IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NEWPORT COUNTY COURT
(HIS HONOUR JUDGE CROWTHER QC)

CCRTF 98/0686/2

Royal Courts of Justice
Strand
London WC2

Friday 22nd January, 1999

B e f o r e:

LORD JUSTICE CHADWICK
LORD JUSTICE SEDLEY

- - - - - -

MOHAMMED ASHRAF

Appellant

- v -

MOHAMMED AKRAM

Respondent

- - - - - -

(Computer Aided Transcript of the Palantype Notes of
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MR P BROOKS (Instructed by Messrs Gartside, Harding & Davies, Newport, South Wales NP9 1DJ) appeared on behalf of the Appellant

MR I WIGHTWICK (Instructed by Messrs Stuart Cohen & Mae, Cardiff CF2 3JD) appeared on behalf of the Respondent

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J U D G M E N T
(As approved by the Court)

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Friday 22nd January, 1999

JUDGMENT

LORD JUSTICE CHADWICK: This is an appeal against the order made by His Honour Judge Crowther QC in the Newport Gwent County Court on 28th April 1998 in proceedings between Mr Mohammed Ashraf as plaintiff and Mr Mohammed Akram as defendant.

The proceedings, which included a claim and counterclaim, arose out of an incident which occurred on 9th July 1994. As the judge explained in his careful judgment, both the plaintiff and the defendant were prominent members of the Muslim community in Newport. They were members of the same mosque. The Judge found that there had been some history of ill feeling between them. On 9th July 1994 the plaintiff, Mr Ashraf, and his son were at the mosque for the purpose of some cleaning operations. While they were there, the defendant, Mr Akram, came to the mosque for the purposes of private prayer. On finding the electric lights on and not seeing the plaintiff or his son, the defendant turned the lights off. He went into a nearby washroom to prepare himself for prayer. Mr Ashraf and his son turned the lights on again so that they could continue with their cleaning. Mr Akram, on returning from his preparation, turned them off again. That seemingly trivial incident was the cause of an argument. Some heated words were exchanged.

The parties taking the view, understandably, that the mosque was not an appropriate place in which to conduct such an argument, left up a stairway and into the courtyard or car park. There is or was a dispute as to the manner in which they left; and, in particular, whether Mr Akram was pushed by the plaintiff's son or whether it was the other way round. The upshot was that when the three of them arrived in the car park they came to blows. It is out of that fight or scuffle that the present action and counterclaim arise.

In the Particulars of Claim, which were served on 21st February 1996, some 18 months after the incident itself, the plaintiff alleged that the defendant assaulted his son in the mosque and that:

> "2. [When] the Plaintiff sought to separate his son from the Defendant, the Defendant assaulted and beat the Plaintiff with his fists and causing the Plaintiff to fall to the floor."

Those allegations are not easy to reconcile with the basis upon which the trial was conducted. It appears to have been common ground at the trial that the fisticuffs occurred outside the mosque.

In his Defence and Counterclaim the defendant made no admissions in relation to the alleged assault, either on the plaintiff or on his son, but went on to say this:

> "3. The Defendant avers that he was attacked and physically assaulted by the Plaintiff and the Plaintiff's son and that any injuries suffered by the Plaintiff were as a result of the Defendant taking reasonable steps and using reasonable force to defend himself from the attack launched upon him by the Plaintiff and the Plaintiff's son."

The defence contained a denial of causation. It went on, at paragraphs 5 and 6:

> "5. Further, and in the alternative, the Defendant will aver that any injuries suffered by the Plaintiff were as a result of blows received by the Plaintiff from the Plaintiff's son during the attack upon the defendant.
>
> 6. The Defendant avers that the Plaintiff and the Plaintiff's son assaulted and beat him [the defendant] with their fists, by kicking him and with the aid of a metal bar or pipe."

The defendant counterclaimed in respect of those injuries.

On the pleadings, therefore, the issues before the Court in the action were: first, whether the defendant had assaulted the plaintiff's son; secondly, if so, whether the defendant had assaulted the plaintiff in the

course of the plaintiff's attempt to separate his son from the defendant's assault; and thirdly, whether, if the defendant had struck the plaintiff at all, that was done with reasonable force used in self-defence. On the counterclaim the issues were whether the plaintiff and the plaintiff's son had assaulted the defendant. It was not alleged by way of reply that if the plaintiff had assaulted the defendant, the plaintiff had done so by way of self-defence. The plaintiff's case was simply that he had not struck the defendant at all.

The trial was on liability only; it having been decided (for reasons which may have turned out to be unfortunate, but which are understandable) that the cost of investigating quantum with medical evidence should be deferred until after a decision on liability. That had the result that the judge did not have the benefit of medical evidence which might have assisted him in reaching a conclusion as to the probable cause of the injuries as were suffered on either side. All he had was a medical report prepared on 16th September 1996 which recorded the injuries with which the defendant had presented at the Accident and Emergency Department of the Royal Gwent Hospital in the late evening of 9th July 1994; and a report by a psychiatrist, prepared on 5th January 1996, recording the state of the plaintiff's head injuries as at that date.

The authors of those reports were not called. The only evidence given at the trial was the evidence of the plaintiff, his son and the defendant.

At the conclusion of the evidence there was an interchange between the judge and Mr Wightwick, counsel for the defendant. The judge is recorded as saying this:

> "It is an important case. It is important for all sorts of reasons - personal, social in the community I am sure more than most - I do not need much persuasion about that. What is the situation in your submission, if in the face of the fact that plainly there is some hard swearing from one party or two, I find it quite impossible to resolve the issue as to who is telling me lies?"

Mr Wightwick responded to that by accepting that such a finding would have the effect that the judge could not find for the defendant on the counterclaim as well as being unable to find for the plaintiff on the claim. He made reference to the consequence that that result might have in relation to costs; no doubt conscious of the fact that the defendant was not in receipt of legal aid, whereas the plaintiff was legally aided.

The judge clearly took Mr Wightwick to be accepting that, if the Court were to reach a conclusion that he could not make no finding that the plaintiff had established his claim on the balance of probabilities, the defendant would not press for a finding that he, the defendant, was entitled to succeed on the counterclaim. To put the point in the vernacular, Mr Wightwick indicated that he and his client were content to leave court on the basis of a no-score draw.

The judge referred in the course of that inter-change to a case recently decided in this Court which, although he did not name it, is likely to have been Sewell v Electrolux Ltd, The Times, 7th November 1997. THis Court had pointed out that it was the task of a Court to resolve differences in opinion evidence between medical experts. But the Judge described that as a different situation and expressed the view, before hearing argument, that he could see nothing in principle which would prevent him from saying that he simply could not decide between those two accounts "because frankly that is the situation in which I am".

Nevertheless, having expressed that provisional view at the end of the evidence, he invited Mr Milwyn Jarman, who then appeared as counsel for the plaintiff, to address him on the reasons why he, the judge, ought to be satisfied by the plaintiff's account of the incident; which was, of course, supported by the evidence of the plaintiff's son. Mr Jarman accepted that invitation. He took the Court through a number of factors which, he said, pointed inferentially to the plaintiff's account, and that of his son,

being more likely to be correct than the account of the defendant. Mr Jarman indicated in the course of his submissions that he did not propose to undertake a blow by blow account or analysis because he did not think that that would get anyone very far. He plainly took the view, understandably if I may say so, that the underlying question that the Court was being asked to decide was: who started the fight?

In the light of the indication that had already been given by Mr Wightwick as to the defendant's position, he was not called on to address the judge on the effect of the evidence. The judge began his judgment by reminding himself that this was not a trivial case. He recognised that it had a particular importance in the context that both the plaintiff and the defendant were devout members of their local community - a relatively small community in which, as he thought, most members would know each other - and that, despite the potentially serious nature of the injuries, it was perhaps the injury to reputation and self-esteem that were the most critical matters between the parties.

The Judge explained that the counterclaim had really been a response to the claim. Bearing in mind that the claim itself was not made until some 18 months after the incident, that would seem to be a correct inference. He went through the matters which Mr Jarman had urged upon him, point by point, and came to the conclusion that he found those matters of no assistance in the task of resolving the question whether he believed, on the balance of probabilities, the plaintiff and his son on the one hand or the defendant on the other. He concluded with this paragraph:

> "Insofar as by way of a general balance I would incline on demeanour and the tiniest indications, I would incline to prefer the evidence of the defendant, but I have said that I cannot determine that I am satisfied to the standard required in such a case that the plaintiff, with the assistance of his son, has proved his case or that the defendant has proved his counterclaim, and in those circumstances the claim will be dismissed as will the counterclaim, and I hope I have indicated ... why it is I feel forced to come to that conclusion."

The final observation in that paragraph is a reference to an indication which had been given by the

judge at the beginning of his judgment. He had said that he was wholly dependent upon an assessment whether, on the balance of the probabilities, "is the plaintiff telling me the truth with his son or is the defendant?" He referred to the indication that he had given that he felt unable to make a reliable and safe determination as to that question. He went on to say this:

> "I am well aware that one ought not, in a difficult case, to resort to the use of the burden of proof as a way avoiding making the decision, and in particular I have reminded myself that but recently in the case of opinion evidence from experts it has been authoritatively held that one simply must not do it. There is an obligation to come to a conclusion. Where there is a difference of opinion evidence, one has to choose one or the other as best one can in the circumstances and give one's reasons. But it seems to me that that principle, although desirable in terms of the fundamental difference as to fact, cannot properly be required of a judge who has to determine in accordance with the ordinary basis of `Has the plaintiff proved his case against the defendant; has the defendant proved his counterclaim against the plaintiff?'"

The plaintiff, Mr Ashraf, appeals to this court. It is contended on his behalf that the judge was wrong in law in failing to make determinations of fact as to the issues between the parties; and that he ought to have considered the possibility that there were elements of truth in the evidence of each of the plaintiff, his son and the defendant.

When the appeal was opened it became clear that the real criticism made on behalf of the appellant was that the judge had taken the view that this was a case in which, for understandable reasons connected with their standing within the community, it would have done a great deal more harm than good to make a finding of fault against either party; and that it was in the interests of both that there should be no finding against either of them which could be relied upon as a criticism on which to base an attack on their reputation thereafter.

If that were the approach of the judge then, understandable though that approach would be in the circumstances of this case, it would plainly be wring in law. It is not for judges to impose their own views as to what is in the best interests of the parties. If the parties, however wrongheadedly, take the

view that it is in their interests to have a finding of fact - accepting the risk that that may be a finding against them - it is the duty of the Judge to try the issue in a proper and judicial way and to reach a conclusion upon it if he can. If this were a case in which it could be established that the judge had not discharged that function, then there would be no alternative but to order a new trial. But in my view, on a proper analysis of his judgment, this is not such a case.

This, as it seems to me, is one of those rare and exceptional cases recognised by this court in Morris v London Iron and Steel Co [1988] 1 QB 493, in which a judge, conscientiously seeking to decide the matter before him, may be forced to say "I just do not know". I refer to the judgment of May LJ at page 504D-E:

> "Judges and tribunals of fact should make findings of fact in relation to matters before them if they can. In most cases, although in some cases it may be difficult, they can do just that. Having made them, the tribunal is entitled to draw inferences from the findings of primary fact where appropriate. In the exceptional case, however, a judge conscientiously seeking to decide the matter before him may be forced to say `I just do not know:' indeed to say anything else might be in breach of his judicial duty. In this connection, however, I would say this. Speaking from my own experience some people find it easier to make up their minds than others and it should not be thought that a swift reliance upon where the burden of proof lies and a failure to decide issues of fact in the case, ought in any way to be considered an easy or convenient refuge for anybody who does find it difficult to make up his mind in a particular case. Judges should, so far as is practicable and so far as it is in accordance with their conscientious duty, make findings of fact. But it is in the exceptional case that they may be forced to reach the conclusion that they do not know on which side of the line the decision ought to be. In any event, where the ultimate decision can only be between two alternatives, for instance negligence or not, or, as in the instant appeal, dismissal or resignation, then when all the evidence in the case has been called the judge or the tribunal should ask himself or itself whether, on that totality of the evidence, on the balance of probabilities, drawing whatever inferences may be thought to be appropriate, the alternative which it is necessary for the plaintiff to establish in order to succeed is made out. If it is not, then the operation of the principle of the burden of proof comes into play and the plaintiff fails."

The Lord Justice goes on to explain that different circumstances may apply where the ultimate decision could be between more than two possibilities.

In the present case, as it seems to me, the judge was faced with a decision between two possibilities: either the fight had been started by Mr Ashraf or his son - so that the defendant was responding by defending himself - or the fight had been started by the defendant. The material on which to conduct an analysis of each blow, and to decide whether that particular blow was struck in self-defence or not, was simply not there in the evidence before the judge. In order to succeed, the plaintiff had to establish that the fight was started by the defendant.

The judge came to the conclusion that, on the evidence which he had heard, he was not able to reach the conclusion that the plaintiff had established that essential fact on the balance of probabilities. Accordingly, the plaintiff's claim failed. Because he reached that conclusion, he was absolved from reaching a conclusion whether the defendant himself had been assaulted by the plaintiff because of the concession which had been made by the defendant's counsel.

We were referred also to Sewell v Electrolux and to Bray v Parker [1953] 1 WLR 1455. I need say no more about Sewell v Electrolux. That was a case in which expert evidence was clear and inherently credible. The task of the Recorder was to decide between the two rival contentions. There was no difficulty in ascertaining what those contentions were. They were contained in written reports by medical experts. The position is different in a case where the evidence is confused and inherently incredible.

Bray v Palmer, however, is of importance in this context. That was a case in which there had been a collision between a motorcycle, driven by the plaintiff, and a motor car driven by the defendant. Each party alleged that the cause of the accident was the negligence of the other. Oliver J held that the accident must be due either entirely to the negligence of the plaintiff or entirely to the negligence of the defendant. He did not see his way to holding, on the evidence, that both were responsible. Because he was unable to decide whether the plaintiff's story or the defendant's story was the true account, he

dismissed both action and counterclaim. The plaintiff appealed. The Court of Appeal held that the judge had been wrong not to consider the possibility that the truth lay somewhere between the two accounts; so that this might have been an accident caused partly by the negligence of one party and partly by the negligence of the other. Accordingly, a retrial was ordered. But in the course of reaching that conclusion, Lord Evershed MR said this, at page 1458:

> "Mr Fox-Andrews put the case thus: He said that in essence and in substance the judge, having heard and considered the evidence, concluded, as a fact that the occurrence in issue was only explicable upon hypothesis `A' or upon hypothesis `B' and that, if that is right, then there is no duty upon a judge so compelling that he must, whatever the evidence and its nature and however great his experience, conclude the matter in favour either of `A' or of `B'. I do not find it necessary to express a conclusion whether the judicial duty in such a circumstance does require a judge to decide one or the other. I am not saying it does not, but it is unnecessary for me to say that he must, in those circumstances, make up his mind. Certainly no judge could have been more qualified by his experience to make up his mind between two conflicting stories than this judge; but I am not satisfied that the premise upon which it is said the final conclusion should have been reached is established."

This Court was accepting, as it seems to me, that there will be circumstances - not present in that case - in which the facts must be either `A' or `B'; and that, if the party whose case depends upon establishing that the facts are `A' cannot persuade the judge of that on the balance of probabilities, he will necessarily fail.

In my view, for the reasons which the judge set out in his judgment, this was a case in which he was left in the position that the fight must have been started either by the plaintiff's son or the defendant; that he was not persuaded on the balance of probabilities that it had been started by the defendants; or that the defendant had used more than reasonable force in self-defence and that, accordingly, in fulfilling his judicial duty he was bound to reach the conclusion that the plaintiff had not made out the facts which he needed to establish in order to succeed in his claim. Accordingly, he was right to dismiss that claim; and, having dismissed it, was entitled to dismiss the counterclaim also on the basis of the concession to which I have referred.

For those reasons, I would dismiss the substantive appeal. There is, however, a secondary point to which I should refer. In the course of the proceedings leading to trial, the defendant sought to strike out the plaintiff's action on the grounds of abuse of process, relying upon inordinate delay and prejudice. That application failed. The District Judge made an order, as he was entitled to do, that the defendant pay the plaintiff's costs of that application. In the circumstances that the defendant was not legally aided, the effect of that order was that he would have to pay the costs personally, unless there were some costs to which he subsequently became entitled against which he could set off the costs of the interlocutory hearing.

Following judgment at the trial, it appears that neither party asked for the costs of the action or the counterclaim. Accordingly, there was no scope for setting off the interlocutory costs which the defendant had been ordered to pay against the costs of the action to which, *prima facie* at least, the defendant would otherwise have been entitled.

It may be that the point was recognised at a late stage. In an attempt to deal with it, the judge was persuaded to give leave to appeal the order of the District Judge out of time, to treat that appeal as before him (without the plaintiff having had any warning about that or, as we were told, having been given any opportunity to deal with it) and to hold that the District Judge had been wrong to make the order that he did. Accordingly, the judge included, in his order of 28th April 1998, a direction that there be no order as to costs in respect of the hearing before the District Judge.

The course which the Judge adopted was understandable in the context of a desire to achieve a no-score draw; but, in my judgment, it was not a course which was open to him. The order, in that respect, was plainly wrong.

To that extent, and only to that extent, I would allow the appeal and restore the order as to costs before District Judge to the order made on 29th January 1998.

LORD JUSTICE SEDLEY: I agree. The authorities confirm what one would expect, namely that a trial judge's duty is to decide the issues relevant to his judgment and not to evade them. But the authorities also recognise that there will be the occasional case in which the common path to the resolution of the ultimate issue, namely who is telling the truth, is blocked by an intractable evidential tangle. In such a case it may be not only legitimate but inevitable that the judge will hold that the plaintiff has failed to show a preponderance of evidential probability in favour of his case. Where there are cross-claims, in such a situation the counterclaim will also logically fail. It is unnecessary to decide in the present case whether the judge's conclusions, though tentative, amounted, as Mr Wightwick suggests they do, to a narrow preference for the defendant's evidence over the plaintiff's evidence. At lowest the judge has concluded, as on the evidence he was entitled to conclude, that the plaintiff had not persuaded him that he had more probably than not been the victim and not the aggressor.

The defendant in his final submission had in this event waived his counterclaim, making it unnecessary for the judge to do more than dismiss it, though logically dismissal of both claims followed from the impasse in to which the evidence had taken him.

This was, in my judgment a case in the limited class described by May LJ in Morris v London, Iron and Steel Co [1988] 1 QB 493 as "the exceptional case". It was not the kind of abdication rejected by this court in Sewell v Electrolux Ltd, The Times Law Reports, 7th November 1997. It corresponds with the situation envisaged by Jenkins LJ in Bray v Palmer [1953] 1 WLR 1455 at 1459:

> "The judge did not simply reject the plaintiffs' and the defendant's evidence and say: "I do not believe that the accident happened in the way claimed by either side." If he had done that, then his decision would not, as far as I can see, be open to any criticism."

In such a situation it is possible that the Court will have formed its own picture of what happened. But if no such third picture emerges -- and none emerged in the present case -- then there is no legal criticism to be levelled at a judge who holds simply that the plaintiff's case that he was attacked has not been made out.

For these reasons, and more importantly for those given by my Lord, I agree that the plaintiff's appeal on liability should be dismissed, but that his appeal against the oversetting by the judge of the District judge's interlocutory costs order in the plaintiff's favour should be allowed.

ORDER: Appeal dismissed, save as regards the oversetting of the District Judge's interlocutory costs order by the Circuit Judge. Order for costs to be made against the Legal Aid Board, subject to the usual provision that the Board have an opportunity to apply to vary that order within 10 weeks. Order made after considering that the assisted party, namely the appellant, should not himself have to contribute in the circumstances that he is legally aided with a nil contribution.

(Order not part of approved judgment)

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