

Introduction

[1] Two actions were heard together when this matter proceeded to trial. The first action, CI 14-01-91476 ("476") was commenced by Floriberto Gordeiro Gomes ("Gomes") on September 19, 2014 against the defendant Davey Edward Joseph Laporte ("Laporte"). In the context of 476, Laporte commenced third party proceedings against Curtis Reutlinger, the son of Gomes ("Reutlinger") and Blake Paradis ("Blake"). When Gomes passed away, 476 continued with the Estate of Gomes ("the Estate") as the named plaintiff. The action by Gomes and subsequently the Estate essentially alleges an unprovoked assault by Laporte. The counterclaim and the third-party claim by Laporte allege an assault by Gomes; an assault and a trespass by Reutlinger; and an assault by Blake.

[2] The second action, CI 15-01-98001 ("8001") was commenced on October 1, 2015 by Laporte against Gomes and Brock Paradis ("Brock"). In it Laporte alleges malicious prosecution and civil conspiracy against both Gomes and Brock. Both 476 and 8001 arise out of an incident that occurred on June 24, 2013, although 8001 alleges that the malicious prosecution and civil conspiracy arose out of actions subsequent to June 24, 2013 undertaken by Gomes and Brock, including statements they each made to the police following the June 24, 2013 incident.

[3] It should be noted that counsel for Laporte advised that as a result of s. 53(1) of ***The Trustee Act***, C.C.S.M. c. T160, the action for malicious prosecution could not be continued by Laporte against the Estate after the death of Gomes. That provision provides:

53(1) All actions and causes of action in tort, whether to person or property, other than for defamation, malicious prosecution, false imprisonment, or false arrest, in or against any person dying continue in or against his personal representative as if the representative were the deceased in life; but in any action brought or continued under authority of this section by the personal representative of a deceased person for a tort causing the death of the person, the damages recoverable for the benefit of his estate do not include any exemplary damages or damages for loss of expectation of life and shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

[4] Nevertheless, the action for civil conspiracy, which does not appear to be barred by the operation of s. 53(1), was continued by Laporte against the Estate.

[5] It should be further noted that while Brock and Blake appeared at trial to defend the actions brought against them by Laporte, neither had legal counsel. Neither the Estate or Reutlinger appeared at the trial to defend against the actions brought by Laporte, nor did the Estate advance its action against Laporte as set out in 476.

The Facts

[6] The evidence establishes that Gomes and his family members and Brock and his son Blake are well known to each other and may be described as long-time family friends or acquaintances.

[7] Although the defendants Brock and Blake took the stand in order to defend themselves against the allegations made by Laporte, for reasons that will be apparent shortly, their *viva voce* evidence cannot be relied upon as shedding any light on how the events unfolded on June 24, 2013. They are not credible witnesses. The reason for this is that, unbeknown to either of them, almost the entire incident involving Laporte was videotaped by means of a surveillance security system overlooking the street where the incident took place. As both admitted on the stand at trial, their

accounts of the altercation with Laporte given in statements prior to the trial (and prior to their realization that the altercation had been videotaped) does not correspond with what is evident from the videotapes.

[8] Laporte lived to the west and on the south side of the street where the van was parked facing west. The surveillance videotape was taken from a home located northeast of the van with the camera facing in a southwesterly direction. It shows Laporte approaching the driver's side of the van from the west. Not clearly visible, but soon identified as the events unfolded, was Gomes speaking to the driver at the driver's door of the van. The driver was subsequently identified as Brock. Reutlinger was speaking to the passenger seated in the front passenger side of the van. The passenger was subsequently identified as Blake when he got out of the van.

[9] What is not evident from the video is the initial close contact between Laporte and Gomes and what transpired between the time Laporte approached Gomes on the driver's side of the van and when Gomes and Laporte appeared together a short time later at the back of the van.

[10] Laporte's evidence is that he approached the van to speak to Gomes about a \$100 loan which he said he made to Gomes and which had not been repaid. He admits that the verbal exchange between the two rapidly degenerated after a denial by Gomes that he owed Laporte any money. The two engaged in foul language and traded insults between each other. Although Laporte admits to taunting and mocking the smaller man, he states that he did not touch Gomes until Gomes spat at him. At that point he states he moved Gomes' head with his hands in a manner that would direct Gomes' spit

away from his face. At that point both men began grabbing at each other and when both men come into view of the video camera from the driver's side at the back of the van, they were grappling with each other, but still upright.

[11] At this point the videotape shows both Reutlinger, the son of Gomes and Blake enter the fray. Without getting into a blow-by-blow account, it is clear that Laporte attempted to extricate himself from the struggle which had resulted in him falling on top of Gomes. It does not appear that Laporte struck out with his fists or his feet either against Gomes or the other individuals, including Blake, Reutlinger, Brock and a daughter of Gomes who also became involved. After getting off the ground and trying to remove himself from the altercation with the others, including Gomes who was now lying prostrate face up on the street, it is clear that Laporte did not punch or kick any of the others. On the other hand, Reutlinger and Blake took the opportunity to strike Laporte a number of times with their fists. Furthermore, as Laporte moved to the west and north of the passenger side of the van along the boulevard bordering the north side of the street, Blake approached Laporte and threw him to the ground.

[12] It is Laporte's testimony that the group of people from the van followed him to where he lived and furthermore, that Reutlinger entered Laporte's property which was enclosed by a fence and struck him again.

[13] Without commenting at this point as to the wisdom of Laporte's decision in initially approaching Gomes, I accept the evidence provided by Laporte as to how the altercation commenced and proceeded. Although both Brock and Blake stated in almost identical testimony that Laporte had commenced the physical altercation with

Gomes, by "sucker punching" him or otherwise hitting Gomes with his right hand in Gomes' right eye, I would note that this account is inconsistent with their prior written or verbal statements made to police or otherwise. In view of the fact that virtually the entire account testified to by Blake and Brock was caught on videotape and since their testimony is also substantially inconsistent with the videotape evidence, I have no difficulty in deciding that their testimony is wholly unreliable and inconsistent with what actually happened. I would note in particular that the evidence provided by Brock in his prior statements that Laporte repeatedly punched and kicked Gomes and might have killed him had he not been restrained, is simply not true. There is no evidence of Laporte kicking and punching Gomes in the manner described by Brock nor any truth in the suggestion by Brock that had he not pulled Laporte off Gomes, Laporte might have killed Gomes. Indeed, the video shows that Brock did not physically intervene at any time in the physical altercation between Laporte and the others, much less pulling Laporte away from Gomes in order to prevent him from repeatedly kicking and punching Gomes.

[14] Laporte testified that he has many years of martial arts training. Yet his physical conduct on the videotape shows restraint and certainly demonstrates that he did not physically attack his opponents. Even when Blake threw him to the ground on the boulevard, Laporte got up and continued to move away from any altercation rather than physically striking back or otherwise defending himself.

[15] The videotape evidence also discloses that while Gomes did require some assistance to get back up on his feet, it is also clear that he quickly rejoined his friends

in following Laporte back to his residence after a very short while and as stated in Laporte's testimony, actively participating in confronting Laporte at his residence. While an ambulance was called and Gomes was subsequently transported in it for medical examination at a medical facility, it appears that the injuries suffered by Gomes do not appear to have been significant. The evidence is certainly not consistent with the allegations made against Laporte that he had kicked and punched Gomes numerous times and would have killed him had he not been restrained. I doubt that Gomes suffered any discernible physical injuries as a result of the altercation with Laporte.

[16] This matter should have ended on June 24, 2013 when the police were called. After initially taking Laporte into custody at his residence, the police released him a short while later as the matter seemed to have been concluded when both Laporte and Gomes decided not to press any charges against each other or against Gomes' two children, including Reutlinger, who had participated in the altercation with Laporte.

[17] However, it is clear that Gomes saw an opportunity to make some money by initiating a civil lawsuit over a year later. It appears that he decided to urge the police to pursue criminal charges against Laporte and to that end, contacted the police on July 23, 2013.

[18] When a police statement was finally taken from Gomes on October 5, 2013, Gomes asserts in that statement that he was "sucker punched" by Laporte after which he fell to the ground and that Laporte then proceeded to kick him in the stomach 15 to 20 times.

[19] However, no criminal charges were initiated by the police until May 22, 2014, approximately a month and a half after a statement was taken from Brock on April 6, 2014. This was approximately six months after Gomes made his statement to the police. In his statement to police, Brock provides a statement that is consistent with the one given by Gomes and indicates, inter alia, that Laporte:

- Put the boots to Gomes;
- Kicked and punched Gomes in the face;
- Looked like he "was on something ... cause of his eyes";
- Was not of a "stable mind"
- Left Gomes "for dead"
- Was "laughing at [Gomes]" and
- Was not going to stop ... "he wanted to kill him"

[20] I would note that as early as June 24, 2013, Gomes threatened to sue Laporte and take his house. Although he initially advised the police that he would not pursue criminal charges, he made it clear to police on the date of the incident that he was going to consult his own lawyer about the matter.

[21] Furthermore, the evidence establishes that at the time Brock gave his police statement at the police station, he knew that Gomes was planning on suing Laporte for \$50,000 and that Brock knew he was considered a key witness in the criminal case against Laporte.

[22] The statements of Gomes and the statements and *viva voce* evidence of Brock are not only consistent with each other's evidence, the evidence of both in respect of

what Laporte did is blatantly and demonstrably false as evidenced by the videotape. To the extent that there is a discrepancy between the evidence of Gomes and Brock on the one hand and Laporte on the other hand, including in respect of what occurred at the time of the initial confrontation between Gomes and Laporte, I accept the evidence of Laporte.

[23] It is also of note that Gomes commenced his civil action against Laporte on September 19, 2014, after police initiated the criminal charges in May 2014. In his statement of claim, Gomes generally repeats the clearly unfounded allegations that he and Brock made in their respective police statements including, inter alia, that Laporte “wilfully and maliciously kicked [Gomes] several times in the head, back, stomach and ribs while [Gomes] was in a helpless state.”

[24] The criminal charge against Laporte was stayed by the Crown on June 9, 2015, but not until after Laporte had incurred a fee of over \$14,000 in hiring a lawyer to defend himself against the criminal charge.

Decision

[25] On the basis of the findings of fact set out in this decision, together with the fact that the Estate did not appear or present evidence, the statement of claim brought against Laporte by Gomes and continued under the style of cause of the Estate of Floriberto Cordeiro Gomes is dismissed.

[26] In respect of the conduct of Reutlinger, I find that his actions behind the van while Laporte was trying to extricate himself from the struggle constituted an assault and battery on Laporte that is not justified on the basis of self-defence or the lawful

defence of any third-party. Furthermore, on the basis of the testimony of Laporte, when Reutlinger followed Laporte back to Laporte's residence after the initial confrontation and entered Laporte's fenced property and struck Laporte, he again committed the tort of assault and battery as well as trespass.

[27] In respect of the conduct of Blake, I am similarly satisfied that he committed the tort of assault and battery on Laporte while Laporte was initially attempting to extricate himself from the altercation with Gomes taking place on the street behind the van and further that he again committed the tort of assault and battery on Laporte when he followed Laporte and threw him to the ground on the boulevard on the north side of the street. At neither of those two points in the altercation were the actions of Blake justified on the basis of self-defence or the lawful defence of a third party.

[28] In respect of the malicious prosecution claim against Brock, the elements of the tort of malicious prosecution are set out in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, (S.C.C.) (QL). That decision holds that there are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution:

- a) the proceedings must have been initiated by the defendant;
- b) the proceedings must have terminated in favour of the plaintiff;
- c) the absence of reasonable and probable cause; and
- d) malice, or a primary purpose other than that of carrying the law into effect.

[29] Lamer J. states in the course of his reasons:

43 The first two elements are straightforward and largely speak for themselves. The latter two elements require explicit discussion. Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of

a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed" (*Hicks v. Faulkner* (1878), 8 Q.B.D. 167, at p. 171, Hawkins J.)

44 This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. The existence of reasonable and probable cause is a matter for the judge to decide as opposed to the jury.

45 The required element of malice is for all intents, the equivalent of "improper purpose". It has according to Fleming, a "wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage" (Fleming, op. cit., at p. 609). ...

[30] Further, as explained in *Berman v. Jenson*, [1989] 77 Sask.R. 161 (Sask. Q.B.) (QL), a defendant need not actually commence the prosecution in order to fall within the scope of first element. Rather:

This is how *Corpus Juris Secundum*, under malicious prosecution, writing of instigation or participation by the defendant, treats the matter:

The test of liability in an action for malicious prosecution is: Was defendant actively instrumental in putting the law in force? In order to sustain the action, it must affirmatively appear as a part of the case of the party demanding damages that the party sought to be charged was the proximate and efficient cause of maliciously putting the law in motion, and, if such fact appears, defendant is liable, although he did not actually make or sign the affidavit on which the warrant was issued, or although he was not the prosecutor of record. Mere passive knowledge of, acquiescence or consent in, the acts of another is not sufficient to make one liable; in order to impose liability there must be some affirmative action by way of advice, encouragement, pressure, etc., in the institution, or causing the institution, of the prosecution, or in affirmatively encouraging its continuance after it has been instituted.

This is how *Corpus Juris Secundum*, under malicious prosecution, writing of statements made to the prosecuting attorney and others, treats the matter:

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One who causes another's prosecution by false statements or misrepresentations, made to a police officer, with an improper motive, is liable for malicious prosecution, although he does not file a complaint or

actually procure the prosecution. Where, however, he discloses in good faith, to a police officer, or other public officer, all facts within his knowledge having a material bearing on the question of the guilt of the person suspected and leaves it to the officer to act entirely on his own judgment and responsibility as a public officer as to whether or not there shall be a criminal prosecution, he is not liable in an action for malicious prosecution by reason of the erroneous conclusion of the officer that the facts warrant him in instituting a criminal prosecution.

[31] In my opinion, Laporte has successfully proven all four elements of the action for malicious prosecution against Brock. First, the evidence establishes in its sequence and in its substance that as a key witness Brock was actively instrumental in putting the prosecution in force by providing a very damning but false statement to police. Second, the proceedings were terminated in favour of Laporte when the Crown entered a stay of proceedings in the matter. Third, it is clear on the evidence that there was no honest belief by Brock in the guilt of Laporte founded on reasonable grounds. He had no reasonable grounds for that belief. Four, Laporte has demonstrated on a balance of probabilities that Brock provided the police with false statements or misrepresentations for an improper motive, whether it was out of spite, ill-will or a spirit of vengeance or the improper purpose of gaining a private collateral advantage for Gomes' civil suit. The blatant falsehoods and gross misrepresentations made by Brock lead to no other reasonable explanation. Indeed, only when confronted on the stand by the obvious discrepancy between his testimony and the third-party video recording that Laporte obtained, did Brock admit that his recollection of the events was in error. In my opinion the discrepancies between his testimony and the third-party video point inexorably to a much greater problem with his testimony than a faulty memory.

[32] In respect of the claim of a civil conspiracy involving both the Estate and Brock as defendants, it is my opinion that Laporte has successfully proven all essential elements of this tort on a balance of probabilities.

[33] In *Driskell v. Dangerfield*, 2007 MBQB 142, 217 Man.R. (2d) 124 (QL), the court held:

28 In *Hunt v. Carey*, Wilson J. adopted Professor Fridman's explanation of the tort of conspiracy as a correct statement of the law. She said (*supra*, at pages 985-986):

As Fridman has noted in *The Law of Torts in Canada*, vol. 2, at ...

...

Fridman goes on to observe at pp. 265-66:

In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances.

[emphasis added]

29 While Fridman describes three situations, one can divide the tort of conspiracy into two categories, distinguished by the defendants' intent. There will be a conspiracy where:

(1) the defendants agree to act, by lawful or unlawful means, with the predominant purpose of injuring the plaintiff, or

(2) the defendants agree to commit unlawful acts directed at the plaintiff which they knew or should have known would injure the plaintiff.

[34] While the agreement between Gomes and Brock may not have been particularly sophisticated or formalized, in my opinion there was an understanding between the two

that Brock would provide a statement to the police accusing Laporte of this particularly brutal crime, with the implicit or express knowledge that this would result in a criminal prosecution and in turn advance Gomes' civil lawsuit.

[35] Brock knew that Gomes was proceeding with a lawsuit against Laporte but instead of refusing to assist Gomes in his plan to sue Laporte on the basis of false allegations, Brock provided a statement to the police that corresponded closely with Gomes' false account of what had transpired.

[36] Although the evidence of even an informal conspiracy is circumstantial, in my opinion the relationship between Gomes and Brock, Brock's admitted knowledge that Gomes was proceeding with a lawsuit against Laporte, and the marked similarity in the patently false accusations being made by both in their statements to police all point to more than coincidence. On the contrary, they point to the reasonable conclusion that a conspiracy to injure Laporte existed between the two. Given the poor quality of Brock's evidence generally, I am not satisfied that his general denial of any sort of conspiracy without any further explanation is sufficient to rebut the establishment of a civil conspiracy to injure Laporte by providing false statements to the police to procure a criminal conviction which in turn would assist in advancing Gomes' lawsuit against Laporte. In the result, I conclude that the tort of civil conspiracy has been established in respect of Gomes and Brock, resulting in liability on this basis against the Estate and against Brock.

Conclusion

[37] In determining an appropriate quantum of damages in respect of the liability arising out of my findings, I am not unmindful of the foolish manner in which Laporte approached and confronted Gomes on June 24, 2013. Even if Gomes did owe the \$100 to Laporte as a result of an outstanding loan, common sense and prudence ought to have forewarned Laporte that to exchange insults and admittedly taunting or mocking this much smaller man could have untoward consequences. In the result, the action of Gomes' nearby family members and friends is not altogether surprising, even though the actions of both Blake and Reutlinger improperly went beyond simply breaking up a physical altercation between Gomes and Laporte.

[38] The abrasive and confrontational behaviour of Laporte in the context of his initial encounter with Gomes should be taken into account when determining the quantum of damages. The assault and battery in this case was not as the result of an inexplicable attack on a stranger enjoying a quiet afternoon in the neighbourhood where he lived.

[39] In the result, I conclude that damages in favour of Laporte should be awarded as follows:

a) **Payable by Curtis Reutlinger:**

- General and all other damages in respect of assault and battery committed by Curtis Reutlinger: **\$2,000**
- General and all other damages in respect of trespass committed by Curtis Reutlinger: **\$1,000**

b) **Payable by Blake Paradis:**

- General and all other damages in respect of assault and battery committed by Blake Paradis: **\$2,000**
- c) **Payable by The Estate of Floriberto Cordeiro Gomes:**
- General and all other damages including specific, punitive and aggravated damages arising out of and in respect of the civil conspiracy: **\$10,000**
- d) **Payable by Brock Paradis:**
- General and all other damages including specific, punitive and aggravated damages arising out of and in respect of the civil conspiracy and malicious prosecution: **\$10,000**

[40] All other causes of action and claims arising out of both actions, including the action for assault and battery brought by Laporte against Gomes, are dismissed.

[41] For the sake of clarity, each party is only responsible for the amount of the judgment awarded against that individual party as set out above.

[42] I decline to award solicitor/client costs. The plaintiff shall have his costs on a party and party basis. Each party, namely Curtis Reutlinger, Blake Paradis, the Estate and Brock Paradis is responsible to Laporte only to the extent of one-quarter of the total party and party costs awarded in respect of both actions. If costs cannot be agreed upon, counsel for Laporte or each individual party may forward a copy of a proposed order for costs in respect of both actions along with any written explanation to my attention for my consideration and determination.

_____ J.