12/03; [2003] VSC 227

SUPREME COURT OF VICTORIA

LEWANDOWSKI v MEDRZYCKI

Ashley J

20, 26 June 2003

CIVIL PROCEEDINGS – CLAIM FOR DAMAGES AS A RESULT OF ALLEGED ASSAULT – CLAIM BY DEFENDANT THAT INJURIES SUSTAINED WHEN DEFENDANT ACTED IN SELF-DEFENCE – DEFENCE UPHELD BY MAGISTRATE – CLAIM DISMISSED – PRINCIPLES OF LAW RELATING TO SELF-DEFENCE – WHETHER PROPERLY APPLIED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR IN UPHOLDING DEFENCE.

L. sought damages for injuries sustained when he was allegedly assaulted and kicked by M. In his defence, M. said that L.'s injuries were sustained as a result of M. acting in self defence when M.'s foot made contact with L.'s chest. In dismissing the claim, the magistrate found that the kick was "administered in the heat of the fight and on that basis I find that the defence of self-defence is made out." Upon appeal—

HELD: Appeal allowed. Order set aside. Remitted for rehearing by a different magistrate.

1. Matters to be considered concerning the law as to self-defence are:

(i) The question to be asked is whether the defendant believed on reasonable grounds that it was necessary in self-defence to do what he/she did.

***Zecevic v DPP (Vic)* [1987] HCA 26; (1987) 162 CLR 645; (1987) 71 ALR 641; (1987) 25 A Crim R 163; 61 ALJR 375, applied.**

(ii) The defendant's relevant belief is to be assessed by what the defendant might reasonably have believed in the circumstances and not the hypothetical reasonable person in the position of the defendant.

(iii) Self-defence is not available where the harm is out of all proportion to the threat faced.

(iv) In some circumstances self-defence may be availed of even where the person seeking to maintain the defence was the initial aggressor.

(v) A pre-emptive strike may, depending on the circumstances, constitute self-defence.

(vi) In a civil trial the onus of proving assault lies on the plaintiff and the onus of proving self-defence lies on the defendant. In each case the onus is on the civil standard, but having regard to the seriousness of the allegations raised.

2. The reference by the magistrate to "the heat of the fight" could not sustain a conclusion that it was shorthand for a finding that M. kicked L. believing on reasonable grounds that it was necessary to do so. What the magistrate said was not apt to make out the defence of self-defence. Accordingly, the magistrate applied a wrong principle in deciding the matter in M.'s favour.

ASHLEY J:

The circumstances of the appeal generally described

1. This is an appeal under s109 of the *Magistrates' Court Act* 1989 from a final order of the Magistrates' Court made on 22 October 2002 by which the plaintiff's civil claim for damages against the defendant was dismissed and the plaintiff was ordered to pay the defendant's costs.

2. On 26 February 2003 a Master discerned the following questions of law arising out of the proceeding below:

> "(i) having regard to the whole of the evidence was it open to the Magistrate to hold that the Appellant's injuries had been sustained as a result of the Respondent acting in `self defence'?
>
> (ii) did the Magistrate give any sufficient reason for ruling that the Respondent acted in 'self defence'?"

3. Before me, Mr Foster of Counsel for the Appellant argued two aspects of the first question: first, whether the learned Magistrate misdirected himself when considering the defence of self defence raised by the Respondent. Second, whether there was any evidence to support the Magistrate's finding that the defence was made out. He did not address the second question framed by the Master.

4. The appellant by his complaint[1] alleged that on 23 November 2000 he was "assaulted and kicked by" the respondent, and that by reason of the incident he suffered injuries. The injuries alleged were principally a fracture of the right 7th rib and symptoms on the right side of the chest.

5. The respondent by his defence dated 20 December 2001 relevantly alleged

> "(1) On 23 November 2000 at the Defendant's premises at 35 Glen Road Silvan the Plaintiff struck the Defendant who fell to the ground. The Plaintiff then approached the Defendant in a threatening manner and the Defendant reasonably apprehended that the Plaintiff was about to commit an assault and battery on him again. The Defendant pushed the Plaintiff away with his foot on the Plaintiff's chest.
>
> (2) If the Plaintiff was injured during the scuffle (which injuries are not admitted but are expressly denied) then any such injuries were occasioned solely by the Defendant's need to protect himself from the Plaintiff's said assault and battery and involved the Defendant in using no more force than was reasonably necessary in the circumstances."

6. The appellant's claim was heard on 21 and 22 October 2002; that is, about two years after an incident which admittedly occurred. Each of the appellant, Mr Chris Fleischer, Mr Colin Allan, Mr Dennis Lewandowski and Miss Kim Lewandowski gave evidence concerning the incident in support of the claim. The respondent gave evidence in opposition thereto. So did his father, though his contribution was peripheral.

7. Although the complainant alleged that the appellant had been "assaulted and kicked" by the respondent, the parties treated the alleged assault as being constituted by a kick and nothing else. It is convenient here to note that, although the evidence varied in a number of respects, it did disclose that at some stage the respondent's foot contacted the appellant's chest.

The Evidence

8. The alleged assault occurred on land owned by the respondent[2] at Silvan. The land seems to have been used mainly for intensive agriculture. There was a shed on the property. It was leased to a transport company. Produce was aggregated there and shipped out.

9. In 1999 and early 2000 some of the land was leased to the appellant. There was a dispute about water usage. After that dispute arose, the appellant and respondent, who are cousins, and of middle age, did not enjoy a happy relationship.

10. It is next apparent that at some time on 23 November 2000 the appellant brought a load of produce to the shed. He was seen by the respondent, who was then using his tractor and a rotary hoe to work up ground on the property. The respondent got off his tractor – whether he drove it close to the shed before doing so was in dispute – and approached the appellant. The respondent was of the view, rightly or wrongly, that the appellant should not have been at the shed. He asked the appellant what he was doing there.

11. What I have said in the last three paragraphs of these Reasons was, with the one identified exception, really common ground. Then the evidence diverged.

12. The appellant's account was generally as follows: The respondent approached, taking off his heavy shoe as he did so – as if to arm himself. He, the appellant, somehow went to the ground. The respondent fell on top of him. Their bodies were opposed – the head of one at the feet of the other. The respondent attempted to throttle him, using his legs to do so. Then the respondent got up quickly. He, the appellant, began to get up. Whilst he was doing so the respondent kicked him on the left side of his chest. He fell to back to the ground; and again the respondent jumped on him. A little later, after they had regained their feet, the respondent sought to arm himself: first, and unsuccessfully, with a chain which formed part of a roller door installation of the shed; then with a piece of pallet board. He, the appellant, disarmed the respondent.

13. The respondent gave evidence that he asked the appellant, in a raised voice, what he was doing at the shed. The appellant said that he could come there "fucking any time". He, the respondent, told the appellant to take his produce off the property. Then he kneeled down[3] to remove dirt which had got into a boot. Whilst he was in that position the appellant kicked him on the right buttock. He fell on his back. The appellant came strongly at him. He stuck his foot out and kicked the appellant. Then he got up and they began to tussle. They went to the ground. The appellant attempted to throttle him. He forced the appellant to let go by applying pressure to the latter's thumb. They got to their feet. He obtained the piece of pallet board for defensive purposes. The appellant's children were by that time present, as were others.

14. Mr Fleischer was employed as at November 2000 by the lessee of the shed. He gave evidence, in effect, that he had seen the whole incident, although he had not closely observed everything that occurred. He said that the men were scuffling a bit. The appellant fell over, then he "turned to see (the respondent) running up to (the appellant) and actually kicking him in the ribs". The appellant was on all fours. The respondent took two steps and brought his foot through. Thereafter the respondent got hold of the pallet board, having unsuccessfully attempted to arm himself with the roller door chain.

15. The witness said that he had not seen the respondent on the ground choking the appellant with his legs. His belief was that the respondent had run in from the appellant's right side. The witness admitted to friendship with the appellant's children. He denied bitterness towards the respondent.

16. Mr Allan was visiting Mr Fleischer at the time of the incident. He said that he, Mr Fleischer, and the latter's then wife were upstairs (there was a mezzanine or the like in the shed, used for accommodation) when Mr Fleischer remarked that something was happening. He went downstairs. The appellant and the respondent "were going at each other fairly sort of full on". The appellant went down. The respondent kicked the appellant in the ribs as the latter was in the process of standing up. The respondent was a few steps back before running in and kicking the appellant. He was sure that the respondent had kicked the appellant on the right side.

17. Dennis Lewandowsi, the appellant's son, said that on his arrival at the shed he saw the appellant and respondent on the ground. They got up. They were arguing. Thereafter the respondent attempted to get the chain and in fact got hold of the pallet board. The appellant disarmed him. [4] The respondent, he conceded, was basically defending himself when he got the pallet board. A group of persons were all around him.

18. Kim Lewandowski, the appellant's daughter, went to the shed with her brother. She saw her father and the respondent standing up,[5] wrestling. They pulled apart, then the respondent ran into the shed and obtained the pallet board. Her father grabbed it and threw it away. She had not noticed him holding his ribs whilst he did so.

19. In recounting the evidence concerning the incident I have attempted to give a general impression of what each witness said. There was in fact much inconsistency, often revealed by competent cross-examination.

20. I should say something about the medical evidence. The appellant called two doctors; the respondent none. The first of the witnesses was a pain management specialist who had examined the appellant on one occasion only – in July 2002. The second witness was a general practitioner whom the appellant had first attended in December 2001. The appellant did not adduce evidence from the Maroondah Hospital which he said he had attended on the night of the incident.

21. The witnesses gave evidence that when they examined the appellant his complaints were of left sided chest and shoulder pain. The initial injury, as they understood it, was rib fracture on the right side. The evidence of Messrs Fleischer and Allan, directly or inferentially, was that contact had been made to the right side of the appellant's chest. Only the appellant said that he had been kicked on the left side. The question how a right rib fracture could possibly produce long term symptoms on the left side of the chest and in the left shoulder area remained unanswered, in my opinion, at the conclusion of the hearing in the Magistrates' Court.

The Magistrate's Reasons

22. The learned Magistrate noted in his Reasons, orally delivered, that the appellant "carrie(d) throughout" the onus of proof of the civil standard. He found that Messrs Fleischer and Allan had not witnessed the beginning of the incident, but that they came downstairs and witnessed the kick being delivered.[6] He noted that their evidence and that of the respondent as to the circumstances in which the kick was delivered was at odds.

He found, consistently with acceptance of their evidence – and the evidence of the appellant – that

> "the injuries sustained by Mr Lewandowski was (sic) the result of a kick administered by Mr Medrzycki while Mr Lewandowski was crouching or getting up off the ground."

He further found that the kick

> "was administered in the heat of the fight and on that basis ... the defence of self defence is made out."

Earlier in his reasons he said

> "That there were blows struck between the two gentlemen is common ground."

Misdirection

23. There is no doubt as to the law concerning self-defence. First, in the context of a criminal proceeding, Wilson, Dawson and Toohey JJ said this in *Zevecic v DPP (Vic)*.[7]

> "An explanation of the law of self-defence requires no set words or formula. The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal."

24. Second, the pertinent belief of the defendant is to be assessed by what the defendant might reasonably have believed in the circumstances. The belief is not that of the hypothetical reasonable person in the position of the accused.

25. Third, self-defence is not available where the harm caused is out of all proportion to the threat faced. Whether the degree of force applied was excessive is considered by reference to what an ordinary person would have characterised as reasonable.

26. Fourth, in some circumstances self-defence may be availed of even where the person seeking to maintain the defence was the initial aggressor.

27. Fifth, a pre-emptive strike may, depending on the circumstances, constitute self-defence.

28. Sixth, in a civil trial the onus of proving assault lies on the plaintiff and the onus of proving self-defence lies on the defendant. In each instance the onus is on the civil standard, but having account of the seriousness of the allegations raised.[8]

29. Mr Burns of counsel for the respondent submitted that there was nothing in the transcript or otherwise by which it was stated or from which it could be inferred that the learned magistrate acted on a wrong principle. He submitted that counsel for the respondent had referred to a key authority, *Zevecic*, and that his Worship was in any event to be presumed to know the law. Mr Foster submitted, to the contrary, that the principle upon which the learned magistrate had acted was in fact disclosed, and that it was erroneous. His Worship, having accepted the appellant's account of the circumstances in which he was kicked, had simply said of the kick that "(i)t was administered in the heat of the fight and on that basis I find that the defence of self-defence is made out."

30. I am very clear that words used by a magistrate in Reasons for Decision should not be worked over or dissected in an extravagant attempt to discover a fault. It is also the case that a magistrate should be taken to know and apply the law, even if the same is not set out *in extenso*, or even at all, in the Reasons. But making every allowance for those considerations, it nonetheless seems to me that in the present case his Worship did apply a wrong principle.

31. This is not a case in which the magistrate said nothing about the conceptual basis for

the defence. Rather, he essayed a reason why the defence was made out. What his Worship said, standing alone, was not apt to make out that defence. The relevant passage in his Reasons might have described a defence of provocation. Alternatively, it could have a described an act done in the course of assault by each man on the other. But what his Worship said was apparently unrelated to any belief of the respondent on reasonable grounds that it was necessary for him to do what he did; and the critical passage in his Reasons closely followed a passage in which he necessarily rejected the respondent's account of events immediately preceding and at the time of the kick - an account which was the foundation for the respondent's evidence, in effect, that he kicked the appellant whilst fearing for his safety.

32. Counsel for the respondent submitted, however, that his Worship's finding as to the circumstances in which his client had kicked the appellant did not imply acceptance of the appellant's version of antecedent events. So, reference to "the heat of the fight" was inconsistent with the appellant's evidence; for on that account the appellant had been a victim throughout. Counsel adverted also to his Worship's observation that it was common ground that blows had been struck by both men. He argued that his Worship's reference to the kick being administered in the heat of the fight was consistent with his accepting of the respondent's evidence that he had been kicked at the outset, and with his concluding that the respondent had launched a pre-emptive strike, the appellant later being on the ground, against a prospect of further assault upon him.

33. The submission was well thought out and developed. But I am not persuaded that it should be accepted. The learned magistrate's reference to "the heat of the fight" is perplexing. On the appellant's account there had been no fight. He had been assaulted; and up to the time when he was kicked he had simply been a victim. It is true, again, that his Worship did not in terms reject the respondent's evidence that he had been kicked by the appellant. Further, his Worship did refer to it being common ground that blows had been struck by both men. If his Worship had found that the respondent had been kicked by the appellant at a time before, having the ascendancy, he kicked the appellant, a finding of self-defence might have been open. So also, if it had been the case that blows had been delivered by both men before the respondent kicked the appellant, a finding of self-defence might possibly have been open. But it was not in fact common ground that both men delivered blows – as counsel agreed in the course of their submissions. Further, it would be at least difficult to conclude that his Worship's reference to blows being struck was an intended reference in part to the appellant kicking the respondent. Again, it seems unlikely that his Worship would have accepted an important part of the respondent's evidence, having rejected another part, without specifically saying so. In the event, just what his Worship meant when he referred to "the heat of the fight" remains opaque. I could not conclude that it was shorthand for a finding that the respondent kicked the appellant believing on reasonable grounds that it was necessary to do so.

Any evidence that the Respondent acted in self defence?

34. Counsel for the appellant submitted that the learned magistrate had evidently accepted his client's overall account of the incident. Properly instructed, his Worship must have rejected the defence, there being on that account no evidence to support a finding that the respondent had acted in self-defence. I should assess damages; or else the complaint should be remitted for assessment of damages.

35. Counsel for the respondent resisted such an outcome. At its highest, he submitted that there was evidence, implicitly accepted by the magistrate, which made out the defence. In consequence, any misdirection was immaterial. He adverted to his Worship's reference to "the heat of the fight" and to the alleged common ground that blows were struck by both men.

36. In my opinion his Worship's reasons do not show, expressly or by implication, that he accepted the appellant's account of events generally. I do not accept, therefore, Mr Foster's submission that upon the facts found as to the circumstances in which the kick was delivered there was no evidence to support a finding of self-defence; and that I should assess damages, or else remit the matter for assessment of damages. But neither do I accept Mr Burns' submission that, regardless of misdirection, there was evidence, implicitly accepted by his Worship, which made out the defence.

37. I am not satisfied that his Worship accepted any such evidence. Even if he did so, what he would have made of the defence had he properly directed himself is speculative.

38. It follows that there might be a re-trial generally.[9] It is undesirable that these two middle-aged relatives should be consigned to a re-trial in the Magistrates' Court in connection with a short-lived and foolish incident which occurred years ago; short-lived and foolish whatever be its precise detail. It is the more undesirable when the evidence before the magistrate suggested that the appellant, whether unconsciously or otherwise, overstated the *sequelae* of his being kicked; and where in any event a considerable issue of causation appeared to arise.

39. When I concluded hearing this appeal I suggested that, if it succeeded, the parties might wisely put an end to the litigation, letting costs lie where they fell. I gather from what counsel then said that the parties had been immune to advice. Now I have concluded that the appeal must be allowed; and that there must be a re-trial generally. I can only make orders accordingly. It is not to say, however, that the parties should ignore the sensible advice of their solicitors and counsel as would enable the matter to be ended without a re-trial.

Orders

40. Subject to anything that counsel may say I shall make orders in accordance with the following minutes:

(1) The Appeal is allowed.

(2) The final order of the Magistrates' Court at Ringwood made 22 October 2002 is set aside.

(3) The proceeding is remitted to the Magistrates' Court for re-hearing in full by a magistrate other than the magistrate who constituted the court on 21 and 22 October 2002.

(4) Orders for the costs of the proceeding in the Magistrates' Court generally, and specifically the costs of the hearing on 21 and 22 October 2002, are in the discretion of the magistrate who re-hears the proceeding.

(5) Respondent pay the appellant's costs of the appeal, including reserved costs.

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[1] A copy is Exhibit EL1 to his affidavit sworn 21 November 2002.
[2] Or his family.
[3] Later he said "squatted".
[4] This last evidence was at odds with the evidence of Messrs Fleischer and Allan; but was consistent with the appellant's evidence, and that of Kim Lewandowski.
[5] Compare the evidence of her brother.
[6] The transcript of his Worship's Reasons, derived from an audiotape, is incomplete at a critical point; but it is clear enough that this was the gist of what his Worship found.
[7] [1987] HCA 26; (1987) 162 CLR 645 at 661; (1987) 71 ALR 641; (1987) 25 A Crim R 163; 61 ALJR 375.
[8] *McLelland v Symons* [1951] VicLawRp 21; [1951] VLR 157 at 166 & 168-9; [1951] ALR 422.
[9] Counsel for the respondent understandably did not argue that the respondent's account of the immediate circumstances in which the kick was delivered, an account rejected by the magistrate, could be relied upon to support the defence; whilst counsel for the appellant made it clear that his argument that there was no evidence to support that defence put that account to one side.

APPEARANCES: For the appellant Lewandowski: Mr J Foster, counsel. Ken Smith & Associates, solicitors. For the respondent Medrzycki: Mr AG Burns, counsel. Messrs Mahonys, solicitors.
