That right of way, and its use, was a matter of contention between the parties. The plaintiffs say that the defendant claimed sole use of the beach, and was trying to deny them access to it. This dispute dated back many years to at least 1992.[4]

13. At about 11 a.m. on the morning of Sunday 16th May 2004, the plaintiffs' sister telephoned Peter and told him that the defendant was attempting to restrict the access to the beach. The sister was not called to give evidence, and her categorization of the work is not strictly admissible as to what the defendant was in fact doing, but it is both admissible and

[3] These are a tab 4 of the plaintiffs' bundle, and they were canvassed in evidence.
[4] Peter Bromby's witness statement refers to a letter of 29th April 1992, but it is not in either party's lists or in their bundles. However, this was not challenged.

highly relevant to the plaintiffs' state of mind. As a result of that call Peter picked up a piece of pipe that was lying close to where he had been working at repairing a fence, and met up with his brother John, who was similarly armed with a hoe handle. They then proceeded together down the access to the beach. Once down there they found the defendant's employee, Earl Waldron, operating a mechanical excavator – a back-hoe – moving large rocks into the vicinity of the right of way.

14. It is the plaintiffs' case, which is not challenged, that they then told Waldron that what he was doing was illegal and that he should stop. They also say that they told him that they understood he was only doing his job and that they did not have an issue with him. The implication, of course, is that they had an issue with his employer, the defendant. Waldron did stop, and everyone agrees that he then got down from the excavator and started walking away, going south down the beach. At this point the defendant, who had been at the southern end of the beach when the brothers arrived, came up to them and there was an altercation. The defendant says that during it they threatened to kill him if he proceeded with the work, and that Peter assaulted him by jabbing him with his piece of pipe. The plaintiffs accept that this was a heated exchange, but say that it was the defendant who was being aggressive, and that they did nothing, merely holding their pieces of pipe and wood down by their sides and behind them.

15. After a few minutes the police arrived. They had been called by Peter Bromby's sister. Both marine and land units attended. The plaintiffs say that once the police arrived they let them take control, and they put down their weapons when requested to do so. However, the defendant remained belligerent and was eventually handcuffed by the police. The defendant maintains that that was unnecessary, and his witness statement implies that that was done because the plaintiffs had been the ones to call the police, but that once he was able to tell his side of the story the police changed their assessment and determined to investigate the plaintiffs.

16. Three days later, on Wednesday 19th May 2004 the local daily newspaper, The Royal Gazette, carried an article headlined "Conservationists Horrified by Damage to Gilbert's

Bay". The article was critical of the work on the beach, suggesting that it was environmentally damaging and may have been carried out without planning permission, but it did not mention the Brombys by name and did not deal with the altercation. Later that day, at about 2.40 pm, Mr. Talbot attended at the Somerset Police Station and indicated that he wished to make a complaint about the Brombys. The complaint was taken by Police Sergeant Jermaine Tucker, who had been at the beach on Sunday morning. He says that he took the details and entered them on the police computer. He says that he specifically asked Mr. Talbot if he had sustained any injuries as a result of the alleged assault, and was told that had not. Sgt. Tucker was called as a witness by the plaintiffs, and gave evidence before me. Having seen him, I unhesitatingly accept his evidence as true.

17. Sgt. Tucker also says that he requested Mr. Talbot to return to the police station at a later date to provide an official complainant's statement, which he did on 25th June, although the statement that Mr. Talbot then produced was not taken by a police officer but was already type-written, and was dated 7th June. That statement alleges that both Peter and John hit him on his left and right sides respectively, and that then Peter jabbed him with the pipe, but it does not mention any lasting injury from his treatment. However, there was evidence from his doctor that he had attended Mr. Talbot on 4th June 2004, when Mr. Talbot reported[5]:

- "Anterior abdominal wall pain following an alleged injury to this area in a fight that had taken place on his property at Somerset on May 16 2004.
- He had stated being hit by a blunt stake or similar object."

On examination the doctor recorded –

> "A 13 cm in diameter bluish-black bruise with surrounding swelling on the left lower quadrant of the abdomen. This bruise and its surrounding were still tender to palpitation."

[5] See the Doctor's report of 25th April 2005, which was disclosed among the defendant's documents. The doctor gave evidence, and in effect I allowed his report to stand as his witness statement.

18. The actual information against the Brombys was not laid until 28th October 2004,[6] and it appears that they were not summoned to appear until 22nd February 2005. The matter was then set for 28th April when it was tried. The plaintiffs feel that, in the gap between the making of the defendant's complaint and the laying of the charge, he brought political or personal pressure to bear on the police to ensure that the matter proceeded, but there is no evidence of that, and I reject the suggestion.

FINDINGS ON THE ISSUES

(a) Whether proceedings were instituted by the defendant

19. The defendant maintains that it was not his decision to charge the plaintiffs with a criminal offence. He says[7] –

> "It was the decision of the police through whatever mechanism they employ to charge the Plaintiffs with the counts on the information. It was also my information that the Director of Public Prosecution's Office made the decision to formally charge the Plaintiffs in Court and statements were taken by them in preparation for trial."

However, I do not think that there is any real doubt that the police would not have pursued this had the defendant not made his statement of 7th June. They could not have brought charges without his evidence, as the alleged assault happened before their arrival at the scene. And Sgt. Tucker's evidence[8] is that it was as a result of the allegations made by the defendant that the plaintiffs were charged with common assault and threatening words. I have no doubt, therefore, applying the test from Martin v Watson (*supra*), that the defendant was in substance responsible for this prosecution, which was procured by him, and the fact that he was not technically the prosecutor should not enable him to escape liability if the other elements are made out.

[6] I take that date from the Index to the Appeal Record at Tab 17 of the plaintiffs' documents. The actual Information is omitted from the copy of the record that was placed before me, but the date was agreed.
[7] See paragraph 4 of his witness statement.
[8] See paragraph 8 of his witness statement.

(b) Whether the proceedings terminated in the plaintiffs' favour

20. There can be little doubt on this limb either. Bell J held –

> ". . . I allow the appeals, quash the convictions as against both Appellants, and direct that a judgment of dismissal of the informations as against both Appellants be entered."

It is, however, worth re-iterating that the learned Judge quashed the convictions on the basis that the Magistrate failed to make the necessary findings of fact on the crucial issues and failed to say how he resolved the difficulties in the evidence. In other words, Bell J was essentially giving the appellants the benefit of the doubt, and his judgment on the appeal does not amount in any sense to a concluded finding in the plaintiffs' favour on the contested issues.

(c) Whether the proceedings were instituted without reasonable and probable cause

21. A review of the authorities suggests that in many cases this issue can give rise to real difficulties as to the extent of the defendant's knowledge, and the legal consequences that might flow from it. But in this case the factual issue is fairly straightforward, though no less difficult to decide because of that. It really boils down to whether the defendant was telling a lie – a deliberate untruth – when he alleged to the police (and subsequently to the Magistrates' Court) that the plaintiffs threatened him, and that Peter Bromby jabbed him with his pipe. From the evidential stand-point this issue goes hand in hand with the question of malice, and so I have considered the two issues together.

(d) Whether the defendant instituted the proceedings maliciously

22. This issue only arises if the plaintiffs can demonstrate an absence of reasonable and probable cause for the prosecution. That is because if there was reasonable and probable cause, no amount of malice can make out the tort. On the facts of this case, this issue is likely to be determined by the presence or absence of reasonable and probable cause. If the plaintiffs succeed in showing that the defendant was lying about the threats and the physical assault, then that will be strong evidence of malice. In addition, the plaintiffs plead that the defendant was motivated by malice because of the ongoing dispute over the right of way,

and that he solicited his employees to give false evidence before the Magistrates' Court, one of whom, Earl Waldron, actually did so.

23. The starting point of my consideration of these questions is the evidence of the plaintiffs themselves. Both deny threatening or hitting the defendant. John concedes that the argument got heated, but asserts that the defendant was not scared or threatened in any way, and indeed was more aggressive than they were. He concludes –

> "The worst I called him was a piece of shit for doing what he was doing".

24. When they went down to the beach both of the plaintiffs were armed. Peter had a piece of pipe. His explanation for that is as follows[9] –

> "I picked up a piece of pipe that was lying close to where I was working and I met up with my brother John. I brought the pipe because I was aware that the defendant had a construction crew at the beach and I figured that John and I would be outnumbered. I brought the pipe down purely for protection and as a deterrent."

25. John had an old hoe handle. His explanation was[10] –

> "I brought the hoe handle down there because I knew Mr. Talbot had some dogs and in the past they had threatened people. I was carrying the hoe handle solely for my own protection."

26. The defendant maintains his position that the plaintiffs were guilty of the charges as laid. His evidence at the Magistrates' Court trial had been -

> "Tone of voices was very hostile.
>
> I did not reply. I was going to walk away. I had one on both side of me. One came here, the other there. I moved back against the boulders.
>
> The stick and pipe were in their hands.

[9] See paragraph 3 of his witness statement.
[10] See paragraph 4 of his witness statement

> Peter said to me I'm not to move, I'm not going anywhere and if I do he will lay me out there. I took it to mean they were serious and they planned on hurting me.
>
> I stood there and John said, "we're not joking, we're serious". Then they start hitting John on one side, Peter on the other.
> John hit me up around my shoulder with his hand. Like in slapping, pushing sort of thing.
>
> Peter hit me the same way – on the other side – I kept saying to them don't put your hands on me. They continued – then Peter said to me he will kill me right here if I don't move those boulders and machine.
>
> I felt threatened – I felt they were serious.
>
> John turned and said to a young lady – "take the pictures of the 2 gentlemen – because they're illegal workers and he does not have a permit for them". At this point Peter took the pipe and jab me up in here – in my groin- my stomach
>
> I reacted – I moved from it.
>
> At that time – the marine police came around the Beach towards us. They sort of moved back and I moved out. I got off the rocks and went on the beach."

27. Bell J had been troubled by the evidence of a Ms. Lima (who was then John's girlfriend) and a Mr. Simons, both of whom witnessed the scene and testified that they did not see the Brombys raise the stick or the pipe. Whether that was a real problem for the prosecution would depend, *inter alia*, on the exact viewpoint of these witnesses. It should also be born in mind that the blow relied upon was a jab, which would not have required the pipe to be raised above shoulder level. Ms. Lima did not give evidence at the trial before me. I was told that she was out of the jurisdiction, and no application was made to admit her witness statement. Mr. Simons did give evidence before me. At the time of the events he had been 15 years old. He says that he was at the top of the stairs leading to the beach and that he could see and hear everything. He says he never heard the threats and that the sticks were kept by the Brombys' sides at all time and that Peter never hit Mr. Talbot.

28. Justice Bell had also been troubled by various conflicts between Mr. Talbot's evidence as to when he reported the alleged offence and the police evidence. At the trial before me the plaintiff called two of the police officers who attended the scene. WPC DeSilva says she attended in a marked police vehicle. On her arrival she saw a heated discussion between the parties, and formed the view that the defendant was "clearly the most aggressive and boisterous of the three". She says that, despite the police efforts to calm matters, the defendant became increasingly belligerent and agitated, so that she warned him that if he continued in this vein she would have to arrest him, which only made him worse. She says he was waving his hands in her face and shouting at her, so she arrested him for conduct likely to cause a breach of the peace and handcuffed him, and later took him to the police station, although he was eventually released without charge. She says that he made no criminal complaint at the scene about being hit by the Brombys or struck by a pipe. Indeed he made no criminal complaint about anything. She also says that he gave no indication of having sustained any injury, and did not appear to have suffered any injury or to be in fear.

29. The other police witness called by the plaintiffs was Sgt. Tucker. He was present when WPC DeSilva arrested the defendant. He says that at no time on 16th May did the defendant complain to him about being threatened or assaulted by either of the Brombys, and that it was not until 19th May that Mr. Talbot attended at the Police station and made his complaint. It was at that point that the sergeant says he specifically asked the defendant if he had sustained any injuries as a result of the alleged assault and he said that he had not.

30. At the trial before the Magistrate the prosecution was able to call the backhoe operator, who largely confirmed the defendant's version of events. He was not called before me. I was told by counsel that he was permanently hospitalized with complications from diabetes, and was incapable of giving evidence. No medical evidence was called or produced by way of a report or a certificate to support this. Counsel is not competent to give evidence on such matters, and if the issue is contentious should not expect the court to take his word for it, but should substantiate the position with evidence. However, the point did not appear to be contentious, and so I draw no adverse inference from Mr. Waldron's absence. It does mean, however, that I do not have the benefit of his evidence as counsel

made no attempt to get his police statement or his evidence before the Magistrate admitted in these proceedings by way of Part IIA of the Evidence Act 1905, and the mechanisms provided in RSC Ord. 38, Part III.

31. On the other hand, the plaintiffs' counsel did cross examine the defendant on the basis that he had put Waldron up to lie in the Magistrates' Court, and that was pleaded as a particular of falsity and malice. In particular it was put to him that, while Waldron gave evidence that it was Peter who hit the defendant with a pipe, he later appeared to be unable to identify Peter, the suggestion being that he was just parroting what he had been told to say, rather than recounting something which he had seen. That was denied by the defendant, and not having had the benefit of seeing Mr. Waldron cross-examined, I do not think that I can give much weight to the point.

32. The plaintiffs did, however, call another employee of Mr. Talbot's who was at the scene. This was a Fernando Landingin. He is a Filipino and gave evidence through an interpreter, which made it more difficult to assess his veracity. I did require him to give his evidence in chief *de novo*, rather than simply letting his witness statement stand as his evidence in chief, because it had been made with the assistance of an unofficial interpreter. In his evidence he said that he was on the beach and saw the Brombys come down and talk to Waldron, and then the defendant approached them. He said the Brombys were asking why he was putting rocks on their pathway. He said that he was close to them, and they were just talking and that he saw nothing happen, and saw no physical contact. However, he said that some time afterwards the defendant talked to him about a court case, and said his lawyer was coming and that when he came the witness was to tell him that the defendant was struck in the stomach with the PVC pipe by Peter Bromby. This was two weeks before the trial, and the defendant told him that if there was a hearing he should come to court. However, in the event he did not attend the trial.

33. There no dispute that Mr. Landingin was there that day. He is shown in some of the photographs. It was, however, suggested to him that he was lying to revenge himself on the defendant after a work dispute. It was suggested he walked off the job after being shouted

at by Mr. Talbot's son, but he maintained that his three-year contract had come to an end, and that he had parted amicably from the defendant's employment. However, he accepted that the defendant would not give him the release papers required by the labour department before he could seek other employment. It seems that he left the defendant in June 2005 and that his permission to be employed elsewhere came through in January 2006. There were suggestions that he had worked in the interim illegally, but he denied that and there was no evidence to the contrary. Nor can I properly embark upon a trial of such an ancillary issue which goes only to credit. He also complained that Mr. Talbot and his son had been harassing him, although at the same time he asserted that they had maintained good relations.

34. As to his contact with the Brombys, he said that John had first approached him while he was in a restaurant with his new employer, and asked him if he had been working for the defendant on the day of the dispute. Following that, he had gone into John's shop with his co-workers to buy cigarettes, and was again asked if he had seen what happened. Then, after that, the plaintiffs called him and took his statement. In cross-examination, he denied ever having worked for the Brombys.

35. In evaluating Mr. Landingin there are several difficulties. He gave his evidence through an interpreter, which always makes it more difficult. Although he made statements about his immigration position, and particularly his release papers from the defendant, there was no independent verification either way, and no evidence was called from the department of immigration. That means that I have no objective touch-stone. Doing the best that I can I find that the likelihood is that he did leave the defendant's employ prematurely, walking off the job because he did not like the way he was being treated, and that after that the defendant caused him difficulty in seeking new employment. Not only does that mean that he has an incentive to give evidence against the defendant, but it also means that having disbelieved him on that issue I cannot give his evidence much credence on the central issue.

36. There is also some uncertainty as to Mr. Landingin's position on the beach, and whether he could in fact have seen and heard what transpired. His evidence was that he followed the defendant up the beach and was standing by him – about five feet from him – during the altercation. Mr. Simons, however, in his cross-examination, described the two Filipino workers as being in the distance.

37. There was indeed another Filipino worker, Rudy, on the beach. He was not called, and I was told he had returned to his home country when his immigration permission expired. Again there was no evidence of this, but it seems plausible and was not seriously contested. Nor did he give evidence before the Magistrate. I therefore treat his absence as a neutral fact.

38. Dr. Femi Bada gave evidence under sub-poena. I have already referred to his findings of bruising on the defendant's abdomen on 4th June 2004. At trial he was unable to express an opinion on the age of the injuries, or their causation beyond the obvious that they were caused by some form of blunt force. Mr. Woolridge also attempted to lead evidence as to the link between the bruising which the doctor observed and an abdominal aneurysm which the defendant suffered and for which he required surgery. That did not go very far. The doctor accepted that he had referred the defendant to a specialist, but stated simply that that was unrelated to the bruising. I did not allow Mr. Woolridge to pursue that further, not only because to do so would be to cross-examine his own witness, but also because he had produced no medical reports, either from Dr. Bada or the specialist or any other doctor dealing with this point[11]. And, in any event, by that stage the counterclaim had been abandoned, and it was no longer relevant to any issue in the case.

[11] RSC Ord. 38, Part IV, requires a party seeking to adduce expert evidence to obtain leave prior to trial, and that is usually given on condition of disclosure of a written report of the evidence which it is intended to lead. This is intended to avoid ambush at trial, and to ensure that the other side has a proper opportunity to have its own experts address the issues.

Conclusions

39. It is important to be clear that this is a civil trial, not a criminal one, and that the burden of proof is on the plaintiffs. They must show that it is more likely than not that the defendant's complaint to the police, and his evidence at the Magistrates' Court trial, was deliberately false. The defendant does not have to prove that he was telling the truth. The position would have been different if the counterclaim had survived, because that would have required proof that Peter Bromby hit him and caused the injury for which he claimed damages. But the counterclaim was withdrawn, and I do not now have to decide upon it.

40. It is accepted on all sides that the argument between the parties on the beach was heated. John accepts that he called the defendant a 'piece of shit'. It was no doubt fuelled by the preceding property dispute, and by an aggrieved sense of right on both sides. It is a truism that different witnesses see and remember traumatic and fast moving events differently, and in disputes such as this recollections become coloured and partial. Having heard and seen the plaintiffs I think it likely that they were shouting and verbally abusing the defendant, even if they may not have used the exact words alleged. In those circumstances I am not persuaded that the defendant was lying when he complained of threats

41. The alleged assault is more problematic. At the trial in the Magistrates Court it came down to[12] –

> "Then they started hitting – John on one side, Peter on the other. John hit me up around my shoulder with his hand. Like in slapping, pushing sort of thing. Peter hit me the same way – on the other side . . . At this point Peter took the pipe and jab me up in here – in my groin – my stomach."

42. I accept, and find as a fact, that the defendant did not tell the police officers about it on the beach, but that is not determinative. It is plain that he was almost hysterical with anger, and having seen him in the witness box I can readily understand that he is the sort of man to work himself up in that way. He first reported the assault three days later, on the 19th May.

[12] See p. 6 of the transcript.

Much is made of the fact that he did not report any injury at that point, but that also is not determinative. The injury alleged was not a severe one. At the Magistrates' Court trial it was described as "a bruise in my stomach groin area". The more serious sequelae relied on in the counterclaim were never mentioned at trial, and formed no part of the prosecution. It may be that the defendant later sought to over-egg the pudding by attaching the bruising that the doctor observed on the 4th June to this incident, but that would not mean that the charge of assault was without reasonable cause: indeed it was not necessary to make out the charge of assault that he suffer any injury at all, because the threshold for assault is very low (at common law mere threats would suffice).

43. There is also the question of the weapons carried by the Brombys. Peter says that he armed himself anticipating a need for self-defence. The law does not permit that. The law permits a person who is attacked to use reasonable and necessary force to defend himself, but it does not permit a man who goes looking for trouble to take along a weapon in case he finds it. The proper course, if trouble is anticipated, is not to go. As it is, the moment Peter took up the pipe foreseeing that he might need to use it to defend himself, it became an offensive weapon,[13] and it is not a reasonable excuse for carrying an offensive weapon that a person arms himself to repel unlawful violence which he himself is about to create, for example by visiting someone who he knows is likely to greet him with violence[14]. John says that he was carrying his hoe handle to protect against the defendant's dogs, but I was not much impressed by that evidence when he gave it and think that it is an *ex post facto* rationalization. There is no suggestion that the dogs were on the beach. I think that like his brother he armed himself instinctively for whatever might come.

44. I accept that the Brombys were not charged with carrying offensive weapons. That may be because the offence is only constituted if the weapons are carried in a public place, and the beach is private. But it remains utterly inappropriate to carry weapons to a dispute, and the fact that they did so colours all that follows.

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[13] At the time of these events an offensive weapon was defined for the purposes of section 315(4) of the Criminal Code as "any article made or adapted for use for causing injury to the person or intended for such use by the person having it in his possession".

[14] See Archbold, 2009 ed. At para. 24-122, citing Malnik v DPP [1989] Crim. L.R. 451, DC.

45. In all the circumstances I am not persuaded that the defendant was lying when he said that he was assaulted. The parties were heated. Things were moving quickly. In such situations the observation of witnesses can be uncertain. It may well be that the various discrepancies were such that no court could be sure that the defendant was telling the truth (which was the test at the criminal trial), but they do not mean that I can conclude that he was probably telling a lie (which is the test at this trial).

THE COUNTERCLAIM

46. The defendant filed a Counterclaim with his Defence of 26th June 2007. In it he claimed for the cost of overseas medical treatment to repair an abdominal aneurysm, and loss of earnings associated with that treatment. The total was some $43,777.10, plus a claim for general damages. The pleading promised that "further doctors reports which confirm that the injury to the Defendant's abdomen and explain the nexus with the 'Abdominal Aorta Aneurysm' . . . would be filed and served . . . as they become available", but that was never done. In any event, in the course of his evidence, the defendant disclaimed the counterclaim, saying that it had been filed without instructions by his former lawyer. Given the specificity of the pleading of the special damages, I find that improbable and reject it. Moreover, in his witness statement, which is dated 20th April 2009 and was produced on the first day of trial, the defendant states –

> "The matters pleaded in my Counter Claim are in accordance with the findings of the doctor who is the expert. He can attest to his findings. The report was unfortunately not used by the Crown in the prosecution's case."

That does not sit well with the defendant's subsequent assertions that he was totally unaware of the counterclaim. In the event, the counterclaim was formally withdrawn on 23rd April 2009, at the close of the defence case.

SUMMARY

47. Having heard the evidence, I am not persuaded that the defendant was deliberately lying about the events on the beach. I am, therefore, unable to say that the prosecution was brought maliciously, and accordingly I dismiss the plaintiffs' claim.

48. As to costs, I will have to hear the parties, but there are the following considerations. Notwithstanding his win on the main action, the defendant is still going to have to pay any and all costs occasioned by the substantial counterclaim which he abandoned. He is going to have to pay 50% of the taxed costs of the strike out application, which I ordered in any event, so that is unaffected by the eventual outcome. In that respect, the plaintiffs have put in a bill for $2,908.75, which does not yet appear to have been taxed. I think it important that an end be put to the litigation between these parties, and I am minded to summarily assess any costs that I award to the defendant, pursuant to RSC Ord. 62, r. 7(5), rather than order an expensive and time-consuming taxation. However, I will hear submissions on that when I deliver this judgment.

Dated the 12th day of June 2009

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Richard Ground
Chief Justice