IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Diana M. Cameron
Madam Justice Karen I. Simonsen

B E T W E E N :

KRISTY NICOLE IRONSTAND	)	***R. I. Histed***
	)	*for the Appellant*
(Plaintiff) Appellant	)	
	)	
- and -	)	***V. F. Y. Li***
	)	*for the Respondents*
THE CITY OF WINNIPEG, CONSTABLE ZIMMERMAN, CONSTABLE BOONE, CONSTABLE SLOBODESKY, CONSTABLE HANWELL, CONSTABLE BEVAN, CONSTABLE WHITNEY, CONSTABLE VAGI and CONSTABLE HERRICK	)	*Appeal heard:* ***March 26, 2019***
	)	*Judgment delivered:* ***June 11, 2019***
(Defendants) Respondents	)	

On appeal from 2017 MBQB 192

PER CURIAM

[1] This is an appeal from an award of damages made in favour of the plaintiff following a trial in which the trial judge found that the defendant police officers, who attended the plaintiff's residence in answer to a 911 call, unlawfully entered her residence and falsely imprisoned and battered her.

[2] The trial judge found that the entry into the plaintiff's residence was neither justifiable nor reasonably necessary. He wrote (at paras 25-26):

> So, on arrival they did not consider that the 911 caller was intoxicated and uncooperative, or that her perception may have

> been wrong. They did not pause for even a moment to make any meaningful inquiries about her call, in effect to check or scrutinize the 911 call information with her. They did not consider that there were no signs of a break-in or an assault or other criminal offence. They did not consider that, despite [the plaintiff]'s anger, the fact she answered the door was important as it showed the occupant was not avoiding the police. Moreover, at the door, they did not try to identify [the plaintiff] or question why she was there (i.e. that she was the resident) or what was going on in the suite. In addition, when she told them she was the resident and had just returned from out of town, they did not pause to assess that information or identify her or ask if anything was wrong in the suite.
>
> Bottom line: despite their good intentions, the totality of these circumstances do not support the conclusion that their entry into the suite was justifiable, or reasonably necessary.

[3] He also added the following (at paras 28-29):

> As noted earlier, I accept the [defendant] police officers' evidence of what happened once they entered the suite and were upstairs. In effect, [the plaintiff] remained irate, belligerent, loud and obstructive. The [defendant] police [officers] had no particular interest in being in that stressful situation any longer than necessary. There was no ulterior motive. They simply wanted to ensure that everyone was safe. To do that, they wanted to speak to the adult male who was there. But, everything [the plaintiff] did, physically and verbally, prevented that from happening in a sensible and reasonably calm way. After she was removed, the [defendant] police [officers] were able to confirm who the male was, his relationship to [the plaintiff] and that everything was okay, although there may have been an argument earlier. They were also able to confirm that children who were in the residence were safe.
>
> As a result, I have no hesitation in concluding that the [defendant police] officers acted reasonably or proportionally in forcibly detaining and removing [the plaintiff] from the suite in order to properly and safely complete the safety check they believed they had to do. There can be no doubt that these types of situations can

> turn violent in a split second. The trigger for violence, who starts the violent behaviour and who becomes the target, whether the police or others in the area, is wholly unpredictable. But for [the plaintiff]'s conduct and over-reaction to the [defendant] police [officers] entering her suite, none of what followed afterwards would have happened. Whether the [defendant] police [officers] were legally justified in being in the suite or not, nothing they did should have caused [the plaintiff] to react in the manner in which she did. It should have been clear to her that they were there to protect her or others who may have been in jeopardy.

[4] The trial judge found that, in detaining the plaintiff, the defendant police officers took her to the ground and handcuffed her. In so doing, they caused an abrasion and swelling to her eye and bruising on her right arm, and her glasses were broken. Once removed from the residence, she was placed in a cruiser car while an officer checked the suite. After that officer had completed his inspection, the plaintiff was released.

[5] The plaintiff was seeking a global award of $25,000, which was to include damages for false imprisonment, battery, entry to the home and breach of privacy, as well as punitive damages and public law or constitutional damages.

[6] In dealing with the issue of damages, the trial judge stated (at paras 35-37):

> I note the Manitoba Court of Appeal's observation without comment, in ***Everett*** [*Everett et al v McCaskill et al*, 2015 MBCA 107], of the provisional assessment of damages by the trial judge and other cases counsel referred me to.
>
> Given all of the circumstances, I award $2,500 general damages for the unlawful entry into [the plaintiff]'s home and breach of privacy. I also award $500 general damages for false imprisonment and battery. No one should expect significant

> compensation when escalating a situation, such as happened here, and effectively forcing the [defendant police] officers to react and defend in the way they did.
>
> Given my finding that the [defendant] police [officers] acted proportionally and in good faith, and that their entry into the home was minimally intrusive in that they did not force entry, did not cause any damage, and were in the residence for only as long as it took to sort the situation out, there is no basis for punitive or aggravated damages. The fact she was slightly injured was wholly unintentional and coincidental to their proportionate response to her behaviour. (***Jensen v. Stemmer***, 2007 MBCA 42, 214 Man.R. (2d) 64, at paras. 32 and 105-11)[.] Likewise, "public law" damages pursuant to s. 24(1) of the ***Canadian Charter of Rights and Freedoms*** [are] not warranted here.

[7] Although the plaintiff alleged that the trial judge erred in not awarding her punitive or public law damages, through counsel, she has advised the Court that, if she was awarded the sum of $25,000, the amount she was originally seeking, she would not pursue that claim.

[8] The plaintiff preliminarily challenges the finding of proportionality. The defendants argue, and we agree, that the trial judge made no palpable and overriding error in reaching his conclusion.

[9] The plaintiff's principal ground of appeal is that the trial judge erred in reducing general damages based on the conduct of the plaintiff herself. She also relies on a decision of this Court in *Check v Andrews Hotel Co Ltd* (1974), 56 DLR (3d) 364. In writing for the majority, Matas JA wrote (at p 370):

> I have had the advantage of reading the reasons for judgment of my brother Hall, J.A. With respect, I agree with his conclusions as to liability and as to costs in the trial Court; I do not agree that the damages allowed to [the] plaintiff ought to be reduced because of provocation on his part. Reduction of compensatory damages

> on the ground of provocation would conflict with *Fontin v. Katapodis et al*. (1962), 108 C.L.R. 177 (H.C. Aust.); *Lane v. Holloway*, [1967] 3 All E.R. 129 (C.A.), and the majority view in American jurisdictions.
>
> . . .
>
> In *Fontin*, the High Court of Australia held unanimously that (headnote):
>
> > The rule by which the defendant in an action in which exemplary damages are recoverable is entitled to show that the plaintiff's own conduct was responsible for the commission of the tortious act and to use this fact to mitigate damages has no application to damages awarded by way of compensation. It operates only to prevent the award of exemplary damages or to reduce the amount of such damages which, but for the provocation, would have been awarded.

[10] The plaintiff further argues that it is apparent that the trial judge considered his damage award from the perspective of the defendant tortfeasors and not from the perspective of the plaintiff who was the victim of the wrongful acts of the defendant police officers.

[11] Finally, the plaintiff argues that the award is so low as to simply amount to a licensing fee being charged to justify conduct that came about as a result of a policy directive within the Winnipeg Police Service and that the award is so inordinately low that it will not deter similar conduct in the future.

[12] The defendants argue firstly that, in order to overturn a damage award, an appellate tribunal must be satisfied that there was either an error in principle or an overriding and palpable error and that, in this case, neither of those circumstances exists.

[13] The defendants further argue that the setting of a damage award is discretionary and that deference is due.

[14] At the outset of our analysis, we state without hesitation that, based on the facts of this case, the trial judge did not err when he declined to award punitive damages or public law damages. The trial judge's explanation as to why he was declining to make an award under those heads is reasonable and his comments with respect to proportionality and good faith are appropriate in the context of those two heads of damages. We are not convinced that the actions of the defendant police officers, although found to be unlawful, are of such a nature as to attract an award of punitive damages or public law damages. Therefore, we are satisfied that the trial judge did not fall into error in declining to make an award of damages under these heads of damages.

[15] We are also satisfied that declining to make an award under those two heads of damages was justified on the basis that the petitioner was not seeking specific awards for those heads of damages. She advised both the trial judge and this panel that what she was, and is, seeking is an aggregate award of $25,000.

[16] That leads us to deal with the award of $2,500 for unlawful entry and $500 for false imprisonment and battery.

[17] With respect to those heads of damages, Manitoba law supports the plaintiff's argument that the trial judge was in error when, in his assessment, he considered that the plaintiff's behaviour forced the defendant police officers to act as they did and that the defendant police officers had acted reasonably or proportionately. There is, however, more recent conflicting

authority from other jurisdictions. For example, in *Hurley v Moore* (1993), 107 DLR (4th) 664 (Nfld CA), Steele JA, writing on behalf of the Court, noted that the *Check* decision, among others, relied on the English case of *Lane v Holloway*, [1967] 3 All ER 129 (CA (Eng)), for the assertion that provocation could only be considered in the assessment of punitive damages. After consideration of the jurisprudence post *Lane* and *Check*, he found that provocation may be considered in mitigation of general (compensatory or pecuniary) damages, stating (at p 682):

> I am satisfied that the traditional Canadian position that evidence of provocation ought to be considered in mitigation in assessing damages is good law. *Lane v. Holloway* has been discredited and there is no recent authoritative Canadian decision on the point. However, *Murphy v. Culhane* [[1976] 3 All ER 533], a 1976 decision of the English Court of Appeal, stands for the proposition that "where the injured man, by his own conduct, can fairly be regarded as partly responsible for the damage he suffered", such evidence in an action for assault is a valid consideration in mitigation of the damages to be awarded. That decision, reproaching *Lane v. Holloway* in the process, lends strong support to the traditional Canadian position.

Also see Lewis N Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at 153-56; Philip H Osborne, *The Law of Torts*, 5th ed (Toronto: Irwin Law, 2015) at 307-8; and the Honourable Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 10th ed (Toronto: LexisNexis, 2015) at 114-16.

[18] Nonetheless, even finding that the trial judge erred by not applying the law as outlined in *Check*, we have not been persuaded that the facts of this case and the injuries suffered by the plaintiff merit an award different than that made by the trial judge. While at the very low end of the range for battery and wrongful imprisonment, the total damage award is, in our view,

reasonable (see *Sherman v Renwick*, 2001 CarswellOnt 595 (Sup Ct J); *Leclair v Ottawa (Police Services Board)*, 2012 ONSC 1729; and *Everett et al v McCaskill et al*, 2015 MBCA 107).

[19] Therefore, the appeal is dismissed with costs.

Monnin JA

Cameron JA

Simonsen JA