
CANADA / JUDGMENT

Siegresit v. Tilton

2020 BCSC 549

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 549 Siegerist v. Tilton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Siegerist v. Tilton,

2020 BCSC 549

Date: 20200303

Docket: S132377

Registry: Vancouver

Between:

Riley Robert Siegerist an infant,

by his Litigation Guardian, Tanya Hoffman

Plaintiff

And

Michael Daniel Forbe Tilton

Defendant

Before: The Honourable Mr. Justice Walker

Oral Ruling on No Evidence Motion

Counsel for the Plaintiff:

J. Cameron

Counsel for the Defendant:

J.J. Hittrich

Place and Date of Hearing:

Vancouver, B.C.

March 3, 2020

Place and Date of Ruling:

Vancouver, B.C.

March 3, 2020

Introduction

- [1] The defendant Michael Tilton brings this no-evidence motion (brought by a filed notice of application) at the close of the plaintiff's case. Some background is necessary to put Mr. Tilton's application in its proper context.
- [2] On April 15, 2009, when he was 14 years old, the plaintiff Riley Siegerist was assaulted moments after he left the grounds of his high school in Delta, B.C. to walk home. Two adult males, one or both wielding telescopic batons, jumped out of a vehicle driven by Michael Tilton, ran after Mr. Siegerist, and physically assaulted him. When they paused at Mr. Tilton's instruction, Mr. Siegerist was then physically assaulted by Mr. Tilton's eldest son.
- [3] Judge Dohm of the Provincial Court convicted Mr. Tilton of two counts of assault causing bodily harm for his role as the directing mind. Judge Dohm's reasons for judgment are unreported but have been transcribed. Mr. Tilton's conviction was upheld by the Court of Appeal.
- [4] Mr. Siegerist brings this civil action in battery against Mr. Tilton to recover damages he sustained as a result of his injuries. His position is that Mr. Tilton's liability is not in dispute, given Mr. Tilton's conviction, such that this trial only concerns an assessment of his damages. Mr. Siegerist's position is that the findings from the criminal trial, as well as the conviction, establish Mr. Tilton's liability as a joint tortfeasor and the doctrine of abuse of process bars Mr. Tilton from relitigating his role in and culpability for the battery.
- [5] Mr. Tilton denies liability. He says he never touched Mr. Siegerist and can thus not be liable in battery since the tort requires direct physical contact. He also disputes the effect of his criminal record conviction in this action. He also argues that the pleadings are defective, inasmuch as they do not allege that he was a joint tortfeasor or co-conspirator or otherwise liable for the tort of assault (which in oral submissions Mr. Tilton conceded he likely was). I find there is no merit in the application.

Battery

[6] Battery is the intentional bringing about of harmful or offensive contact with another person. The cases are clear that Mr. Titlon's liability for battery is not predicated solely on physical contact. He will be liable in battery if Mr. Siegerist establishes that he was injured by the direct act or acts of Mr. Tilton: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at paras. 3-8. In her reasons in that case, Madam Justice McLachlin (as she then was), cited with approval several cases discussing the tort of battery and said this at para. 8:

Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant.

[7] The same point is made in subsequent cases such as *Bettel v. Yim* (1978), 29 O.R. (2d) 617 at 5:

To approach this issue one must first examine what interests the law seeks to protect. A thorough discussion of the history of the old actions of trespass and case is found in Prosser, *Law of Torts*, 4th ed. (1971), p. 28 et seq. Terms such as battery, assault and false imprisonment, which were varieties of trespass, have come to be associated with intent. The old action on the case has emerged as the separate tort of negligence. Today it is recognized that there should be no liability for pure accident, and that for there to be liability the defendant must be found at fault, in the sense of being chargeable with a wrongful intent, or with negligence. Thus, "with rare exceptions, actions for injuries to the person, or to tangible property, now require proof of an intent to inflict them, or of failure to exercise proper care": Prosser, *supra*, p. 30.

In discussing battery Fleming writes, *supra*, pp. 23-4:

Of the various forms of trespass to the person the most common is the tort known as battery, which is committed by intentionally bringing about a harmful or offensive contact with the person of another. The action, therefore, serves the dual purpose of affording protection to the individual not only against bodily harm but also against any interference with his person which is offensive to a reasonable sense of honour and dignity. The insult involved in being touched without consent has been traditionally regarded as sufficient to warrant redress, even though the interference is only trivial and not attended with actual physical harm. "The least touching of another in anger is a battery", and so is such offensive and insulting behaviour as spitting in another man's face, cutting his hair or kissing a woman. The element of personal indignity is given additional recognition in the award of aggravated damages to compensate for any outrage to the plaintiff's feelings ...

.....

Battery is an intentional wrong: the offensive contact must have been intended or known to be substantially certain to result. On the other hand, it is not necessary that the actor intended to inflict bodily harm, since we have seen that the legal injury is complete without it. Indeed it may be sufficient that he intended only to frighten but in a manner fraught with serious risk of bodily contact or harm. [Footnotes omitted]

Fleming, in the use of "intent" accepts the definition set out in the Second Restatement of the Law of Torts (1965):

8A. Intent

The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it.

- [8] A defendant will be found liable as a joint tortfeasor if he or she acted in concert with others towards a common end to commit battery.

Mr. Tilton's Criminal Conviction

- [9] I will begin with the findings of Judge Dohm, who rejected Mr. Tilton's evidence and defence. Judge Dohm's findings are excerpted from his reasons for judgment below. His reasons are unreported but transcribed (16 March 2011), Surrey Registry 176395-1). The initials "R.S." refer to Mr. Siegerist:
- [21] Based on the testimony of the Crown witnesses, I find the following to be the facts relating to the two charges of assault causing bodily harm: The accused was at the school looking for R.S. in order to seek revenge for R.S. punching his son Sean in the face. The accused was driving his truck, his son Matt was in the front seat and two unknown males were in the backseat. When R.S. was located, the accused drove his truck into the oncoming lane of travel and came to an abrupt stop, causing the tires to screech. The accused turned his head to the backseat and said something like, "Go get 'em," which immediately resulted in the two unknown males exiting the truck and chasing R.S. One or both of these men were armed with an item similar to an asp baton. The two males caught up to R.S., who had tripped and fallen, and they began to strike R.S. with the baton and their fists. R.S. was struck several times on the head and upper body.
- [22] The accused and Matt arrived within seconds and the accused told the two males to "let Mattie get in there". The two males immediately stopped beating R.S. R.S. stood up and began to take his football jersey and chain off. Matt moved in and struck R.S. and the two began to wrestle. The accused remained within a few feet of this altercation, making sure no one intervened. He uttered words of encouragement to Matt and he also said, "This is what you get," obviously directed to R.S.

[23] R.S. began to get on top of Matt and the accused moved closer to them as if he was about to intervene in the altercation. Adam Summers observed the accused's movements and he grabbed the accused by his jacket and positioned himself between the accused and the two boys fighting to prevent the accused's further advancement. Adam said to the accused words to the effect that these were "just kids". The accused paused, looked at Adam, and then head-butted Adam with the top of the accused's head striking Adam in the mouth area. The accused began to bleed and he wiped some of the blood on Adam's face. The head butt caused Adam to have a white flash and he let go of the accused. The altercation with R.S. and Matt came to an end around the same time. Moments later, the accused came up to R.S. and put his arm around him and said, "Are we all even now?" R.S. angrily said, "No." The accused started heading back to his truck.

...

[25] Based on these findings I have no difficulty concluding the Crown has proven beyond a reasonable doubt the guilt of the accused on the two charges of assault causing bodily harm. The accused was the directing mind of the assault on R.S. by these two unknown males. He was at the school for a specific purpose; to exact revenge for R.S. punching his son Sean. He obviously recruited the two males specifically for that purpose. He directed the two males to pursue and assault R.S. and he ordered them to stop beating R.S. so Matt could fight R.S. The evidence proves the accused was a party to this assault on R.S. by the two unknown males.

[26] The intentional nature of the head butt to Adam Summers, along with the pause by the accused immediately prior to it, demonstrates the accused's actions were deliberate and not accidental or incidental. As for the accused's complaint that the head butt was never described by any of the witnesses who saw it, in my view it is well understood what a head butt is, and in any event, D.E. did describe it when he testified he saw the accused take back his head and hit Adam with his head. That description clearly established the intentional nature of the accused's actions in head-butting Adam in the mouth.

[10] The Court of Appeal's reasons affirming the conviction are indexed at 2012 BCCA 428.

Abuse of Process

[11] At this juncture at the close of the plaintiff's case and before Mr. Tilton has elected to put in his case, Mr. Siegerist submits it would be an abuse of process to allow Mr. Tilton to relitigate the issue of his liability.

[12] The Supreme Court of Canada's decision in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 is the leading case discussing the doctrine of abuse of process. In writing for the majority, Madam Justice Arbour said the doctrine engages the inherent power of the court to prevent the misuse of its procedure and is applied to bar relitigation of a claim that has already been determined.

[13] From Arbour J.'s extensive discussion of the doctrine, excerpted in part below, it is clear that Mr. Tilton is not able to relitigate his liability for battery as it would amount to a collateral attack on the decisions of Judge Dohm and the Court of Appeal.

36 The doctrine of abuse of process is used in a variety of legal contexts.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), *aff'd* (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (*Watson*, *supra*, at pp. 624-25).

...

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See *Doherty J.A.*'s reasons, at para. 65; see also *Demeter (H.C.)*, *supra*, at p. 264, and *Hunter*, *supra*, at p. 536.)

...

44 The adjudicative process, and the importance of preserving its integrity, were well described by *Doherty J.A.* He said, at para. 74:

The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario Evidence Act, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

. . .

47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

48 The appellant relies on *Re Del Core*, *supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Re Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted (at p. 22):

The right to challenge a conviction is subject to an important qualification. A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so. . . . Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. The ambit of this qualification remains to be determined
[Emphasis added.]

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely *Demeter* (H.C.), *supra*, and *Hunter*, *supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (H.C.), *Franco*, *supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See for example *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (H.C.), at p. 218, *aff'd* without reference to this point (1978), 18 O.R. (2d) 714 (C.A.); *Bomac*, *supra*, at pp. 26-27; *Bjarnarson*, *supra*, at p. 39; *Germesheid v. Valois* (1989), 68 O.R. (2d) 670 (H.C.); *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49 (Man. Q.B.), at p. 61; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540 (Alta. Q.B.), at p. 546; *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.), at p. 438; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106 (Gen. Div.), at p. 115; see also P. M. Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189, at pp. 196-97; and *Watson*, *supra*, at pp. 648-51.

50 It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see M. Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (*Watson*, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial

system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, supra, at para. 80.

...

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

[14] The abuse of process doctrine was applied by Mr. Justice Kent in a civil case arising from an assault in *MacKay v. Jhulley*, 2015 BCSC 1114. In that case, the plaintiff sought damages as a result of a significant blow to his head during an altercation with the defendant. The defendant denied liability and counterclaimed for damages. During the course of the trial, Justice Kent learned that the defendant had been convicted of assault and uttering threats in a criminal proceeding. Justice Kent determined the findings from the criminal trial were completely dispositive of the liability issues in the case before him and found the defendant liable for assault and dismissed the counterclaim:

[23] In my view, as occurred in *McCaffery v. Arguello* . . . this is a case where the law requires the findings of the Provincial Court in respect of the criminal charges to have been conclusively established against Mr. Jhulley in the present civil proceeding. Those findings include that:

- Mr. Jhulley uttered threats of death or bodily harm to Mr. MacKay over the phone before driving over to the latter's house;
- Mr. Jhulley was the aggressor throughout;
- Mr. Jhulley presented himself at the house with a metal pole in his hands and swung at Mr. MacKay several times through the front window before proceeding to the back of the home;
- Mr. Jhulley approached Mr. MacKay and struck him once on the head with a metal pole causing a wound;
- Mr. MacKay defended himself by striking the accused in the right eye area with his fist;
- Mr. Jhulley was not acting in self-defence;
- Mr. MacKay was never the aggressor, and did not have an object in his hands when he approached Mr. Jhulley, rather he was simply defending himself throughout; and

- Mr. MacKay did not carry out any sort of unprovoked assault.
- [24] These findings are completely dispositive of the liability issues in this case, including Mr. Jhulley's counterclaim for damages for personal injury. I find Mr. Jhulley liable to Mr. MacKay for the tort of assault and battery, and Mr. Jhulley's counterclaim for personal injuries sustained in the altercation is dismissed.
- [15] In MacKay, the defendant was engaged in both assault and battery as he struck the plaintiff. He was convicted of assault, since there is no offence in the Criminal Code for battery. In the civil action, he was found liable for both assault and battery.
- [16] Like the defendant in MacKay, Mr. Tilton was conclusively convicted of assault in the prior criminal proceeding.
- [17] The exceptions to the application of the doctrine of abuse of process spoken of by Justice Arbour in CUPE at paragraphs 50 and 53 - the prior proceeding was tainted by fraud or dishonesty, fresh evidence previously unavailable conclusively impeaches the original result, or fairness dictates original results should not be binding - have yet to be shown to be engaged in this case. There is no suggestion of fraud or dishonesty in the criminal proceeding. Mr. Tilton told me he intends to lead some evidence, but not that he intends to adduce fresh evidence that was not available at the time of the criminal trial. Nor do any issues of fairness in applying his conviction in the instant proceeding arise. Mr. Tilton was represented by counsel at his criminal trial and gave evidence. The example of an unfairness factor suggested by Justice Arbour in C.U.P.E., where the stakes in the prior proceeding were too minor to generate a full and robust response, in contrast to the much more considerable stakes in the subsequent proceeding, has no application to the case at bar.

Joint Tortfeasor

- [18] Mr. Tilton's conviction for criminal assault causing bodily harm for his role as the directing mind of the assault was grounded in s. 21 of the Criminal Code, R.S.C. 1985, c. C-46 , which provides:

Parties to offence

21 (1) Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

Common intention

- (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[19] These provisions mirror civil liability for joint tortfeasors.

[20] The concept of joint tortfeasors is discussed by the Supreme Court of Canada in *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at paras. 74-75:

74 In *The Law of Torts* . . . Fleming discusses the concept of joint concurrent tortfeasors. He states this . . .

A tort is imputed to several persons as joint tortfeasors in three instances: agency, vicarious liability, and concerted action. The first two will be considered later. The critical element of the third is that those participating in the commission of the tort must have acted in furtherance of a common design. . . . Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, though it is probably not necessary that they should realise they are committing a tort. [Emphasis added.]

75 The appellants' actions bring them within the third category of joint tortfeasors so well described by Fleming. In the context in which the text writer has utilized the word conspiracy, it refers to the design or agreement of persons to participate in acts which are tortious, even though they did not realize they were committing a tort.

[21] Additional discussion of joint tortfeasors is found in two cases from the New Brunswick Court of Appeal cited on behalf of Mr. Siegerist in submissions.

[22] In the first, in *Martin v. Martin et al.* (1996), 176 N.B.R. (2d) 178, the Court of Appeal affirmed the liability of two defendant brothers as joint tortfeasors for the battery committed by the other brother (also a defendant) in retaliation against the plaintiff on their behalf. The two defendant brothers who did not strike the plaintiff were found jointly and severally liable for their role in battery, even though they did not strike the plaintiff. They were found to have acted in concert to a common end:

[19] I start with dispelling any doubt that torts such as battery cannot be committed jointly because of the argument that the battery of one defendant cannot be the battery of another. A battery can be committed jointly, *Hickman v. Poyns* cited in *Broome v. Wooton* (1605), *Yelv.* 67; 80 *E.R.* 47. In fact, *Glanville Williams in Joint Torts and Contributory Negligence* (Stevens & Sons Ltd.: London, 1951), at page 14, is of the opinion that there is no tort incapable of being committed jointly.

[20] In his approach to the question of whether the brothers were joint tortfeasors, the trial judge cited a passage from G.H.L. Fridman, Q.C., *The Law of Torts in Canada* (Toronto: Carswell, 1990), vol. 2, which emphasizes that the defendants, in order to be joint tortfeasors, must be engaged in a common action for a wrongful purpose. He cited from pages 347-348:

"For two or more persons to be considered to be joint tortfeasors, the tort in question must be committed by one of them on behalf of or in concert with another. The acts must be performed in furtherance of a common design. Mere similarity of design is not enough, there needs to be concerted action to a common end. Thus, whenever one party is vicariously liable for the acts of another, they will be joint tortfeasors. They will be considered to have acted in concert. In other instances, the necessary combination of concerted action must be established. Only in one situation, the case of nonfeasance in breach of a joint duty, will actual or imputed combination be unnecessary. What is to be considered combined or concerted action has been the subject of numerous judicial decisions. It would seem that the various defendants must be engaged in a common action for a wrongful, not a lawful purpose. They will not be acting in concert where they are acting together for a lawful purpose that is potentially dangerous."

[21] I point out that there is nothing mysterious in the words "acting in concert". They mean simply "acting together". The trial judge then referred to the *Johnston v. Burton* decision where a judge of the Court of Queen's Bench in Manitoba held that the defendants were joint tortfeasors. One of the defendants was fighting with the plaintiff when the other defendants got involved in the fight, severely injuring the plaintiff.

...

[23] Lastly, the trial judge referred to the New Brunswick Court of Appeal decision in *Newcastle (Town) v. Mattatall*, a case in which three youths broke into a hockey arena to commit theft. One of them negligently set a fire which destroyed the arena. His intention was to see what could be stolen. The unintentional fires were for the purpose of furthering the common intent of theft. They were held to be joint tortfeasors.

[24] The seminal case most frequently cited as to whether persons are acting as joint tortfeasors is *Koursk, The*, [1924] P. 140; [1924] All E.R. Rep. 168 (C.A.), where Scrutton, L.J., said at 173, that the acts of the defendants must be in concert or in furtherance of a common plan. At page 175 he posed the question as follows:

"The substantial question in the present case is: What is meant by 'joint tortfeasors'? and one way of answering it is: 'Is the cause of action against them the same?' Certain classes of persons seem clearly to be 'joint tortfeasors.' The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree in common action, in the course of and to further which one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of or in concert with another."

[Emphasis added]

- [23] In related proceedings subsequently brought by the plaintiff to enforce his judgment in light of the defendants' assignments into bankruptcy, the Court of Appeal again discussed (in reasons indexed at *Martin v. Martin*, 2005 NBCA 32) the liability of joint tortfeasors when determining that the defendants/respondents should not be released from their liability on the judgment by reason of their discharge as a bankruptcy:
- [15] It is in that context that the Court of Appeal reached the conclusion that the respondents were "trespassers and aggressors" who had been acting "in concert for a common end in the chain of events leading up to the ultimate battery", that they had been involved in a "concerted action to a common end" which had been "achieved on their behalf by Zoël Martin: retaliation against the appellant [Lucien Martin] and anyone who helped him for having fought with their brother Siméon.". It should be emphasized here that the respondents were found to be joint tortfeasors by this Court because of their involvement in a "concerted action to a common end". This finding is of some importance because one can be a joint tortfeasor even if he or she is not involved in a concerted action for a common end. As this Court stated in *Bransfield (S.) Ltd. v. Fletcher et al.* (2003), 264 N.B.R. (2d) 366 at para. 6:

... A joint tortfeasor can be so found in cases of vicarious liability resulting from agency or employment or as a result of concerted action. In the case of concerted action, the critical element is that the participant in the tort must have acted in furtherance of a common design. In the case of concurrent tortfeasors, there are as many separate causes of action as there are tortfeasors, but in the case of joint tortfeasors acting in concert to cause damage there is but one and indivisible cause of action. (See *Thompson v. Australian Capital Television* (1996), 186 CLR 574, para.6; see also *Fleming on Torts*, supra, pp. 288-9.

...

- [17] As mentioned, this Court found the respondents to be joint tortfeasors involved in a concerted action to retaliate against the appellant. Their brother Zoël simply carried out the retaliation on their behalf. As joint tortfeasors, their conduct was as reprehensible as that of their brother Zoël who actually inflicted the injuries upon the appellant. The exception which concerns us here provides that an order of discharge does not release the bankrupt "from any award of damages in respect of bodily harm intentionally inflicted." The award of damages for which judgment was entered against the respondents as joint tortfeasors is in respect of bodily harm intentionally inflicted.
- [24] Other examples of a like approach are found in a decision of Madam Justice Boyd of this Court in *Bains v. Hofs, Devries, and Langbroek*, (18 December 1992) VA C901094 and in a decision of the Saskatchewan Court of Queen's Bench in *Reese v. Falkowsky* (1996), 145 Sask. R. 66.
- [25] The plaintiff in *Bains* sought to recover damages for arson. Boyd J. found the defendant Langbroek liable as a joint tortfeasor, even though his role was as a "wheelman", ferrying instructions from one defendant to another at the site. He was not involved in the initial

planning nor did he participate in setting the fire. At one point he tried to dissuade the other defendants from starting the fire. He drove the getaway vehicle that took the other defendants from the scene after the fire started. Boyd J. found Mr. Langbroek liable as a joint tortfeasor, and in doing so, made this conclusory statement about the law:

Thus, one who knowingly assists or encourages another to commit a tort, or one who is merely present as a conspirator in the wrong that is done, is, in law, a joint tortfeasor.

- [26] At 12, Boyd J. said that Mr. Langbroek was liable as a joint tortfeasor even assuming he was "somehow unaware" of the initial purpose of the drive to the Bains' farm because he did not disassociate himself from the wrong being committed nor did he do anything to stop the other two defendants.
- [27] In support of her decision and reasoning, she cited several passages from John G. Fleming, *The Law of Torts*, 7th ed. (1987: Sydney, Law Book Company Ltd.) at 229-230, as well as from other decisions from other provinces, *Johnston v. Burton* (1970), 16 D.L.R. (3d) 8689 (Man. Q.B.) and *Newcastle v. Mattatall* (1988), 52 D.L.R. (4th) 356 (N.B.C.A.).
- [28] In *Reese*, the plaintiff, a process server, sued the defendants for battery arising from an incident where he was struck by a bullwhip by one of the defendants as he attempted to serve documents. The case was framed in battery. Justice McIntyre found both defendants liable as joint tortfeasors even though it was only the defendant Edward Falkowsky who struck the plaintiff with the whip. McIntyre J. accepted the plaintiff's evidence that Lester Falkowsky, the other defendant, handed the bullwhip to Edward: para. 3. Both were found to have engaged in a concerted action to a common end. "It was not necessary", McIntyre J. said at para. 9, "that they both struck the plaintiff with the bullwhip"
- [29] Accordingly, there is no merit in Mr. Tilton's submission that he could not be liable because he did not strike Mr. Siegerist. He was found by Judge Dohm to be the directing mind of the assault (which involved battery on Mr. Siegerist), drove the assailants to carry out the attack, and once they found him, he encouraged them to carry out the attack with at least one metal baton. Mr. Tilton also instructed them to stop in order to allow his son to participate. He was not only the directing mind, he acted throughout in a concerted action to a common end.
- [30] Accordingly, at this juncture, Mr. Siegerist has established his case against Mr. Tilton based on the findings in the criminal proceeding.
- [31] Even absent his conviction and the application of the abuse of process doctrine, Mr. Siegerist has adduced evidence at this trial that:
- (a) Mr. Tilton drove his vehicle with his son and two adult males armed with at least one collapsible metal baton in order to inflict a beating on Mr. Siegerist;
 - (b) Mr. Tilton told the two assailants who initially exited his vehicle to "go get him", meaning Mr. Siegerist;

- (c) someone from Mr. Tilton's vehicle yelled, "Trip him," to onlookers as Mr. Siegerist tried to flee;
 - (d) Mr. Siegerist was beaten over the head and his body by the two males who came out of Mr. Tilton's vehicle;
 - (e) at some point while the two males were hitting Mr. Siegerist over the head and striking his body with at least one metal baton, Mr. Tilton told them to stop in order to allow his older son to "have a go at him", again meaning Mr. Siegerist;
 - (f) Mr. Tilton's son then attacked Mr. Siegerist;
 - (g) while Mr. Tilton's son and Mr. Siegerist were grappling with each other, Mr. Tilton got out of his car, walked over to Mr. Siegerist, put his hand on his shoulder area and said, "Are we all good now?";
 - (h) Mr. Tilton directed and facilitated the battery upon Mr. Siegerist in order to inflict a beating on Mr. Siegerist to avenge a prior altercation between Mr. Siegerist and Mr. Tilton's younger son;
 - (i) Mr. Tilton acted in concert with the individuals who struck Mr. Siegerist to a common end; and
 - (g) Mr. Siegerist was injured as a result.
- [32] Accordingly, Mr. Siegerist has adduced evidence at trial that he was injured as a consequence of the direct acts of Mr. Tilton.

Sufficiency of Pleadings

- [33] In light of the clear articulation of the nature of the tort of battery found in the case law, and absent a demand for particulars, it was not necessary for Mr. Siegerist to specifically plead additional facts in his notice of civil claim concerning Mr. Tilton's role in the battery. No demand for particulars was ever made in this case.
- [34] In submissions Mr. Tilton conceded that he is not prejudiced from the absence of any pleading of facts or an allegation of joint tortfeasor or conspiracy in the notice of civil claim. That is likely due to the fact that the full nature of Mr. Siegerist's claim against Mr. Tilton has been known to Mr. Tilton from the outset.
- [35] Mr. Siegerist's position was reiterated to Mr. Tilton at the trial management conference and in subsequent correspondence from Mr. Siegerist's counsel dated January 23, 2020. The reference to a Master in the correspondence is to the presider at the trial management conference:

I wanted to update you on the question which we discussed with the Master in relation to the liability of the Defendant as he was found to be a party to the offence of assault.

As you know it was found as a fact at the criminal trial that the Defendant recruited and directed these two unknown males to pursue and commit a battery . . .

As to the effect in law of those findings in the area of tortious liability, the authorities are clear.

Persons who aid or abet the commission of a wrong are joint tortfeasors with those who actually execute the plan. Joint tortfeasors are liable for the same wrong. An action can be maintained against any one of them based on the same facts. For that proposition see the following cases and textbooks . . .

The Koursk, [1924] P 140 (CA);

Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd (1977), (1979] AC 374 (PC);

Fish & Fish Ltd v Sea Shepherd UK, [2015] UK.SC 10, [2015] AC 1229;

Newcastle (Town) v Mattatall, Porter and Harris et al (1988), 87 NBR (2d) 238 (CA) [Newcastle];

Martin v Martin et al (1996), 176 NBR (2d) 178 (CA);

Raywalt Construction Co v Bencic, 2005 ABQB 989, [2006] 8 WWR 440;

Botiuk v Toronto Free Press Publications Ltd, [1995] 3 SCR 3;

W Page Keeton et al, Prosser and Keeton on the Law of Torts, 5th ed (St Paul, Minn: West, 1984) at 323;

GHL Fridman, The Law of Torts in Canada, 2nd ed (Toronto: Carswell, 2002) at 888-91.

After reviewing the authorities you may want to consider amending your pleadings.

If you wish I can apply to amend the Notice of Civil Claim to expressly state that the Defendant was a joint tortfeasor as he was, on the day in question, part of an event in which two or more people acted together in furtherance of a common design or plan for a wrongful purpose and during the course of this, the aforesaid battery occurred. I don't think that is necessary but will do so at the same time as the date we have earmarked for a possible application.

[Emphasis added]

[36] Mr. Siegerist's counsel did not receive any response to that letter.

Disposition

Mr. Tilton's no-evidence motion is dismissed.

"Walker J."

The Honourable Mr. Justice Walker

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