COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Hanisch v. Canada,***
2004 BCCA 539

Date: 20041021
Docket: CA031070

Between:

Tassilo Goetz Hanisch

Respondent
(Plaintiff)

And

Her Majesty the Queen in Right of Canada,
Renee Wissink, Blake Ward and John Doe

Appellants
(Defendants)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Thackray

S. Gaudet	Counsel for the Appellants
D.W. Burnett	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia April 22 and 23, 2004
Place and Date of Judgment:	Vancouver, British Columbia October 21, 2004

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Thackray

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] Rose Harbour, established in 1910 as a whaling station, is on the southern tip of the Queen Charlotte Islands, now within the Gwaii Haanas National Park Reserve. It is, in the words of the trial judge, “as wild an environment as Canada can be”. Few reside there. One of the few is the respondent Tassilo Goetz Hanisch.

[2] On July 26, 1998, a gale blew up. A large Parks Canada vessel, the *Acco Chan*, with its zodiac tethered to it, was moored in the harbour. The zodiac broke free and began to drift toward the harbour’s rocky shore, driven by the strong winds. Mr. Hanisch, a resident of Rose Harbour, seeing the zodiac’s peril, ran to the shore, entered the water and with considerable effort secured the zodiac in the safe mouth of a creek.

[3] This act of daring that, at another time, might have received a commendation, led to Mr. Hanisch’s arrest for mischief on June 27, 1998, his transport by helicopter to Queen Charlotte City from which he was left to find his way home, further travel to Queen Charlotte City to tend to the criminal proceedings and, ultimately, to dismissal of the criminal charge at a preliminary inquiry.

[4] This foolishness in return for his good deed caused Mr. Hanisch to sue for false arrest, false imprisonment and defamation. The appellant, Her Majesty the Queen in Right of Canada (“Canada”) was joined as employer of the personal defendants. The appellant Renee Wissink was the Parks Canada warden and peace officer involved in the incident. The appellant Blake Ward, a constable with the Royal Canadian Mounted Police, was the arresting police officer.

[5] The learned trial judge found that Cst. Ward and Mr. Wissink, jointly, had committed the torts of false arrest and false imprisonment. Although the issue of defamation was then largely irrelevant, he agreed that Mr. Hanisch was defamed by Mr. Wissink and Cst. Ward and rejected the defences of absolute privilege, qualified privilege and justification. He ordered the defendants to jointly pay $2,500 in pecuniary damages and $25,000 in non-pecuniary damages. He ordered Mr. Wissink and Canada to pay $35,000 in punitive damages in response to Mr. Wissink’s part in the events and Cst. Ward and Canada to pay $15,000 punitive damages in response to Cst. Ward’s part. The defendants were ordered to pay ordinary costs up to and including April 30, 2003 and thereafter double costs. The reasons for judgment may be found at (2003), 16 B.C.L.R. (4th) 310, 2003 BCSC 1000.

[6] Cst. Ward has not appealed the conclusion that he falsely arrested and imprisoned Mr. Hanisch. His appeal is confined to the finding he defamed Mr. Hanisch, the quantum of general damages assessed for the torts of false arrest and false imprisonment, and the order he pay punitive damages. Mr. Wissink appeals, in addition to those three matters, the finding he is jointly liable for false arrest and false imprisonment. He contends that the evidence does not support the trial judge's conclusion that he bore legal responsibility, and liability, for Mr. Hanisch's arrest and transport to Queen Charlotte City. In effect, he says his role in the arrest was too indirect to amount to a trespass to the person. And throughout the appeal both appellants complain of the trial judge's interventions.

Discussion

1. *Mr. Wissink's Liability for False Arrest and False Imprisonment*

[7] Mr. Wissink contends that there is no evidentiary basis to support a finding against him of joint liability, with Cst. Ward, for the false arrest and false imprisonment of Mr. Hanisch. In order to understand this ground of appeal more must be said of the events of July 26 and July 27 and the trial judge's conclusions.

[8] There is some history of dispute between the residents of Rose Harbour and Parks Canada, and evidence that the residents of Rose Harbour believe that the Park Service does not value their presence in the Gwaii Haanas National Park Reserve.

[9] Rose Harbour is used by water craft as a haven from storms. On July 26, 1998, several vessels, including the *Acco Chan*, a fishing vessel leased by Parks Canada, with zodiac and tender attached, were moored in the harbour. Mr. Wissink was on board the *Acco Chan*. The weather deteriorated as the day wore on, with winds over 40 knots and accompanying wave action. Mr. Hanisch, observing the storm develop, contacted the captain of the *Acco Chan* and suggested that he change moorage. The captain (not a Parks Canada employee) thanked Mr. Hanisch, but did not move, considering it better to stay put and wait out the storm.

[10] The zodiac broke away in the storm and was foundering when Mr. Hanisch came to its rescue. He entered the water to raise its outboard motor and manoeuvred it to safety in the mouth of a creek. The salvage took 30 to 45 minutes and was observed by both the captain of the *Acco Chan* and Mr. Wissink.

[11] Mr. Hanisch then phoned the *Acco Chan* on a radio telephone. Conversations on a radio telephone can be heard by others. In this case they were heard by another resident of

Rose Harbour, Ms. Cohen. The content of this phone conversation was in issue at trial. Mr. Wissink testified that Mr. Hanisch told him in this conversation that he would not be returning the boat. Mr. Hanisch denied telling Mr. Wissink he would not return the boat. He testified that he told Mr. Wissink he had rescued the zodiac and that it was safe, that he would like recognition for what he had done and compensation, that he would speak to a lawyer about a salvage claim, that he would bring Mr. Wissink ashore (offer declined), and that the zodiac would be floated at high tide the next day. Ms. Cohen supported Mr. Hanisch, testifying that Mr. Hanisch did not refuse to return the zodiac.

[12] The trial judge did not believe Mr. Wissink and believed Mr. Hanisch, saying “Mr. Wissink knew from the moment of that first call that the plaintiff would be returning the boat, while preserving his right to claim salvage.”

[13] I turn to Cst. Ward. He was one of a two-constable RCMP detachment. On the evening of July 26, Cst. Ward received a telephone call from the other member of the detachment and was told that Mr. Hanisch had a zodiac belonging to Parks Canada which he was refusing to return. The two police officers concluded that the issue raised was civil and not criminal. On the morning of July 27, Cst. Ward phoned Mr. Wissink and so

advised him. He asked Mr. Wissink to phone Mr. Hanisch to ask for return of the zodiac, and to call him back.

[14] Mr. Hanisch and Mr. Wissink then spoke by radio telephone, again overheard by Ms. Cohen. Mr. Wissink testified that during this conversation Mr. Hanisch repeated his refusal to release the zodiac and said that he had a right to hold it until he was guaranteed payment. In his testimony, Mr. Hanisch denied refusing to return the zodiac. In similar vein, Ms. Cohen testified that Mr. Hanisch did not refuse to return the zodiac. Again, the trial judge accepted the evidence of Mr. Hanisch and Ms. Cohen and found that at no time did Mr. Hanisch refuse to return the vessel.

[15] After his conversation with Mr. Hanisch, Mr. Wissink telephoned Cst. Ward. He told Cst. Ward that Mr. Hanisch had said he would only return the zodiac if Parks Canada guaranteed payment of his salvage claim. Mr. Wissink requested police assistance, referring to “officer safety”. By “officer safety” he meant to express his concern, as a sworn peace officer, for his own safety. The trial judge said, as to this:

> [44] . . . I find his suggestion was without any validity in that the persons present at the time were three long-term residents and tourists, among whom was an American attorney and her husband, and the executive of a British Columbia company (the

> videotaper). There was not the remotest suggestion in the evidence before the court that there was potentially a volatile situation much less any danger presented by the presence of these persons. **This concept was intentionally used by Mr. Wissink to bring in the involvement of the R.C.M.P.**
>
> [Emphasis added.]

[16] Cst. Ward agreed to come to Rose Harbour. Later that day, July 27, he flew by helicopter to the *Acco Chan* accompanied by another park warden. Cst. Ward testified that Mr. Wissink and the other warden then went ashore to attempt to retrieve the zodiac, leaving him on the *Acco Chan* on the basis that "if need be, they could call me and I could go ashore to assist them". Cst. Ward understood that up to that time Mr. Hanisch had consistently refused to return the zodiac.

[17] In the meantime Mr. Hanisch had consulted his lawyer about a claim for salvage and on his lawyer's advice, prepared a note that said "I am giving you possession of this vessel... without prejudice to my salvage claim". He gave the note to Ms. Cohen, saying it should be read and delivered to the Parks Canada representatives who may come ashore and left to attend to preparations for the day.

[18] When Mr. Wissink and the other Parks Canada employee landed ashore, Ms. Cohen met them and, as requested, read the

note aloud and tried to give it to Mr. Wissink. Mr. Wissink refused to accept the note.

[19] Seeing what was occurring Mr. Hanisch approached Mr. Wissink and the other warden. He took the note, read it aloud again and tried to hand it to Mr. Wissink. Mr. Wissink again refused to accept the note, prompting Mr. Hanisch to gather together the other residents of Rose Harbour and their guests to act as witnesses. In turn, Mr. Wissink contacted Cst. Ward. In the words of the trial judge, Mr. Wissink advised Cst. Ward that "nothing had changed in the position of the plaintiff." Then, with witnesses assembled and one guest videotaping the events, but Cst. Ward not yet ashore, Mr. Hanisch read the note aloud to Mr. Wissink. Shortly after this Cst. Ward landed on the shore. Mr. Hanisch approached him and tried to read the note aloud again. Cst. Ward interrupted, telling Mr. Hanisch that it was "up to Parks Canada", with the result that Cst. Ward did not learn from Mr. Hanisch that he was giving Parks Canada possession of the vessel. Nor did Mr. Wissink tell him that the zodiac was returned.

[20] We come then to the arrest. After his attempt to read Cst. Ward the note, Mr. Hanisch started to move away. Cst. Ward told him that he could not leave. Mr. Hanisch explained

that he needed to take care of gear on the beach that was in the tidal zone, prompting Cst. Ward to tell him that if he was not back in five minutes he would be arrested for mischief. When Mr. Hanisch took longer than five minutes, Cst. West arrested Mr. Hanisch “for mischief”, a step he explained as one taken to gain control of the situation. When Mr. Hanisch asked what the mischief was, Cst. Ward said it was “not returning the boat forthwith – that’s mischief”.

[21] Central to the issue of Mr. Wissink’s liability for false arrest and false imprisonment was his behaviour with Cst. Ward in the context of his communications with Mr. Hanisch. The trial judge did not find Mr. Wissink a credible witness and did not accept his version of events, saying:

> [79] I found the defendant Wissink was not a credible witness on this and other questions of importance.
>
> [80] In the course of his testimony over one day, he exhibited most of the traits of a witness raising doubt as to his credibility.
>
> [81] In the course of his testimony, particularly during cross-examination, he was frequently evasive, attempting to deflect the thrust of the examination. He repeatedly did not give responsive answers, choosing to repeat until it became almost a mantra that the plaintiff at all times refused to release the zodiac boat. It was not until the Court, having some concern for the time the cross-examination was taking, suggested to Mr. Wissink that his continued unresponsiveness to questioning was not in his interests, that there was a dramatic

> change in his attitude in relation to responsiveness to questioning.
>
> [82] Mr. Wissink's testimony at trial at times was selective and on occasion, contradictory, and, most importantly, on two occasions admittedly untruthful. On one of those occasions, he admitted that an answer given at discovery conducted six days before the commencement of the trial was not true.
>
> [83] In the course of Constable Ward's cross-examination, the following occurred:
>
> Q. You heard Mr. Wissink give sworn evidence yesterday that you were the person who told him not to receive anything when he got to the beach in Rose Harbour?
>
> A. I heard that yesterday in court, yes.
>
> Q. Was that true or false?
>
> A. That was false, my lord.
>
> Q. You gave no such direction?
>
> A. That's correct, my lord.
>
> [84] It needs no further comment than to say that purportedly in a joint defence, a fundamental difference in material evidence as between the personal defendants is not acceptable. In such circumstances, the trial judge should not be put in the position of determining which testimony is acceptable.

[22] On the question of Mr. Wissink's liability for the arrest of Mr. Hanisch, the trial judge found:

> [113] I find in the circumstances of this case, that the arrest of the plaintiff was as a result of the joint acts of both Constable Ward and Mr. Wissink.

[114] Mr. Wissink initially made the allegation that led to the plaintiff's arrest. After his first radio phone call with the plaintiff, where Mr. Wissink learned of the retrieval of the boat, he telephoned Constable Ward and told him of the loss of the zodiac. **Mr. Wissink advised Constable Ward that the plaintiff refused to return the boat, thus setting the events leading to the arrest in motion. He also expressed concern regarding "officer safety", knowing this would have a very particular result or effect on Constable Ward. As I have said, I find the alleged concern of Mr. Wissink regarding officer safety is totally without an evidentiary basis. Further, I find it was resorted to by Mr. Wissink in an attempt to get the R.C.M.P. to become involved in the matter in a criminal perspective**.

[115] The subsequent day, **after Mr. Wissink had gone to shore and heard the plaintiff's note read to him by Susan Cohen, he quite unbelievably radioed Constable Ward, informed him that nothing had changed in the position of the plaintiff, and to come to shore. He did not tell Constable Ward about the zodiac's availability in the bay that morning and even more unbelievably, did not make any mention of the note. He then said nothing while he saw the plaintiff arrested and imprisoned**.

[116] **The effect of all of these acts or omissions on the part of Mr. Wissink is that Constable Ward did not act alone in making the decision to arrest the plaintiff**. I do not hesitate in finding that Mr. Wissink acted jointly with Constable Ward in arresting Mr. Hanisch, and in my view, it is beyond doubt that he did not have reasonable grounds to do so.

[117] . . . There were absolutely no grounds for Mr. Wissink to believe that the offence of mischief had occurred. Rather, I find that Mr. Wissink knew the offence had not occurred, and that he had no other reasonable grounds for acting jointly in the arrest of the plaintiff.

[118] Further, there is some indication that the arrest was directed to be made because Mr. Wissink had a personal enmity directed towards Mr. Hanisch. In ***R. v. Storrey***, [1990] 1 S.C.R. 241, Mr. Justice

> Cory explained that if factors such as bias or personal enmity are established, they might have the effect of rendering invalid an otherwise valid arrest (p. 252).
>
> [119] I find that Mr. Wissink was here taking advantage of a young, inexperienced police officer. I refer to but one example noted above, of what occurred when Constable Ward directly contradicted what Mr. Wissink said in relation to a most material aspect of the case.
>
> [Emphasis added.]

[23] The appellants contend that on the facts correctly stated, there is no basis on which to found liability of Mr. Wissink for the false arrest and false imprisonment of Mr. Hanisch. They allege error in the findings of fact, and say that the following findings of fact misapprehend the evidence, arise from cross-examination by the trial judge, or are unsupported by the evidence. They complain of the following:

1. the finding that Mr. Wissink telephoned Cst. Ward on July 26 after Mr. Wissink had spoken to Mr. Hanisch and told Cst. Ward of the loss of the zodiac, “thus setting the events leading to the arrest in motion”;

2. the finding that Mr. Wissink expressed concern in this conversation regarding “officer

safety", knowing this would have a very particular result on Cst. Ward;

3. the finding that on July 27, where Mr. Wissink asked Cst. Ward to come ashore he told him "nothing had changed in the position of the plaintiff";

4. weight having been given to the fact that Mr. Wissink did not tell Cst. Ward about the note or that the zodiac was available to him;

5. the finding that Mr. Wissink knew from July 26 that Mr. Hanisch would be returning the boat;

6. the finding that Mr. Wissink played a role in the arrest of Mr. Hanisch for mischief;

7. weight having been put on Mr. Hanisch's offer on July 26 to bring Mr. Wissink ashore; and

8. the weight and interpretation put on Ms. Cohen's evidence that he never said he would not return the zodiac.

[24] An appeal, of course, is not an opportunity to retry a case. The trial judge is uniquely situated to find the facts, particularly where, as here, there is divergent evidence on a

factual issue of importance. However, if evidence is misstated or facts found are unsupported by evidence, this Court may interfere. I will deal with the eight particular complaints and then turn to the general complaint of the trial judge's interventions.

[25] I will first say that I see no basis at all on which to complain about the matters in (4), (7) and (8) above. The weight to be given to evidence, and the inferences to be drawn, is uniquely within the purview of the trial judge. Here the trial judge found that Mr. Wissink had never been told the zodiac would not be returned, contrary to Mr. Wissink's advice to Cst. Ward. Even if Mr. Wissink had believed this to be true up to the time he stepped ashore, which is contrary to the findings of fact, he knew from the time that Ms. Cohen read the note aloud, for a certainty, that he could retrieve the zodiac. It is inexplicable that this information was not passed to Cst. Ward when he phoned Cst. Ward from shore (complaint #4). And whether the offer on July 26 to bring Mr. Wissink ashore (complaint #7) was significant was a matter for the trial judge to assess. Mr. Wissink contends that it was not a serious offer, given the storm. The trial judge found, to the contrary, that the offer indicated Mr. Hanisch's good faith. He was entitled as the

trier of fact to reach this conclusion. Likewise the weight to be given Ms. Cohen's evidence (complaint #8) and the implications to be drawn from it, were for the trial judge to assess and not this Court. The trial judge did not stray, in my view, into impermissible or unreasonable inferences from the evidence referred to in these three complaints. I turn to the other complaints.

[26] The first complaint concerns the finding that Mr. Wissink telephoned Cst. Ward on July 26. In para. 114 the trial judge said: "[a]fter his first radio phone call with the plaintiff . . . [Mr. Wissink] telephoned Constable Ward and told him of the loss of the zodiac . . . thus setting the events leading to the arrest in motion". This was incorrect. Earlier in his reasons, the trial judge accurately found that Cst. Ward first learned of the Rose Harbour situation second hand from the other police officer. However, the misstatement, in my view, is not material. The essence of the conclusion that Mr. Wissink "set the events in motion" follows from Mr. Wissink's report of the incident on July 26 to his superiors which was related to the police, and his reiteration of the information to Cst. Ward when they spoke in the morning of July 27. There is, in my view, no demonstrated reversible error in the trial

judge's conclusion that Mr. Wissink "set the events in motion".

[27] Second, the appellants complain of the trial judge's treatment of Mr. Wissink's statement to Cst. Ward that he was concerned about "officer safety", the conclusion that Mr. Wissink would have known the effect this would have upon Cst. Ward, and the imputation that this was an attempt to have the RCMP view this in a criminal perspective. They contend that the possibility of guns at Rose Harbour and the history between Parks Canada and the residents of Rose Harbour made Mr. Wissink's concerns valid and negated the imputation of bad faith drawn by the trial judge. The inference drawn by the trial judge, in my opinion, was one that the trial judge could fairly make on the evidence that both Cst. Ward and Mr. Wissink were peace officers charged with law enforcement, Cst. Ward as a police officer and Mr. Wissink as a qualified park warden trained at the RCMP training facility in the implications of his role and his proper relationship with the local police. It was reasonable for the trial judge to conclude that Mr. Wissink's expressed concern for his safety would be respected, and be expected by him to be respected, by a police officer. It was also reasonable, in my view, for the trial judge to reject the explanation for Mr. Wissink's avowed

concern about officer safety in light of his conclusion that Mr. Wissink knew the zodiac would be returned. I see no basis on which to accede to this complaint.

[28] Third, Mr. Wissink contends that the trial judge erred in relying upon Cst. Ward's agreement with the trial judge's suggestion that in effect he was told by Mr. Wissink that "nothing had changed in the position of the plaintiff". Again, I would not accede to this complaint. Cst. Ward had earlier testified that the basis on which Mr. Wissink would go ashore without him was that "if need be, they could call me and I could go ashore to assist them". I consider that the trial judge's suggestion to Cst. Ward that the essence of what he was told by Mr. Wissink was that "nothing had changed in the position of the plaintiff", to which he agreed, fairly captured Cst. Ward's testimony on this point.

[29] In the fifth complaint, the appellants say the trial judge erred in finding that Mr. Wissink knew from July 26 that Mr. Hanisch would return the zodiac. I do not agree. Given the trial judge's conclusions, well supported by evidence, that Mr. Hanisch never refused to return the boat, his conclusion that Mr. Wissink knew Mr. Hanisch would return the zodiac is a fair inference. The appellants refer to the evidence that Mr. Hanisch intended to make a salvage claim,

saying this supports Mr. Wissink. In this submission they are really saying that the trial judge wrongly disbelieved Mr. Wissink when he said that he thought Mr. Hanisch would not return the boat. But for good reason, fully explained, the judge did not believe Mr. Wissink. There is, in my view, no merit to this submission.

[30] In complaint #6, the appellants say the trial judge erred in concluding that Mr. Wissink played a role in Mr. Hanisch's arrest for mischief. This complaint goes to the essence of the finding of liability and engages the law of false arrest and false imprisonment.

[31] The appellants do not challenge the principles applied by the trial judge on the issue of Mr. Wissink's liability for false arrest and false imprisonment. Those are set out in ***Robert's v. Buster's Auto Towing Service Ltd.*** (1976), 70 D.L.R. (3d) 716, [1977] 4 W.W.R. 428 (B.C.S.C.) and ***Robitaille v. Mason*** (1903), 9 B.C.R. 499, both referred to by the trial judge. In the latter case, at p. 502, the test is stated as "was it the act of the constable acting on his own authority, or was it the joint act of both defendants?" In the ***Buster's Auto Towing*** case, Mackoff J. distinguished between the situation in which an individual tells the police about events and the police decide themselves to make an arrest, from a

situation in which an individual tells a police officer to stop someone and the officer does so.

[32] In ***Lebrun v. High-Low Foods Ltd. and Parry*** (1968), 69 D.L.R. (2d) 433, 65 W.W.R. 353 (B.C.S.C.) Macfarlane J. found a store manager, whose call to police lead to the arrest of a suspected shop-lifter, responsible for the false arrest and imprisonment of the plaintiff. Macfarlane J. found that the store manager did not have reasonable grounds for his suspicion of shoplifting and the store's liability was founded upon the manager's request to the police, without a reasonable suspicion, to check the shopper's car.

[33] More recently in ***Davidson v. Chief Constable of North Wales***, [1994] 2 All E.R. 597, Sir Thomas Bingham MR reviewed the authorities, starting with ***Aitken v. Bedwell*** (1827), M & M 68, 173 E.R. 1084, and posed the essential question at p. 604:

> Accordingly, as it would seem to me, the question which arose for the decision of the learned judge in this case was whether there was information properly to be considered by the jury as to whether what Mrs. Yates did went beyond laying information before police officers for them to take such action as they thought fit and amounted to **some direction, or procuring, or direct request, or direct encouragement that they should act by way of arresting these defendants**.
>
> [Emphasis added.]

[34] It is clear that Mr. Wissink did not suggest the offence of mischief to Cst. Ward. Nor did he instruct Cst. Ward to arrest Mr. Hanisch. Indeed the trial judge concluded that it was likely that Cst. Ward arrested Mr. Hanisch because he became rattled.

[35] On the other hand, on the findings of the trial judge, the understanding here was that Cst. Ward may be called ashore "to assist" Mr. Wissink who was a peace officer and pursuant to that understanding Cst. Ward was called ashore, the expressed concern of officer safety had no foundation, Mr. Wissink (a peace officer) knew there was no wrongful taking or keeping of property, there was a degree of personal enmity directed by Mr. Wissink to Mr. Hanisch, and Mr. Wissink provided information to Cst. Ward to involve him "in a criminal perspective". In these circumstances it was open, in my view, to the trial judge to find that Mr. Wissink had become a joint tortfeasor in the events he wrongly set in motion.

[36] The public offices of the appellants and their attendant authority, as well as their joint responsibility for the actions on June 27, is reflected in their joint statement of defence in which it is pleaded:

> 5. Wissink and Doe were at all material times peace officers and . . . and were acting in the course and scope of the execution of their duties as peace officers . . .
>
> 6. Wissink and Doe were responsible . . . for, *inter alia*, the preservation of the peace, the prevention of crime, and the prevention and investigation of offences against the laws of Canada and British Columbia and the apprehension of criminals and offenders and others who may be lawfully taken into custody.
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> 7. The Defendant, Blake Ward ("Ward") was at all material times a peace officer and member of the Royal Canadian Mounted Police (the "RCMP") . . . and was acting in the course and scope of the execution of his duties as a peace officer and member of the RCMP . . .
>
> 8. Ward was responsible . . . for, *inter alia*, the preservation of the peace, the prevention of crime, and the prevention and investigation of offences against the laws of Canada and British Columbia and the apprehension of criminals and offenders and others who may be lawfully taken into custody.
>
> . . .
>
> 11. The Defendants state and the fact is that the Plaintiff, after taking possession of the Zodiac, refused to unconditionally release it to the servants of its rightful owner, to wit, he refused to release it to Wissink and others unless Wissink first agreed to pay the Plaintiff money.
>
> 12. Wissink relayed the circumstances and explained his efforts to Ward and as a result, Ward attended the Plaintiff's residence, personally investigated the matter further, and then placed the Plaintiff under arrest on July 27, 1999 for the offence of mischief contrary to the provisions of section 430 of the *Criminal Code*, R.S.C., 1985, c-46 (the "*Code*").

[37] It is noteworthy that the statement of defence then, on behalf of both appellants, turned the blame on Mr. Hanisch for the events:

> 30. The Defendants say that the Plaintiff voluntarily assumed the risk of arrest, and the normal consequences thereof, when he chose to refuse to return the Zodiac and the Defendants plead and rely upon the maxim *volenti non fit injuria*.
>
> 31. Further the Defendants say that at all material times the Plaintiff's conduct was reprehensible, criminal, illegal, immoral, and disgraceful, and the Defendants plead and rely upon the maxim *ex turpi causa non oritur ctio*.

Paragraph 31 was never withdrawn and an apology for its inclusion was given only on the last day of trial.

[38] Mr. Wissink's joint responsibility derives from the arrest based upon the untrue information he provided to Cst. Ward, the nature of the appellants' respective public offices, and the basis on which Cst. Ward was asked to go to Rose Harbour and then was brought ashore after the note clearly communicated a turnover of the zodiac. In my view, the trial judge's conclusion that Mr. Wissink was jointly liable with Cst. Ward for Mr. Hanisch's arrest and false imprisonment was well founded.

[39] Throughout the submissions on these eight specific complaints was a more generalized complaint that the trial judge, improperly and fatally, both expressed incredulity of the events at the beginning of the trial and interfered with the trial in an impermissible way through interruptions of counsel and witnesses and his questions to witnesses. In effect, the appellants say they did not have a fair trial.

[40] The conduct of a trial is not a matter of science, and permits of different styles, provided that the basic object, a fair trial, is not abrogated, and that justice is seen to be done.

[41] This was expressed in ***R. v. Brouillard***, [1985] 1 S.C.R. 39, [1985] S.C.J. No. 3 (Q.L.) by Lamer J., referring to ***Jones v. National Coal Board***, [1957] 2 All E.R. 155 (C.A.), ***R. v. Torbiak and Campbell*** (1974), 18 C.C.C. (2d) 229, 26 C.R.N.S. 108 (Ont. C.A.), ***Yuill v. Yuill***, [1945] 1 All E.R. 183 (C.A.) and ***R. v. Darlyn*** (1946), 88 C.C.C. 269, 63 B.C.R. 428 (C.A.), at p. 44:

> First of all, it is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order.

[42] At p. 46 there is reference to the limits on a judge's interventions:

> In short, everyone agrees that a judge has a right and, where necessary, a duty to ask questions, but also that there are certain definite limits on this right. . . .

[43] Finally, at p. 48 Lamer J. said:

> In conclusion, although the judge may and must intervene for justice to be done, he must nonetheless do so in such a way that justice is seen to be done. It is all a question of manner.

[44] I have read the transcript in its entirety and reviewed each exhibit. I am not satisfied that the complaint is established on the record. There is no doubt the trial judge intervened frequently and sought to direct counsel and witnesses to issues he considered needed to be addressed. A trial judge is entitled to do so. Many of his questions came, appropriately, at the end of the witness' testimony by way of clarification. No opportunity was denied counsel to question further on matters arising from the questions and answers. As to comments at the beginning of the trial, I would observe that the events, baldly recited, are such that any well-schooled listener might express wonderment and doubt. The trial judge did so and, in my view by doing so sharpened the issues.

[45] And while the trial judge did intervene in the case more frequently as the trial developed, it was always open to witnesses to re-state any suggestions he made, as they sometimes did, or to agree or disagree with his summary of their evidence. I view the trial judge's interventions here as reflecting the bizarre events before him, the behavior of the two public servants involved in the incident, particularly of Mr. Wissink, the unsatisfactory explanation they proffered and, in the end, the misleading evidence offered by Mr. Wissink.

[46] I do not agree that the trial judge's interventions stunted the development of the evidence or displayed pre-judgment. The trial was not, in my view, unfair.

[47] It follows I would dismiss Mr. Wissink's appeal from the finding of liability for false arrest and false imprisonment.

2. *Defamation*

[48] The learned trial judge found that the defendants defamed Mr. Hanisch but assessed no damages for the defamation over those assessed on the torts of false arrest and false imprisonment. While his conclusion refers to both defendants, his discussion concerns Mr. Wissink only. I see no basis in

his reasons for judgment or in the evidence for sweeping Cst. Ward into the defamation issue.

[49] Mr. Wissink contends on appeal, as he did at trial, that he is sheltered by the defences of absolute privilege and implied undertaking of confidentiality on the Warden's Occurrence Report. The findings that Mr. Wissink defamed Mr. Hanisch in respect of Mr. Wissink's statements found in the Continuation Report, the Report to Crown Counsel and the verbal statement to Todd Golumbia all to the effect that Mr. Hanisch would not return the zodiac, are not challenged. That being so, and given my conclusion on the issue of false arrest and false imprisonment, and as an appeal is from an order only and the order here is an order for payment of damages, I do not propose to address further the reasons for judgment on defamation.

3. *Punitive Damages Against Mr. Wissink*

[50] Mr. Wissink's challenge to the award against him of punitive damages is tied intimately to his appeal on liability for false arrest and false imprisonment and his challenges to the findings of fact in relation to that issue. Given my conclusions stated earlier, I see no basis on which to interfere with the order of punitive damages. Mr. Wissink's conduct fell far short of that expected of a person charged

with the statutory duties of a peace officer. His behaviour was directed towards a civilian who merited gratitude, not grief. Mr. Wissink was found to be stubbornly dishonest in his reports of the events, and manipulative in his involvement of the police. And there was evidence on which the trial judge could find *animus* on Mr. Wissink's part against Mr. Hanisch. In my view Mr. Wissink's conduct was deserving of the condemnation of the court reflected in the order for punitive damages.

[51] I would not interfere with the order of punitive damages against Mr. Wissink.

4. *Punitive Damages Against Cst. Ward*

[52] The appellants contend that the order of $15,000 punitive damages against Cst. Ward, on the facts found by the trial judge, is an error in law.

[53] I agree.

[54] The trial judge found, in relation to the order of damages:

> [150] Punitive damages are awarded against a defendant in exceptional cases "where the defendant's conduct is so malicious, oppressive and high-handed that it offends the court's sense of decency". (***Manning***, at para. 196). The objective of such damages is to punish the defendant. Punitive

damages are in the nature of a fine which is meant to act as a deterrent to the defendant and others from acting in this manner. (***Manning***, at para. 196).

[151] The test was described in ***Whiten v. Pilot Insurance Co***., [2002] 1 S.C.R. 595, at para. 36 as limiting the award to "misconduct that represents a marked departure from ordinary standards of decent behaviour".

. . .

[153] Constable Ward's conduct is more related to a failure of his duty. It is not suggested and I do not find that his conduct was motivated in the same manner as Mr. Wissink, but his abject failure to investigate the situation and his apparent inability to appreciate what he had done, in my view, warrants his inclusion in this category of damages.

[154] Section 495 allows for an arrest without a warrant, where the police have reasonable and probable grounds for doing so. The importance of this requirement for citizens living in a democracy is self-evident. As Cory J. stated in ***Storrey***, *supra*, at p. 249:

> Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the Criminal Code requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.

[155] Here I have found that there was motivation including deception to make this plaintiff pay for the ongoing dispute between the residents of Rose

> Harbour and Parks Canada, and a perversion of the application of the rule of law in such a manner that an innocent man was deprived of that liberty in circumstances which can only be described as outrageous. The manner in which the plaintiff was dealt with after the arrest simply adds to the outrage. Further, to date he has not received an apology from those responsible.
>
> [156] In the particular circumstances here which I have described in detail in these reasons, and in light of the recent decisions of the courts of this country regarding the purpose of awarding punitive damages, I conclude that a proper amount of such damages should be $50,000 - $35,000 against the defendant Wissink, and $15,000 against the defendant Ward.

[55] The trial judge earlier found as to Cst. Ward:

> [107] It is difficult, if not impossible, to understand the conduct of Constable Ward at this time other than to accept what he candidly stated in his testimony at trial, which is that he became rattled and apprehensive about his position with the number of people present and the occurrences being videotaped, and as a result, he was incapable of the exercise of proper judgment in the circumstances.

[56] In ***Hill v. Church of Scientology of Toronto***, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, at paras. 196-197, Cory J., writing for the majority, described the function of punitive damages:

> [196] Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is

> not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.
>
> [197] Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

[57] In my view, the conclusions of the trial judge that Cst. Ward failed to investigate, was unable to appreciate what he had done, and likely became rattled and apprehensive, do not fit within the notions of malice, oppression or high-handedness referred to in ***Hill***. At worst Cst. Ward’s actions reflect immature judgment, inadequate training, inexperience, or all three states which may lead to poor work performance.

[58] It follows that I would allow the appeal as it relates to punitive damages against Cst. Ward.

5. *Non-Pecuniary Damages*

[59] The appellants say lastly that an award of $25,000 general damages is too high for these torts. They refer to several cases in which general damages less than $10,000 have been ordered, particularly the judgment of this Court in ***Bahner v. Marwest Hotel Company Ltd. Co.*** (1970), 75 W.W.R. 729, 12 D.L.R. (3d) 646, upholding a damage award of Wilson C.J.B.C. of $3,500.

[60] Non-pecuniary damages are intended to compensate for the deprivation of liberty, public humiliation and loss of reputation and mental anguish. As such they reflect the nature of the events, the character of the person wronged and the community where the events occurred.

[61] Here the torts were committed against a well-known person in front of his only neighbours and his guests. The result was removal from his home community initially for three days and then after as he attended to the court process. There were allegations of criminal conduct and the suggestion put about that he was capable of violence. I have no doubt these circumstances merited an award of damages in the upper end.

[62] Considering that $3,500 was considered a fit award in the late 1960s by Chief Justice Wilson and in 1970 by this Court,

and considering the change in the value of money in the thirty plus years since that case, I cannot say the order of $25,000 in non-pecuniary damages is other than fit.

[63] I would dismiss the appeal of the order of non-pecuniary damages.

Summary

[64] For the above reasons I would dismiss the appeal except as to the punitive damages of $15,000 assessed against Cst. Ward and, vicariously, Her Majesty the Queen in Right of Canada, which I would allow.

[65] Given that the predominant success has been with Mr. Hanisch, I would order costs of the appeal in his favour.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Mr. Justice Thackray"